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# Prejudgment Attachment of Foreign Sovereign Assets Under the Proposed Amendments to the Foreign Sovereignty Immunities Act

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**Abstract**

This Note will focus on the proposed amendment contained in S.1071 that would strengthen prejudgment attachment of foreign assets. Part I will discuss the doctrine of sovereign immunity as it has developed in this country, and its present status in the field of United States international litigation. Part II of the Note will examine the prejudgment attachment remedy in light of these sovereign immunity developments. Part III will analyze the proposed amendment dealing with prejudgment attachment. Finally, the Note will conclude that the United States Congress should adopt the proposed judgment provision. By doing so, Congress would remove a formidable obstacle from international litigation, and thus enable many private claimants to ensure a meaningful discovery.

# PREJUDGMENT ATTACHMENT OF FOREIGN SOVEREIGN ASSETS UNDER THE PROPOSED AMENDMENTS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

## *INTRODUCTION*

Prejudgment attachment[1] of foreign sovereign assets in the United States is severely restricted under current sovereign immunities law,[2] thus leaving private litigants highly suscepti-

1. Attachment is a remedy that imposes a lien upon property of the defendants to secure the satisfaction of a judgment. 14A CYCLOPEDIA OF FEDERAL PROCEDURE § 71.03 (3rd ed. 1984). Prejudgment attachment (often referred to as simply "attachment") is a lien imposed prior to any proceedings on the merits of the dispute. *See* Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd., 494 F. Supp. 183 (D. Conn. 1980).

For purposes of this Note the term "attachment" will include the concept of garnishment as well. Garnishment is a species of attachment that allows seizure of the assets held by a third party. *See* United States v. Thornton, 672 F.2d 101, 105 (D.C. Cir. 1982). Attachment and garnishment are basically similar. *See* R. HAYDOCK, D. HERR & J. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION 533 (1985). Garnishment differs from attachment, however, in that the latter usually requires posting of a bond. *Id.*

Prejudgment attachment is statutory in origin. *See* Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 83 (W.D.N.Y. 1982). It is also in derogation of the common law and its traditional rule that a person should be afforded a proper adjudication of his rights before his property is taken. *See infra* note 117. Courts will often use this fact to justify strict construction of the prejudgment attachment statutes against those who seek the remedy. *Ashland Oil*, 540 F. Supp. at 83. There is no federal procedural rule governing prejudgment attachment. Under Rule 64 of the Federal Rules of Civil Procedure, FED. R. CIV. P. 64, attachment of property for the purpose of securing satisfaction of an anticipated judgment is subject to the law of the state in which the federal district court hearing the particular case is seated. *See* Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 436 n.10 (1974). Prejudgment attachment is governed in New York by article 62 of the Civil Practice Law and Rules. N.Y. CIV. PRAC. LAW §§ 6201-6225 (McKinney 1980). When neither federal statute nor state law authorizes prejudgment attachment, it cannot be obtained by virtue of Rule 64. *See* DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 218 (1945).

Prejudgment remedies are also subject to any applicable United States statute and to constitutional limtations. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2932 (1973). For instance, numerous state prejudgment attachment statutes were challenged in the past on the grounds that they violated the debtor's due process rights. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972) (prejudgment repossession statute held unconstitutional absent notice, opportunity for hearing or judicial participation); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (due process clause forbids prejudgment garnishment of wages absent notice and prior hearing).

2. The grant or denial of sovereign immunity in the United States is governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982) [hereinafter cited as FSIA or Act]. *See infra* notes 14-17 and accompanying text (gen-

ble to "hit and run" tactics of an unfriendly foreign government.[3] The sovereign immunities law should be revised to correct this deficiency in light of the importance of prejudgment attachment in international litigation.[4]

Prejudgment attachment is a provisional remedy which allows a claimant to secure the payment, before trial, of any judgment that may eventually be awarded.[5] In essence, this remedy ensures the effectiveness of the judicial process.[6] If a

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eral discussion of the FSIA). Section 1610(d) of the Act specifies the limited circumstances under which prejudgment attachment of foreign sovereign assets will be permitted. *See infra* note 134 and accompanying text.

3. *See infra* notes 135-39 and accompanying text. A claimant's greatest fear in a suit against a foreign party is that the latter may remove all of its assets, not only from the jurisdiction, but also from the country. Removal of assets would prevent the claimant from enforcing its judgment because the defendant would have no assets to satisfy that judgment. Claimants can often prevent private foreign parties from removing assets prior to judgment by attaching those assets. *See supra* note 1. This remedy, however, is virtually unavailable in an action brought against a foreign sovereign or sovereign agency. *See infra* notes 140-41 and accompanying text.

4. International litigation is the by-product of a modern and sophisticated commercial world that is economically interdependent, but also prone to disruptions and other changes that frequently bring about disputes. Burrows & Newman, *Prejudgment Attachment—Sovereign Immunity*, N.Y.L.J., Apr. 23, 1982, at 1, col. 1. As a result, private parties must rely upon a judicial system that can guarantee a proper remedy when these inevitable disputes arise.

5. *See supra* note 1; *see also* S.F. KNEELAND, LAW OF ATTACHMENT (1884).

> An attachment against property may be termed the preliminary arrest of the defendant's property for the eventual satisfaction of the plaintiff's claim.
>
> The distinguishing feature of an attachment process arises from the fact that by it the goods of a debtor are seized before he has an opportunity to be heard upon the alleged indebtedness, and before its validity has been judicially tested by a trial or determined by a judgment of the court. In its nature and effect it may, therefore, be designated as an anticipatory levy, whereby the property of the defendant is seized, *pendente lite*, as security for the enforcement of the proposed judgment.

*Id.* at 2-3 (footnotes omitted). The prejudgment attachment process begins when the claimant satisfies the statutory requirements and obtains a writ of attachment. Under most statutes, once the claimant has obtained a writ of attachment he then delivers it to the sheriff. The sheriff levies on the property to be attached by physically seizing it. If size or some other factor prevents actual seizure, the sheriff may constructively seize the property by disabling it so that the defendant may not use it. Once the sheriff levies on the property, the claimant acquires a security interest in the attached property. *See* R. HAYDOCK, D. HERR & J. STEMPEL, *supra* note 1, at 532. "This security lien will have priority over certain other creditors' claims, depending upon the nature of the other claims and their timing." *Id.*

6. *See generally* 7 J. MOORE & J. LUCAS, FEDERAL PRACTICE, ¶ 64.04, ¶ 64.04[3] (2d ed. 1985) (main goal of provisional remedy statutes is "to provide security, by impounding the defendant's assets, as an incident to a legal claim and for the purpose

defendant removes his assets from the jurisdiction, or otherwise disposes of his assets in order to defraud a potential creditor, any judgment subsequently obtained is likely to result in a Pyrrhic victory. Prejudgment attachment of a defendant's assets prevents this frustration of the claimant's award.[7]

Prejudgment attachment is a vital weapon on the claimant's side in any litigation.[8] However, when the defendant is a foreign government, or an agency of a foreign government, prejudgment attachment is effectively unavailable.[9]

Traditional procedural rules no longer apply when the defendant is a foreign sovereign entity,[10] and the dispute takes

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of assuring collection of a judgment at 'law' "); 7A J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE, ¶ 6201.01 (1985) (an attachment will serve to protect the claimant's prospective judgment "when it seems likely that the plaintiff, if successful on the merits, will have difficulty enforcing the judgment unless the continued availability of the defendant's property for enforcement purposes is assured").

7. *See supra* note 1; *see also infra* note 116.

8. *See* Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 BROOKLYN L. REV. 199, 200-04 (1978). Not only does prejudgment attachment ensure payment of a prospective award, it also prevents the defendant from making full use of the assets during the litigation. This result can have an obvious and powerful coercive effect on the defendant. As one commentator explained, "[a]ttachment requires the defendant to disgorge the 'family jewels' *pendente lite*. Time is no longer the defendant's ally; rather, it is the defendant who, having lost the benefit of the treasure before the day of judgment, may seek to expedite matters in order to have his property returned." *Id.* at 201.

The claimant thus possesses an enormous amount of leverage over the defendant, who faces the possibility of having his assets tied up for an extended period of time. Attachment may pressure the defendant into an unfavorable settlement, perhaps even in a lawsuit that may lack any substantive merit. *Id.*

9. *See infra* notes 134-41 and accompanying text. Under section 1610(d) of the FSIA the foreign sovereign entity must explicitly waive its sovereign immunity before a claimant can attach sovereign assets prior to judgment.

10. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House of Representatives Committee on the Judiciary on H.R. 11315*, 94th Cong. 2nd Sess. (1976) [hereinafter cited as 1976 *Hearings*]. Actions in which the defendant is a foreign sovereign or sovereign entity are particularly prevalent in the area of raw materials and in cartel situations. *Id.* at 71 (quoting a letter form Timothy W. Stanley, President, International Economic Policy Association, to Hon. Walter Flowers, Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, U.S. House of Representatives (June 24, 1976)). Government-operated firms now predominate in the oil industries of many developing countries. National agricultural marketing boards have increased their roles in grain trade, and in the shipping industry many developing countries are buying national fleets which are operated as government-run monopolies. *Id.*

While centrally-planned trade is most visible in socialist economies, *see infra* note 65 and accompanying text, it is by no means limited to those governments. Even the

on a greater complexity. Claims between a private claimant and a foreign sovereign entity are governed by what has been referred to as "the hoary doctrine of sovereign immunity,"[11] a time-honored rule of law that grants states and other international legal persons certain immunities from the exercise of jurisdiction.[12] This doctrine, however, conflicts with the equally important notion that every private citizen that enters into a commercial transaction with a foreign party should be assured of legal redress.[13]

Congress passed the Foreign Sovereign Immunities Act of 1976[14] (FSIA or Act) to strike a balance between the foreign sovereign seeking immunity and the private claimant seeking relief from that sovereign.[15] The Act allows a private party to

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most conservative social and economic systems, which are otherwise thoroughly capitalist, occasionally resort to nationalizing certain industries. *See* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity, Part I*, 85 COM. L.J. 167, 171 (1980).

For a colorful account of one Tennessee "hill country lawyer" and his unanticipated legal battle with the Japanese government and the Japanese electrical power generating industry, see Panel, *Litigating the Immunity of Foreign Sovereigns: Selected Problems of Presenting Your Case in the Courts and the Executive Branch*, 1976 PROC. AM. SOC'Y INT'L L. 41, 41-42 (remarks by Mr. Brower).

11. S. 1071, 99th Cong., 1st Sess., 131 CONG. REC. S5370 (daily ed. May 3, 1985) (remarks by Sen. Mathias).

12. *See* National City Bank of New York v. Republic of China, 348 U.S. 356 (1955) (Frankfurter, J.) "The freedom of a sovereign from being haled into court as a defendant has impressive title-deeds. Very early in our history this immunity was recognized, and it has become part of the fabric of our law." *Id.* at 358 (footnotes omitted). For a more detailed discussion of the sovereign immunities doctrine, see *infra* notes 31-33 and accompanying text.

13. *See* Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356. The Court of Appeal in *Trendtex* noted:

> A consequence of the doctrine of immunity is that in protecting sovereign bodies from the indignities and disadvantages of adverse judicial process, it operates to deprive other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement.

*Id.* at 384; *see also*, 1976 *Hearings*, *supra* note 10, at 27 (testimony of Monroe Leigh, Legal Advisor, Department of State). "The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." *Id.*

14. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1602-1611 (1980)).

15. *See* H.R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as HOUSE REPORT]. The primary purpose of the FSIA, as stated in its introduction, is "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." *Id.* at

pursue claims against a foreign sovereign in certain situations, but grants immunity to the sovereign, as well as its agencies or instrumentalities, in other situations.[16] For the most part, the Act has met the goal of establishing a fair balance between the two competing notions.[17]

However, with respect to prejudgment attachment of foreign assets in the United States, the FSIA decidedly favors the foreign sovereign by drastically limiting those instances in which a plaintiff may resort to this important provisional remedy.[18] The availability of prejudgment attachment is vital in international litigation, because of the vast quantities of foreign sovereign assets in the United States[19] and the distinct possi-

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6604; *see also* Comment, *The Foreign Sovereign Immunities Act: The Use of Pre-judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 NW. J. INT'L L. & BUS. 517, 517-18 (1980). "The Foreign Sovereign Immunities Act of 1976 (FSIA) was designed to balance the interests of private litigants with commercial or tortious claims against foreign states with the interests of the United States in minimizing friction with foreign nations." *Id.* (foonotes omitted); *see* Comment, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 566 (1977). "The Act attempts to compromise between the two evils of leaving the prevailing litigant with a legally useless judgment and executing upon the assets of a foreign state to the serious detriment of good international relations." *Id.*

16. 28 U.S.C. §§ 1604-11; *see infra* notes 78-87 and accompanying text.

17. *See infra* notes 80-89 and accompanying text (discussing the numerous situations in which the sovereign immunity defense will be denied). Upon signing the House bill into law, President Ford issued the following statement explaining the mutual benefits to private parties and foreign sovereigns:

> This legislation will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts. In this modern world where private citizens increasingly come into contact with foreign government activities, it is important to know when the courts are available to redress legal grievances.
>
> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carriers forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

Statement by the President on Signing H.R 11315 Into Law, October 22, 1976, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 25, 1976).

18. 28 U.S.C. § 1610(d). Section 1610(d) of the FSIA governs prejudgment attachment of foreign sovereign assets. For a detailed discussion of this provision, see *infra* notes 129-41 and accompanying text.

19. *See* LaBella, *The Iranian Litigation: Implications for American Business Interests*, 3 CARDOZO L. REV. 195, 199 (1982). Since the end of World War II, there has been a dramatic rise in total foreign investments in the United States. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 803 (105th ed. 1985) (comparison of 1950 foreign investment level with the 1983 level). Today there are almost U.S.$900 billion of foreign assets in the United States. UNITED

bility of a foreign sovereign removing those assets as a result of a crisis in foreign relations.[20] If a private claimant is denied the prejudgment attachment remedy, foreign sovereigns may remove their assets with impunity and thereby thwart any hope of the private claimant executing its judgment.[21]

The American Bar Association recently called for revision of the prejudgment attachment provision, along with a number of other sections of the Foreign Sovereign Immunities Act.[22] Since the American Bar Association proposals, amendments to several sections of the FSIA have been proposed in Congress.[23] These amendments, which would greatly enhance the interests of the private claimant, are contained in Senate bill S. 1071.[24] If Congress passes S. 1071 the prejudgment attachment provision will receive a much needed and most significant alteration.[25]

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STATES BUREAU OF ECONOMIC ANALYSIS, *Survey of Current Business*, June 1985, at 26. Much of this investment is carried on by foreign governments or governmental agencies. *See* STATISTICAL ABSTRACTS OF THE UNITED STATES, *supra*, at 803.

20. Removal of foreign sovereign assets from the United States is a very real possibility. For instance, in November, 1979, diplomatic relations between the United States and Iran deteriorated to a point where the Iranian government announced that it would remove all of its assets from the United States. *See infra* notes 145-51 and accompanying text for a discussion of the Iranian crisis and subsequent events. Although the Iranian crisis may have been prompted by unique circumstances, the likelihood of a similar crisis arising in the future can not be overlooked. *See* LaBella, *supra* note 19, at 199. "[T]o suggest that the Iranian situation presented the type of diplomatic, political and legal crisis not likely to reoccur represents a most dangerous naivete." *Id.*

21. *See* Nichols, *The Impact of the Foreign Sovereign Immunities Act on the Enforcement of Lenders' Remedies*, 1982 U. ILL. L. REV. 251, 259. The FSIA creates many rights. *See infra* notes 74-77 and accompanying text. These rights, though, can easily be nullified in the absence of the prejudgment attachment remedy. As one commentator has explained:

> Even if a creditor surmounts the various hurdles the FSIA puts in the way of post-judgment execution, virtually all of the foreign government's movable property likely will have been removed from the United States by the time a court orders execution. Thus, most creditors will seek a prejudgment attachment at the same time that they file their complaint.

Nichols, *supra*, at 259.

22. American Bar Association Section of International Law and Practice, Report to the House of Delegates, August 1984 [hereinafter cited as ABA REPORT].

23. S. 1071, 99th Cong. 1st Sess., 131 CONG. REC. S5371 (daily ed. May 3, 1985). S. 1071 is entitled "Foreign Sovereign Immunities Act Amendments." *Id.*

24. See *infra* notes 100-11 and accompanying text for a brief explanation of each proposed amendment.

25. *See* S. 1071, sec. 4, 131 CONG. REC. S5372; *see also infra* notes 185-98 and accompanying text (analysis of this proposed amendment).

This Note will focus on the proposed amendment contained in S. 1071 that would strengthen prejudgment attachment of foreign assets. Part I will discuss the doctrine of sovereign immunity as it has developed in this country,[26] and its present status in the field of United States international litigation.[27] Part II of the Note will examine the prejudgment attachment remedy in light of these sovereign immunity developments.[28] Part III will analyze the proposed amendment dealing with prejudgment attachment.[29] Finally, the Note will conclude that the United States Congress should adopt the proposed prejudgment attachment provision. By doing so, Congress would remove a formidable obstacle from international litigation, and thus enable many private claimants to ensure a meaningful recovery.[30]

## I. *EVOLUTION OF THE SOVEREIGN IMMUNITY DOCTRINE IN THE UNITED STATES*

In general, "[s]overeign immunity is a doctrine of international law under which domestic courts, given the proper circumstances, will relinquish jurisdiction over a foreign state."[31] This immunity extends to government agencies and instrumentalities, as well as to the state itself.[32] The doctrine of sovereign immunity, in one form or another, has traditionally been an integral and widely-recognized aspect of foreign rela-

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26. *See infra* notes 31-70 and accompanying text.

27. *See infra* notes 71-111 and accompanying text.

28. *See infra* notes 115-83 and accompanying text.

29. *See infra* notes 184-98 and accompanying text.

30. *See infra* text following note 198 (conclusion).

31. Jet Line Services, Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1168-69 (D. Md. 1978). Another court has defined sovereign immunity as a doctrine that "precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to the suit." Principe Compania Naviera, S.A. v. Board of Commissioners, 333 F. Supp. 353, 355 (E.D. La. 1971).

Sovereign immunity is an affirmative defense. *See* Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615, 619 n.9 (S.D.N.Y. 1979), *remanded on other grounds*, 629 F.2d 786 (2d Cir. 1980). If a defendant fails to plead sovereign immunity, the defendant implicitly waives any right to this defense and is barred from claiming sovereign immunity later in the action. *Id.*

32. *See* Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS 87, 100-01 (Academie de Droit International des Cours) (1976). Because of practical considerations, a state must act through subsidiary entities. These will usually include persons, representatives, instrumentalities, corporations

tions.[33] In the United States the doctrine has slowly progressed from an absolute form[34] to a much more restrictive form that attempts to balance the interests of the private claimant with those of the sovereign entity.[35]

### A. *Absolute Sovereign Immunity*

In its most extreme form sovereign immunity mandates that courts of one sovereign state should not entertain a suit against another sovereign state.[36] Absolute immunity is

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and government departments. "Such agencies being part and parcel of the State are generally accorded the same immunity as the State they represent." *Id.* at 100.

The following list is a sampling of those entities that may invoke the sovereign immunity defense under the proper circumstances:

a) the state itself,
b) its head of state and those designated by him as members of his official party,
c) its government or any government agency,
d) its head of government and those designated by him as members of his official party,
e) its foreign minister and those designated by him as members of his official party,
f) other public ministers, officials and agents of the state with respect to acts performed in their official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state,
g) a corporation created under its laws and exercising functions comparable to those of a department of agency of the state.

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1962).

33. For broad discussions of foreign sovereign immunity see E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933); G.M. BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW (1984); J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963).

Much of the early law of foreign sovereign immunity evolved from the rules governing the sovereign's immune status before the courts of his own territory. This immunity was explained in a nineteenth century English decision, Feather v. The Queen, 122 Eng. Rep. 1191 (1865). The decision held that:

> [A] petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign . . . , but to injuries done by a subject by the authority of the Sovereign.

*Id.* at 1205.

34. *See infra* notes 36-48 and accompanying text.

35. *See infra* notes 49-70 and accompanying text.

36. J. SWEENEY, *supra* note 33, at 20. There is one notable exception to this absolute position. Even under the absolute theory of sovereign immunity, a state is still subject to the judicial process of another state for claims involving an interest in immovable or real property located in the territory of that other state. *See, e.g.*, Storelli c. Governo della Repubblica Francese (Trib. Civ., Rome 1924), 17 Rivista di

granted out of respect for the dignity and independence of every sovereign state.[37] Traditionally, advocates of the absolute form also believed that a strict application of the doctrine best served the interests of international comity.[38]

The United States adhered to this absolute theory of sovereign immunity until the mid-twentieth century.[39] The Supreme Court firmly entrenched the doctrine into United States law with its famous decision in *The Schooner Exchange v. McFadden*.[40] This case involved an admiralty proceeding brought by the alleged owners of a ship.[41] They claimed that the ship had been "violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French."[42] The two United States claimants argued that they, and not the French Navy, were rightful owners of the ship.[43]

The Court nevertheless dismissed the action,[44] and or-

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diritto internazionale (1925) 236, 240; 1924 Giurisprudenza italiana 206, *translated in* 26 AM. J. INT'L L. 589 (Supp. 1932). "The very fact of acquiring and owning, on the part of one State, part of the territory of another State, . . . implies a consent by the former to the exercise of jurisdiction by the latter with respect to such immovables . . ." *Id.*

37. *See* J. SWEENEY, *supra* note 33, at 20. In Compania Naviera Vascongado v. Steamship "Christina," [1938] A.C. 485, 490, Lord Atkin explained: "[T]he courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages." *See also* The Parliament Belge, 5 P.D. 197, 217 (1880) (courts should refuse to exercise jurisdiction over another government "as a consequence of the absolute independence of every sovereign authority").

38. *See* J. SWEENEY, *supra* note 33, at 20 (translating the 1849 French case of Spanish Government v. Lambege et Pujol) (one nation can not assert jurisdiction in litigation involving another nation without seriously impairing their mutual relations).

39. *See generally* R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 3-44 (1965) (brief history of sovereign immunity in the United States prior to the enactment of the Foreign Sovereign Immunities Act).

40. 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.). Even prior to the ratification of the United States Constitution and the creation of the federal court system, the doctrine of foreign sovereign immunity had been recognized in at least one state. *See* Moitez v. The South Carolina, Bee 422, 17 F. Cas. 574 (Admiralty Ct., Pa., 1781) (No. 9,697).

41. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).

42. *Id.* at 117.

43. *Id.*

44. *Id.* at 146-47.

dered the vessel released to the French.[45] The Court justified its decision by emphasizing one of the traditional grounds of sovereign immunity, namely respect for the independence of every sovereign state.[46] Subsequent courts[47] affirmed this notion of sovereign immunity throughout the nineteenth century and into the early twentieth century.[48]

### B. *Limited Sovereign Immunity*

By the mid-twentieth century a new and more limited concept of sovereign immunity emerged in the United States.[49] The grant of immunity became a discretionary matter to be handled by the Executive, rather than the Judicial, branch of government.[50] Specifically, the United States Department of State would resolve immunity questions.[51] Courts deferred consideration of any claim involving a foreign sovereign until the State Department expressed its opinion.[52]

Limited sovereign immunity first surfaced as law in the

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45. *Id.*

46. *Id.* at 137. Chief Justice Marshall wrote:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

47. *See, e.g.*, L'Invincible, 14 U.S. (1 Wheaton) 238 (1816). In this case the Supreme Court held that United States courts have no jurisdiction to redress any alleged torts committed on the high seas by a cruiser regularly commissioned by a friendly foreign power. *Id.* at 252. Other courts further extended the immunity privilege adopted in *The Schooner Exchange. See* The Roseric, 254 F. 154 (D.N.J. 1918):

> The [absolute] privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships.

*Id.* at 158; *accord*, Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

48. *See* Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751 (1929) (discussing and criticizing United States adherence to the absolute theory).

49. *See* R. LILLICH, *supra* note 39, at 9-15.

50. *See* Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 AM. J. INT'L L. 168 (1946); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148, 1155-59 (1954).

51. Jessup, *supra* note 50, at 169.

52. *Id.*; *see, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); Ex Parte

1943 Supreme Court case, *Ex Parte Republic of Peru*.[53] As in *The Schooner Exchange*, this case involved the seizure of a foreign vessel.[54] In *Ex Parte Republic of Peru*, though, the Supreme Court based its decision on a different justification of sovereign immunity than in *The Schooner Exchange*.[55] The Court noted that judicial deference was necessary in cases involving a foreign sovereign entity[56] to prevent embarrassment of the executive arm of the Government.[57] The Supreme Court affirmed its new stance toward the doctrine of sovereign immunity two years later in *Republic of Mexico v. Hoffman*.[58] As evidenced by these and other cases,[59] the Supreme Court had accepted a sovereign immunity theory by the end of World War II that was essentially a "political question restriction" on

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Republic of Peru, 318 U.S. 578 (1943) (both cases discussed *infra* at notes 53-58 and accompanying text).

53. 318 U.S. 578 (1943).

54. Ex Parte Republic of Peru, 318 U.S. 578 (1943). Plaintiff in this case, a Cuban corporation, instituted an in rem admiralty proceeding against the *Ucayali*, a Peruvian steamship, for failing to transport a cargo of sugar to New York. *Id.* at 580.

55. *See supra* note 46.

56. 318 U.S. at 587-88. After concluding that the sovereign immunity rule set out in *The Roseric* and *Berizzi Bros.*, *see supra* note 47, should govern this action, the Court added that "[u]pon recognition and allowance of the claim by the State Department . . ., it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations." 318 U.S. at 588 (citations omitted).

57. *Id. Ex Parte Republic of Peru* was authored by Chief Justice Stone, who five years earlier as Associate Justice, had referred in dictum to the new method of solving sovereign immunity problems in Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938). In *Ex Parte Republic of Peru*, the Chief Justice converted his *Navemar* dictum into holding and asserted that "courts *are required* to accept and follow the execution determination that the vessel is immune [from jurisdiction]." 318 U.S. at 588 (emphasis added). Allowing courts to exercise jurisdiction over a foreign sovereign posed serious problems for the United States Government. Deferring to the Executive branch, according to this Court, would minimize any potential friction between the United States and a foreign government. *Id.* at 588-89.

58. 324 U.S. 30 (1945). Chief Justice Stone again wrote the opinion for the Court. Reiterating his reasoning in *Navemar* and *Ex Parte Republic of Peru*, the Chief Justice concluded that if the United States Government saw fit to allow sovereign immunity, then it was beyond the power of the courts to deviate from this opinion. *Id.* at 35.

59. *See, e.g.*, United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945) (New York courts precluded from deciding case by State Department determination of immunity for Mexican Government corporation); F.W. Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945) (Pennsylvania court refuses to question State Department decision that defendant corporation is an agency of Mexican Government).

the judicial process.[60]

### C. *Restrictive Sovereign Immunity*

The United States adopted a modern, more restrictive view of sovereign immunity when the State Department issued the so-called "Tate Letter" on May 19, 1952.[61] According to this restrictive theory of sovereign immunity, the sovereign remains immune from suit with regard to its public or "sovereign" acts, but not with respect to its private acts.[62] As a result of the "Tate Letter," the restrictive theory of sovereign immunity replaced the absolute theory as the preeminent rule governing disputes between a private United States party and a foreign sovereign.[63]

This decisive shift in policy is attributable to two major factors. First, by 1952 foreign governments were engaging in a wider scope of commercial activity than could ever have been

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60. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 40 (1978).

61. Letter from Jack B. Tate, Acting Legal Adviser of the United States Department of State, to Acting Attorney General Robert Perlman (May 19, 1952), *reprinted in* 26 STATE DEP'T BULL. 984 (1952). The State Department had been reconsidering its policy of granting immunity to foreign government owned and operated merchant vessels for some time. *See* Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1952).

62. 26 STATE DEP'T BULL. at 984. The "Tate Letter" raised the issue of which acts of a sovereign should be characterized as public acts and therefore be protected under the restrictive theory of foreign sovereign immunity. The leading case in the United States concerning this matter is Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In that case, the Second Circuit created its own classification of public acts for which the court would thereafter grant immunity:

1) internal administrative acts,
2) legislative acts, such as nationalization,
3) acts concerning the armed forces,
4) acts concerning diplomatic activity, and
5) public loans.

336 F.2d at 360.

63. *See* Note, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 VA. J. INT'L L. 75, 81-95 (1964). The "Tate Letter" concludes: "It will hereafter be the Department's policy to follow the restrictive theory of sovereign immuunity in the consideration of requests of foreign governments for a grant of sovereign immunity." 26 STATE DEP'T BULL. at 984. One commentator has labelled this shift in thought "the bright dawn of the doctrine of relative immunity." Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, in ESSAYS ON INTERNATIONAL JURISDICTION 40, 46 (1961).

contemplated at the time of *The Schooner Exchange*.[64] The creation of government-operated trade monopolies by socialist regimes was responsible in large part for this phenomenon.[65] Second, by 1952 the restrictive theory of sovereign immunity had been adopted by most nations,[66] and clearly constituted the prevailing rule of international law.[67] The two foreign affairs justifications for extending immunity, preserving international comity and avoiding embarrassment of the executive branch, no longer existed to as great an extent.[68] Instead,

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64. *See* R. LILLICH, *supra* note 39, at 5-9. *The Schooner Exchange* was decided at a time when the activities engaged in by a government encompassed far less than they do today. The idea that a sovereign state might engage in typical commercial activity was alien to international law. "[I]t is highly unlikely that [Chief Justice] Marshall intended to formulate a principle broad enough to bestow immunity upon acts not then envisioned as properly performable by a sovereign." *Id.* at 5; *see also Trendtex Trading*, [1977] 2 W.L.R. 356. In this case, Lord Shaw explained:

> The radical changes in political and economic and sociological concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity. Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in nature. To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded.

*Id.* at 385-86.

65. *See* Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614 (1950). It is no coincidence that nations began adopting the radical, restrictive theory of sovereign immunity shortly after the emergence of the Soviet Union as an international force in the 1920's. The Soviet Government rather than private parties conducted all international trade with other nations. Thus, adherence to the absolute doctrine of sovereign immunity could have prevented parties from ever having disputes arising out of commercial transactions with the Soviet Union decided in a court of law. *Id.*; *see also* E. ALLEN, *supra* note 33, at 301-02. "Courts that had never before assumed jurisdiction over an unwilling foreign state tore aside the veil and saw beneath the garments of the sovereign a powerful economic competitor of national business firms . . . ."

66. For a detailed survey of the status of sovereign immunity throughout the world at the time of the "Tate Letter," see J. SWEENEY, *supra* note 33, at 26-41; Garcia-Mora, *The Doctrine of Sovereign Immunity of Foreign States and its Recent Modifications*, 42 VA. L. REV. 335, 344-54 (1956).

67. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 701-02 (1976). By adopting the restrictive theory of sovereign immunity, the United States accepted a doctrine that most nations already considered an obligation of international law. Bishop, *supra* note 61, at 95.

68. *See Trendtex Trading*, [1977] 2 W.L.R. at 385-86. "It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity." *Id.* at 386. In fact, the interests of maintaining friendly foreign relations may be *less*

these justifications were overridden by the more prominent economic and political considerations stemming from the expansion of governments into purely private areas.[69] Although the Supreme Court never officially adopted the restrictive theory, the Court did declare, just months prior to the passage of the FSIA, that "it is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in this country."[70]

### D. *The Foreign Sovereign Immunities Act*

In 1976, the United States Congress codified the doctrine of sovereign immunity with the passage of the Foreign Sovereign Immunities Act.[71] In addition to adopting the restrictive theory of sovereign immunity,[72] and thereby following the lead of the State Department and numerous courts,[73] the FSIA

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threatened when the rights and obligations of foreign states growing out of their commercial transactions are made a matter of judicial concern rather than a matter of diplomatic concern. The Pesaro, 277 F. 473, 485 (S.D.N.Y. 1921).

69. *See supra* notes 64-65; *see also* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357, *cert. denied*, 381 U.S. 934 (1965). "[B]ecause of the dramatic changes in the nature and functioning of sovereigns, particularly in the last half century, the wisdom of retaining the [absolute] doctrine has been cogently questioned." *Id.*

70. *Alfred Dunhill*, 425 U.S. at 703.

71. *See supra* note 14. Legislation was previously introduced in the House of Representatives in 1973. The bill was subsequently withdrawn for reconsideration. *See* H.R. 3493, 93rd Cong., 1st Sess., 119 CONG. REC. 2880 (1973). The 1976 Act was the result of a combined effort of the Justice Department, State Department, Congress, the private bar, and the academic community. 1976 *Hearings*, *supra* note 10, at 27 (remarks of Monroe Leigh).

The structure of the Foreign Sovereign Immunities Act is as follows:

§ 1602: Findings and declaration of purpose
§ 1603: Definitions
§ 1604: Immunity of a foreign state from jurisdiction
§ 1605: General exceptions to the jurisdictional immunity of a foreign state
§ 1606: Extent of liability
§ 1607: Counterclaims
§ 1608: Service; time to answer; default
§ 1609: Immunity from attachment and execution of property of a foreign state
§ 1610: Exceptions to the immunity from attachment or exception
§ 1611: Certain types of property immune from execution

*See* 28 U.S.C. §§ 1602-11.

72. *See* HOUSE REPORT, *supra* note 15, at 6605.

73. In *Alfred Dunhill*, 425 U.S. at 703, the Supreme Court noted the many cases in which the restrictive theory had been adopted:

made three other important changes that enhanced the interests of the private claimant.

First, the FSIA transferred the task of deciding the immunity question from the State Department back to the courts,[74] thus minimizing foreign relations considerations and adding a measure of predictability to United States sovereign immunities law.[75] Second, the FSIA provided the first statutory method for serving process on, and obtaining in personam jurisdiction over, foreign parties.[76] Finally, the Act removed what had previously been an absolute immunity from execution against the property of a foreign sovereign.[77]

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Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2nd Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2nd Cir.), *cert. denied*, 385 U.S. 931 (1966); Premier S.S. Co. v. Embassy of Algeria, 336 F. Supp. 507 (S.D.N.Y. 1971); Ocean Transport Co. v. Government of Republic of Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967); ADM Milling Co. v. Republic of Bolivia, Civ. Action No. 75-946 (D.C. Aug. 8, 1975); Et Ve Balik Kuruma v. B.N.S. International Sales Corp., 25 Misc. 2d 299, 304 N.Y.S.2d 971 (1960); Harris & Co. Advertising, Inc. v. Republic of Cuba, 127 So.2d 687 (Fla. Ct. App. 1961).

*Id.*

74. *See* HOUSE REPORT, *supra* note 15, at 6606. The preamble to the Act states: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. This result has been acclaimed as the depoliticization of international litigation. *See* HOUSE REPORT, *supra* note 15, at 6634 (quoting a letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Jr., Deputy Attorney General, to Hon. Carl O. Albert, Speaker of the House of Representatives (October 31, 1975)).

75. *See* New England Merchants National Bank v. Iran Power Generation and Transmisson Co., 502 F. Supp. 120, 124 (S.D.N.Y. 1980). Even after the State Department issued the "Tate Letter" and adopted the restrictive theory of sovereign immunity, for political reasons it occasionally requested immunity for disputes arising out of purely commercial acts of the foreign sovereign. *See, e.g.*, Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (State Department issued a suggestion of immunity soon after concluding delicate negotiations with Fidel Castro regarding the return of a hijacked United States airliner). *Rich* has been classified as "one of the international legal monstrosities of American courts for the 1960's." R. LILLICH, *supra* note 39, at 17.

76. *See* HOUSE REPORT, *supra* note 15, at 6606. The FSIA revised section 1330 of title 28 and, in effect, established a federal long-arm statute reaching foreign sovereigns and sovereign entities. *Id.* at 6612. Section 1608 of the Act provides for various means of serving process on foreign parties, all intended to cure the traditional problems of serving foreign sovereign parties. 28 U.S.C. § 1608.

77. *See* HOUSE REPORT, *supra* note 15, at 6606. Section 1610 permits execution against a foreign sovereign's property when the property is used for commercial activity, *see infra* note 88, and when 1) the foreign sovereign has either implicitly or

The FSIA recognizes a presumption of immunity for all foreign states and their agencies or instrumentalities.[78] This presumption may then be defeated in a number of ways.[79] Sovereign immunity will not be granted if the suit involves: 1) a waiver of immunity by the foreign state,[80] 2) rights to property seized in violation of international law[81] or located in the United States,[82] 3) certain torts not involving a discretionary function,[83] 4) related counterclaims[84] or set-offs,[85] or, most significantly, 5) a commercial act of the foreign state.[86] Once the private claimant has defeated the presumption of sovereign immunity, a suit against the foreign sovereign can proceed.[87]

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explicitly waived immunity from execution, or 2) the property is or was used for the commercial activity upon which the claim is based, or 3) the execution relates to a judgment establishing rights in property taken in violation of international law, or 4) the execution relates to a judgment establishing rights in property which is (a) acquired by succession or gift, or (b) immovable and situated in the U.S. and not used for diplomatic purposes, or 5) the property consists of an obligation or proceeds from an obligation to indemnify or hold harmless the foreign state or its employees contained in an automobile or other liability insurance policy. *See* 28 U.S.C. § 1610(a)(1-5). For a discussion of the pre-FSIA law on execution on foreign sovereign property, see *infra* notes 124-28 and accompanying text.

78. 28 U.S.C. § 1604; *see* Kline v. Republic of El Salvador, 603 F. Supp. 1313 (D.D.C. 1985). "Under the Act, a foreign state is immune from suit, and the courts lack jurisdiction, unless a specific statutory exception is found to be applicable." *Id.* at 1315. The FSIA defines "agency or instrumentality of a foreign state" 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, . . . and
> (3) which is neither a citizen of a State of the United States . . ., nor created under the law of any third country.

28 U.S.C. § 1603(b).

79. *See generally* Dellapenna, *supra* note 10, at 167 (methods of defeating presumption of sovereign immunity discussed).

80. 28 U.S.C. § 1605(a)(1). Waiver of immunity can occur by declaration of the foreign state, by international agreement, by contract, by instituting suit in another country, or by intervening in a proceeding. *See* J. SWEENEY, *supra* note 33, at 55.

81. 28 U.S.C. § 1605(a)(3).

82. *Id.* § 1605(a)(4).

83. *Id.* § 1605(a)(5).

84. *Id.* § 1607(b).

85. *Id.* § 1607(c).

86. *Id.* § 1605(a)(2). This concept of "commercial act" is the equivalent of "private act" referred to in the "Tate Letter," *supra* note 62 and accompanying text.

87. *See Kline*, 603 F. Supp. at 1315. While Congress' first priority in passing the FSIA was to aid private United States parties, the Supreme Court in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), held that foreign plaintiffs were equally entitled to bring suit against foreign sovereigns.

Furthermore, if the private claimant does obtain a judgment, property of a foreign state used for commercial activity[88] in the United States will no longer enjoy immunity from execution.[89]

The FSIA was a welcome piece of legislation when it was passed.[90] The Act represented an important legislative attempt to correct the imbalance between the private claimant and the foreign sovereign.[91] For the most part, it was a clear attempt to promote the interests of the private claimant seeking redress,[92] oftentimes at the expense of the foreign sovereign seeking immunity.[93] In this respect, the FSIA continued the trend favoring the private claimant, rather than the foreign sovereign. In fact, the primary impetus behind the present call to amend the FSIA is the desire to *further* promote the interests of the private claimant.[94]

### E. *Proposed Amendments to the FSIA*

One court has called the FSIA "a marvel of compression,"[95] because of its relative brevity. However, in the ten

88. The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). If the activity out of which a claim arises is one in which a private person could engage, then sovereign immunity will no longer be granted. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).

89. 28 U.S.C. § 1610(a)(1-5).

90. *See* Atkeson, Perkins, Wyatt, *H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 298 (1976); Maier, *The Proposed Sovereign Immunities Act: Its Effect on Judicial Deference*, 1976 PROC. AM. SOC'Y INT'L L. 48.

There were some critics who opposed the restrictive theory embodied by the FSIA for varying reasons. *Compare* 1976 *Hearings*, *supra* note 10, at 61-67 (remarks of Professor Michael Cardozo) (politics should not be taken out of the decision to grant or deny immunity) *with* Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 194, 215 A.2d 864, 893, *cert. denied*, 385 U.S. 822 (1966) (Musmanno, J., dissenting) (foreign sovereign immunity is "a colossal effrontery, . . . a shameless fraud" and should be completely abolished).

91. *See supra* note 15.

92. 1976 *Hearings*, *supra* note 10, at 27 (remarks of Monroe Leigh). The FSIA does not, however, promote the interests of the private claimant in the area of prejudgment attachment. *See infra* notes 134-39 and accompanying text.

93. *See* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980). One of the primary purposes of the FSIA was to remove the sovereign immunity defense when foreign states engaged in private commercial activity, thereby placing them on the same footing as private parties engaging in international trade. *Id.* at 987.

94. *See* S. 1071, 131 CONG. REC. S5371 (remarks of Sen. Mathias).

95. *Texas Trading*, 647 F.2d at 306.

years since its enactment, it has become quite apparent that "[t]his economy of decision has come . . . at the price of considerable confusion in the district courts."[96] To rectify this confusion, the United States Senate introduced S. 1071 on May 3, 1985.[97] Its primary goal is to "fill the gaps in the FSIA;"[98] its main effect would be to strengthen a private claimant's position in any legal dispute with a foreign sovereign or sovereign entity.[99]

One of the proposed amendments to the FSIA would expressly redefine "commercial activity" to encompass debt securities issued and guaranteed by foreign states.[100] Another would remove the sovereign immunity barrier in an action brought against a foreign entity to enforce an arbitral agreement or award.[101] A third amendment would eliminate the use of the "act of state" defense by a foreign state in cases in which the FSIA confers authority on the courts to adjudicate claims for expropriation or breach of contract.[102]

The amendments would also greatly enhance execution of judgments. Instead of limiting execution on the foreign state property to that property out of which the claim arises, as does the current FSIA provision,[103] one proposed amendment would sanction execution on *any* property, regardless of

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96. *Id.* at 307. For a brief overview of the perceived problems, see ABA REPORT, *supra* note 22, at 3-6.

97. *See supra* note 23.

98. S. 1071, 131 CONG. REC. S.5370 (introductory remarks of Sen. Mathias). S. 1071 incorporates most of the recommendations offered by the American Bar Association Section of International Law and Practice in its 1984 report. *See supra* note 22. As an introduction to its recommendations, the Section noted that in the time it has been in force, the FSIA has generally been successful in achieving its primary purposes of removing the political considerations that often deprived the private claimant of his just desserts, and implementing the modern, restrictive theory of sovereign immunity. *See* ABA REPORT, *supra* note 22, at 3. However, the Section added that a number of significant problems have emerged under the Act as currently drafted, requiring further action by Congress. *Id.*

99. *See infra* notes 100-11 and accompanying text.

100. S. 1071, sec. 1, 131 CONG. REC. S5371 (amendment to 28 U.S.C. § 1603).

101. *Id.* sec. 2(a), 131 CONG. REC. S5371 (amendment to 28 U.S.C. § 1605(a)).

102. *Id.* sec. 3, 131 CONG. REC. S5371-72 (amendment to 28 U.S.C. § 1606). The "act of state" doctrine mandates that the courts of one nation will not pass judgment on the governmental acts of another nation done within the latter's own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

103. 28 U.S.C. § 1610(a)(2).

whether the claim is based on use of that property.[104] The sole requirement is that this property must be "used or intended to be used for a commercial activity in the United States."[105] A fifth proposed amendment would affect admiralty claims by reducing the penalty for wrongful arrest of a foreign state vessel,[106] and by allowing a claimant to pursue an action in rem against a foreign state vessel.[107] This provision would eliminate much of the uncertainty that exists under the current law.[108]

Finally, one amendment would significantly advance the use of prejudgment attachment of foreign sovereign assets located in the United States.[109] The proposed amendment would prevent a foreign sovereign agency or instrumentality from removing these assets prior to execution,[110] as long as certain enumerated conditions are met.[111] The proposed prejudgment attachment provision deserves special attention in light of the importance of prejudgment attachment as a protective remedy,[112] the limitations imposed on its use up to this time,[113] and the apparent confusion surrounding the present status of the FSIA prejudgment attachment provision.[114]

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104. S. 1071, sec. 4(2), 131 CONG. REC. S5372 (amendment to 28 U.S.C. § 1610(a)).

105. *Id.*

106. *Id.* sec. 2(b), 131 CONG. REC. S5371 (amendment to 28 U.S.C. § 1605(b)). Currently the FSIA's maximum penalty for wrongful arrest is the value of the vessel of cargo. 28 U.S.C. § 1605(b). This proposed amendment would restrict the maximum penalty to an award of damages incurred during the wrongful detention.

107. S. 1071, sec. 2(b), 131 CONG. REC. S5371 (amendment to 28 U.S.C. § 1605(b)).

108. *Id.*, 131 CONG. REC. S5371 (remarks of Sen. Mathias). Many of the problems currently affecting admiralty law arise from the difficulty in determining the true owner of the vessel and from the obvious mobility of these vessels. *Id.* Senator Mathias summed up the reasons behind this particular provision when he added that "[l]itigants in U.S. courts should not have to watch helplessly as their only remedy sails away." *Id.*

109. *Id.* sec. 4(11), 131 CONG. REC. S5372 (amendment to § 1610(d)).

110. *See infra* notes 184-88 and accompanying text.

111. *See infra* notes 194-98 and accompanying text.

112. *See infra* note 116 and accompanying text.

113. *See infra* notes 120-41 and accompanying text.

114. *See infra* notes 142-83 and accompanying text.

## III. *DEVELOPMENT OF PREJUDGMENT ATTACHMENT IN THE UNITED STATES*

Prejudgment attachment of foreign property has traditionally been a delicate area in international litigation.[115] It is undoubtedly one of the most potent and effective provisional remedies available to a private claimant to ensure legal redress in an action brought against a foreign party.[116] Prejudgment attachment, however, can also be a serious and often irritating infringement on a nation's sovereignty.[117] A compromise must be achieved between promoting the interests of the aggrieved claimant,[118] and protecting the interests of a foreign sovereign.[119]

### A. *Prejudgment Attachment Prior to the FSIA*

From 1952, when the Executive branch of the United States Government officially adopted the restrictive theory of sovereign immunity,[120] until Congress enacted the FSIA in 1976,[121] the State Department and the courts only allowed prejudgment attachment of foreign assets for limited purposes.[122] Property owned by a foreign sovereign or sovereign entity

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115. *See infra* notes 116-17 and accompanying text.

116. *See supra* notes 5-8 and accompanying text. Unlike post-judgment remedies, provisional remedies such as prejudgment attachment offer the aggrieved claimant a substantial measure of relief without having tried the merits of the action. *See* New England Merchants National Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 126-27 (S.D.N.Y. 1980). It has also been asserted that "the attachment presents a potent pain in the neck to the debtor, who may then see the pitfalls of deadbeatdom and ante up the money owed plaintiff." R. HAYDOCK, D. HERR & J. STEMPEL, *supra* note 1, at 532. Most significantly, however, without prejudgment attachment the claimant may be left with a worthless judgment. *See supra* note 21.

117. *See infra* note 131 and accompanying text; *see also* Irving Trust Company v. Government of Iran, 85 F.R.D. 135 (E.D. La. 1980). "Relief in the form of an attachment is a harsh remedy and runs contrary to the fundamental concept that a person's property should not be taken from him before he has been given an opportunity for the proper adjudication of his rights." *Id.* at 137; *see New England Merchants*, 502 F. Supp. at 127 ("the provisional remedies are too potentially harassing to be freely granted").

118. *See supra* note 13 and accompanying text.

119. *See supra* notes 37-38 and accompanying text.

120. *See supra* notes 61-63 and accompanying text.

121. *See supra* note 14 and accompanying text.

122. *See* Miller, *Services of Process on State, Local, and Foreign Governments under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers*, 46 F.R.D. 101, 126-27 (1969).

could be attached for the purpose of establishing jurisdiction over the sovereign.[123] Courts, though, refused to allow attachment of foreign sovereign assets for security purposes because such property remained completely immune from execution of judgment.[124]

Opposition to attachment in aid of execution stemmed from the old sovereign immunity cases[125] and their respect for the independence of every sovereign state.[126] The State Department continued to oppose execution on foreign sovereign property, and therefore attachment in aid of execution, despite adopting the restrictive theory of sovereign immunity and expressly recognizing that many sovereign states were expanding the breadth of their government activities.[127] Immunity from

123. *See* Stephen v. Zivnostenska Banka, 15 A.D.2d 111, 115-16, 222 N.Y.S.2d 128, 134 (1961), *aff'd*, 12 N.Y.2d 781, 235 N.Y.S.2d 1 (1962) (State Department supports attaching foreign sovereign property in the United States in order to obtain jurisdiction "where under international law a foreign government is not immune from suit").

124. *See Stephen*, 15 A.D.2d at 116, 222 N.Y.S.2d at 134 (quoting State Department letter of suggestion).

> [P]roperty so attached to obtain jurisdiction over the defendant government cannot be retained to satisfy a judgment ensuing from the suit because in accordance with international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit.

*Id.*

The United States had long recognized that foreign government property is immune from execution under international law. *See* Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). "The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered." *Id.* at 708; *see also* Bradford v. Chase Nat. Bank of City of New York, 24 F. Supp. 28, 38 (S.D.N.Y. 1938) (plaintiff prohibited from executing on deposits at a national bank belonging to the Phillipine government), *aff'd sub nom.* Berger v. Chase Nat. Bank of City of New York, 105 F.2d 1001 (2d Cir. 1939), *aff'd*, 309 U.S. 632 (1940).

125. *See supra* notes 40-48 and accompanying text.

126. *See* Oliver American Trading Co. v. Government of the United States of Mexico, 5 F.2d 659 (2d Cir. 1924). In this case the Second Circuit vacated an attachment issued against the Mexican Government, explaining:

> The property sought to be reached in this country is the public property of Mexico . . ., which that government holds for public purposes, and, being such, it is entitled to the same immunity as a sovereign, or an ambassador, or a ship of war, and for the same reason. The exercise of such jurisdiction by the courts of this country is inconsistent with the independence and sovereignty of Mexico.

*Id.* at 667.

127. *See* Flota Maritima Browning de Cuba, Sociadad Anonima v. Motor Vessel Ciudad de la Habana, 335 F.2d 619, 626 (4th Cir. 1964) (State Department still sug-

execution was extended regardless of whether the foreign sovereign entity engaged in public or private activity.[128]

This approach deprived the prejudgment attachment remedy of most of its potency. Even if the claimant was likely to prevail, there was no benefit in preventing a foreign sovereign from removing its assets when those assets were immune from execution.

### B. *Prejudgment Attachment Under the FSIA*

By providing comprehensive service of process rules,[129] the FSIA eliminated the tactic of attaching foreign sovereign assets to obtain jurisdiction.[130] This technique had understandably created a great deal of friction between the United States Government and foreign states.[131] However, by reducing the instances in which a court can grant immunity from execution,[132] the Act created the potential for utilizing pre-

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gests that foreign sovereign property remain immune from execution even after the "Tate Letter"); New York and Cuba Mail Steamship Company v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). "[T]he principle of the immunity of a foreign government's property from attachment and seizure is not affected by the State Department's favorable attitude towards the restrictive theory of sovereign immunity. . . ." *Id.* at 686.

128. *See New York and Cuba Mail*, 132 F. Supp. at 685 (immunity from execution granted despite State Department finding that sovereign activity was of a private nature).

129. *See supra* note 76 and accompanying text.

130. *See supra* note 123 and accompanying text. In preventing attachment for jurisdictional purposes, the United States Congress expressly recognized that private parties could initiate litigation in United States courts merely upon the fortuitous presence of foreign sovereign property in the United States. Geveke & Co. International, Inc. v. Kompania Di Awa I Elektrisidat Di Korsou N.V., 482 F. Supp. 660, 662-63 (S.D.N.Y. 1979).

131. *See* Panel, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. AM. SOC'Y INT'L L. 182 (remarks of Murray J. Belman, Deputy Legal Adviser, Department of State):

> American litigants are often very ingenious in securing jurisdiction over foreign governments. It is not uncommon for the large New York banks to receive notices of attachment of a foreign government's accounts. I have even seen a case where a plaintiff sought to attach the New York accounts of all the commercial banks of a foreign country on the ground that any dollar assets held by those banks must represent deposits of the foreign government itself.

*Id.* at 184; *see also* 1976 *Hearings*, *supra* note 10, at 31 (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice). "[F]oreign states whose property is attached invariably protest to the State Department." *Id.*

132. *See supra* note 77.

judgment attachment to its fullest advantage. Preventing the sovereign from removing its assets from the jurisdiction becomes a significant matter when a claimant can execute on foreign sovereign assets. Thus, in considering whether to permit prejudgment attachment of foreign sovereign assets, the drafters of the act were once again faced with "walking the tightrope"[133] between protecting foreign relations and promoting the private interests of litigants.

The FSIA provision as enacted allows a private claimant to attach foreign sovereign assets prior to judgment when 1) the foreign sovereign has *explicitly* waived its immunity from prejudgment attachment, and 2) valid justifications for the attachment exist.[134] Requiring an explicit waiver of immunity affords the foreign sovereign entity a great deal of protection,[135] and erects an imposing barrier in the path of the private litigant.[136]

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133. Comment, *The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 NW. J. INT'L L. & BUS. 517, 518 (1980).

134. 28 U.S.C. § 1610(d). This section of the Foreign Sovereign Immunities Act provides:

> The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section,
> if—
> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver,
> and
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction."

*Id.* The FSIA provision on prejudgment attachment could be considered a liberal compromise compared to an earlier sovereign immunity bill submitted. *See* Burrows & Newman, *Prejudgment Attachment—Sovereign Immunity*, N.Y.L.J., Apr. 23, 1982, at 1, col. 1, 30, col. 1. That earlier bill, H.R. 3493, submitted by Rep. Peter Rodino on January 31, 1973, did not permit any prejudgment attachment for security purposes whatsoever. *See* H.R. 3493, 93rd Cong. 1st Sess., 119 CONG. REC. 2880 (1973).

135. The ABA Section of International Law and Practice pointed out the inequity of this provision in its Report to the House of Delegates. ABA REPORT, *supra* note 22, at 4. "This gap in the statutory scheme has the potential to render nugatory the access to the courts and the right of execution provided elsewhere in the statute, since a foreign state sued under the Act is free to remove its assets from the jurisdiction with impunity." *Id.*

136. *See* 1976 *Hearings*, *supra* note 10, at 81 (testimony of Cecil J. Olmstead,

This protection from prejudgment attachment is not extended to private firms engaging in commercial activity in the United States.[137] Yet, a foreign sovereign or, more significantly, a foreign sovereign agency or instrumentality, is protected from prejudgment attachment even though it carries on virtually the same activity as the private firm.[138] As a result, the ability to collect an anticipated judgment depends largely on whether the foreign sovereign entity honors the judgments against it, or whether it removes its assets from the jurisdiction while the litigation is pending.[139]

The claimant may seek to find an explicit waiver by the foreign sovereign, but outright waiver of immunity from prejudgment attachment by the sovereign is unlikely.[140] Even in

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Chairman, The Rule of Law Committee, and Vice President, The Texaco Co.). During the subcommittee hearings on the FSIA bill that was eventually enacted, a number of organizations expressed concern over the restrictions placed on the protective remedy. *See id.*; *see also id.* at 98 (testimony of Michael Marks Cohen, Attorney and Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States). These groups stressed that although section 1610(d) of the Act permits prejudgment attachment where the foreign sovereign explicitly waives its immunity, this exception is so narrow that it virtually eliminates the use of the provisional remedy against a foreign sovereign entity. One spokesman criticized the provision as a complete loss of prejudgment attachment and arrest remedies in actions brought against foreign sovereigns. 1976 *Hearings*, *supra* note 10, at 98.

137. *See supra* note 1.

138. *See* 28 U.S.C. § 1610(d).

139. *See* 1976 *Hearings*, *supra* note 10, at 76. This precarious situation was discussed at the subcommittee hearings, and a few spokesmen voiced their apprehension. *See, e.g.*, *id.* at 76 (letter submitted by the Committee on International Law of the Association of the Bar of the City of New York). If the foreign sovereign property is removed prior to the entry of judgment, the newly created right to execute on that property would be seriously impaired. *Id.*

140. Many of the numerous treaties governing trade between the United States and foreign nations contain waiver of immunity clauses. None of these clauses, however, contain the exact words "prejudgment attachment." Rather, parties to these treaties have agreed to waive immunity from vague concepts such as "other liability." *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, art. XVIII, para. 2, 8 U.S.T. 2217, 2230, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. XVIII, para. 2, 8 U.S.T. 2043, 2073, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. XVIII, para. 3, 9 U.S.T. 449, 463, T.I.A.S. No. 4024; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. XVIII, para. 2, 7 U.S.T. 1839, 1859, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XVIII, para. 2, 4 U.S.T. 2063, 2077, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Aug. 3-Dec. 26, 1951, United States-Greece, art. XIV, para. 5, 5 U.S.T. 1829, 1867, T.I.A.S. No. 3057.

those situations in which explicit waiver arguably exists, courts have, for the most part, been unwilling to find explicit waiver.[141] Therefore, it is highly improbable that a private claimant can obtain prejudgment attachment of foreign sovereign assets under the present FSIA, even when the need to attach these assets is obvious.

### C. *Judicial Handling of the Section 1610(d) Explicit Waiver Requirement*

One of the key factors in reducing the effectiveness of the prejudgment attachment provision of the FSIA has been the difficulty encountered by the courts in interpreting that provision. Courts have struggled to determine what constitutes an explicit waiver of immunity,[142] and have reached conflicting conclusions.[143] Moreover, courts have frequently construed the term "explicit waiver" strictly,[144] thereby depriving the private claimant of the minimal opportunity for protective attachment that the FSIA provides.

The Iranian crisis of 1979[145] prompted a myriad of civil

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141. *See infra* note 144 and accompanying text.

142. *See, e.g.*, Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 728 (S.D.N.Y. 1979); Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 392-93 (D.N.J. 1979); Electronic Data Systems v. Social Security Organization of Iran, 79 Civ. 1711 (S.D.N.Y. June 12) (order of attachment), *remanded*, 610 F.2d 94 (2d Cir. 1979); *see also infra* notes 158-73 and accompanying text (discussion of *Reading & Bates*, *Behring* and *Electronic Data Systems*).

143. *Compare, e.g.*, American International Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) (waiver of immunity found in treaty between United States and Iran) *with* E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294, 1301-02 (N.D. Tex. 1980) (no explicit waiver found in same treaty).

144. *See, e.g.*, S & S Machinery Co. v. Masinexportimport, 706 F.2d 411, 416 (2d Cir. 1983) ("[w]e do not take lightly the congressional demand for explicitness"); Banque Compafina v. Banco de Guatemala, 583 F. Supp. 320, 325 (S.D.N.Y. 1984) (finding an explicit waiver requires a "Talmudic" analysis of treaty language); *see infra* notes 180-83 and accompanying text; *Reading & Bates*, 478 F. Supp. at 728 ("or other liability" can not be read as explicit waiver); *infra* notes 169-73.

145. In the fall of 1978, business and diplomatic ties between the United States and Iran became strained as internal political unrest grew in Iran. N.Y. Times, Sept. 10, 1978, at 82. Soon thereafter United States business and nonessential diplomatic personnel began to leave Iran in increasing numbers. *Americans' Exodus From Iran Spurred By Carter Decision*, N.Y. Times, Dec. 10, 1978, at A1, col. 4. On November 4, 1979, a group of Iranian students seized the United States Embassy in Teheran taking United States diplomatic and military personnel hostage. *Teheran Students Seize U.S. Embassy and Hold Hostages*, N.Y. Times, Nov. 5, 1979, at A1, col. 6. Ten days later, President Jimmy Carter responded by issuing an executive order freezing all assets belonging to the government of Iran and subject to the jurisdiction of the

suits[146] by diverse claimants.[147] Most of these cases named the Iranian Government or an agency of that Government as the defendant.[148] With the impending threat of the complete removal of all Iranian Government assets from the United States,[149] many of these claimants sought prejudgment attach-

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United States. Gwertzman, *Carter Freezes Billions in Iranian Assets as Khomeini Regime Tries to Withdraw Them*, N.Y. Times, Nov. 15, 1979, at A1, col. 6. With all political and economic ties severed, enormous diplomatic and legal problems were unleashed. *See generally* Norton & Collins, *Reflections on the Iranian Hostage Settlement*, 67 A.B.A.J. 428 (1981) (overview of significant legal and diplomatic aspects of the Iranian crisis).

146. *See* New England Merchants National Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73, 75 (S.D.N.Y. 1980). "The volatile political situation in Iran together with the break in the long-standing economic and industrial contacts between American businesses and the Iranian government, its agencies, instrumentalities, as well as private Iranian corporate entities, have caused a flood of lawsuits to be filed in this and other circuits." *Id.*

A number of lawsuits had been filed prior to the hostage seizure, most of which involved attempts to enjoin United States banks from making payment on standby letters of credit issued in favor of the Iranian government, or one of its agencies. *See* Getz, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189, 248-52 (1980). After the hostage seizure, though, United States courts were inundated with suits filed against the Iranian government and its agencies. *See* Security Pacific National Bank v. Government and State of Iran, 513 F. Supp. 864, 866 n.1 (C.D. Cal. 1981) ("over 400 such suits pending in courts throughout the country . . . claims in these suits total over several billion dollars").

147. Included among the many claimants filing suit against the Iranian government were an airline, *see* Pan American World Airways, Inc. v. Bank Melli Iran, 79 Civ. 1190 (S.D.N.Y. March 30, 1979), an accounting firm, *see* Touche Ross & Co. v. Iran, 80 C. 0128 (C.D. Cal. 1980), and a university. *See* Trustees of Columbia Univ. v. Iran, 80 Civ. 0241 (S.D.N.Y. 1980).

148. *See, e.g.*, Gulf Ports Crating Company v. Ministry of Roads and Transportation, 674 F.2d 318 (5th Cir. 1982); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209 (N.D. Ill. 1982); Marschalk Company, Inc. v. Iran National Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981); Hawaiian Agronomics Company (International) v. Government of Iran, 518 F. Supp. 596 (C.D. Cal. 1981); Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981); Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981); International Schools Service v. Government of Iran, 505 F. Supp. 178 (D.N.J. 1981); Grove Valve & Regulator Co., Inc. v. Iranian Oil Services Ltd., 87 F.R.D. 93 (S.D.N.Y. 1980).

149. On November 14, 1979, Dr. Abolhassan Bani-Sadr of the Iranian Revolutionary Council announced that Iran intended to remove all of its assets from United States banks and their overseas branches. Kifner, *Iran Defends Move to Withdraw Funds*, N.Y. Time, Nov. 15, 1979, at 1, col. 5.

Originally, the value of Iranian assets in the United States was estimated to be approximately U.S.$6 billion. Farnsworth, *Action Disturbs Financial Circles; U.S. Stresses Protection of Claims*, N.Y. Times, Nov. 15, 1979, at A1, col. 3. That figure was later raised to U.S.$8 billion, *Value of Frozen Assets Now Put at $8 Billion*, N.Y. Times, Nov. 20, 179, at A13, col. 2, and eventually raised to a point in excess of U.S.$10 billion.

ment of Iranian property in the United States.[150] In response, the defendants in these actions invoked the doctrine of sovereign immunity.[151] Consequently, the Iranian crisis cases afforded United States courts their first opportunity to interpret the FSIA provision on prejudgment attachment.[152] In doing so, however, the courts were unable to reach a consensus regarding the interpretation of explicit waiver.[153]

While the FSIA states that foreign government property in the United States shall be immune from prejudgment attachment except as provided in section 1610(d),[154] it does add that this clause is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act. . . ."[155] The federal courts deciding the Iranian crisis cases were faced with interpreting not only the prejudgment attachment provision, but also the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran[156] (Treaty of Amity). In article XI(4) of this Treaty each party waived any immunity from "taxation, suit, execution of judgment *or other liability*. . . ."[157] Thus, the courts

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Powell, *Iran Accord Establishes Fund of $1 Billion to Pay Claims of U.S. Firms and Citizens*, Wall St. J., Jan. 20, 1981, at 3, col. 1.

150. *See, e.g.*, *Gulf Ports Crating*, 674 F.2d at 319; *Marschalk*, 518 F. Supp. at 731; *Hawaiian Agronomics*, 518 F. Supp. at 596; *Security Pacific National Bank*, 513 F. Supp. at 866.

151. *See supra* note 150. Each of the cases listed *supra* at note 150 involved a claimed defense of sovereign immunity.

152. From January 19, 1977, when the FSIA came into effect, until the Iranian crisis, no reported cases attempted to interpret section 1610(d) of the Act. In one case, Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigacion, 459 F. Supp. 1242 (S.D.N.Y. 1978), an agency of the Algerian Government sought to invoke section 1610(d) to prevent attachment. The district court explained that section 1610(d) did not apply since a default judgment had been entered against the defendants prior to the effective date of the FSIA. *Id.* at 1248.

153. *See infra* notes 158-73 and accompanying text. For a general overview of judicial handling of the prejudgment attachment cases arising out of the crisis, see Comment, *Prejudgment Attachment of Iranian Assets in the U.S.: Waiving Sovereign Immunity*, 13 N.Y.U. J. INT'L L. & POL. 675 (1981); Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 CALIF. L. REV. 837 (1981); Note, *Two Interpretations of Immunity from Prejudgment Attachment Under The Foreign Sovereign Immunities Act*, 6 N.C. J. INT'L L. & COM. REG. 151 (1980-81).

154. 28 U.S.C. § 1609.

155. *Id.*

156. Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 901, T.I.A.S. No. 3853 [hereinafter cited as Treaty of Amity].

157. *Id.* at 909 (emphasis added). The Treaty provides in part:

were faced with the further task of reconciling the strict, explicit waiver requirements of the FSIA prejudgment attachment provision with this preexisting treaty and its waiver of immunity.

In the first of the Iranian prejudgment attachment cases, *Electronic Data Systems Corp. Iran v. Social Security Organization of Iran*,[158] the plaintiff brought suit against various agencies and instrumentalities of the Government of Iran, claiming breach of an executory contract. The plaintiff also sought to attach defendant's funds deposited in a New York bank.[159] The court granted the attachment order, concluding that the waiver provision in the Treaty of Amity was sufficiently explicit to constitute a waiver of Iran's immunity from prejudgment attachment under section 1610(d) of the FSIA.[160] Shortly after the *Electronic Data Systems* decision, two similar cases were decided. These two cases and *Electronic Data Systems* were each decided on divergent reasoning.[161]

In the first of these two cases, *Behring International, Inc. v. Imperial Iranian Air Force*,[162] the district court found that article XI(4) of the Treaty of Amity did not constitute the explicit waiver of immunity from prejudgment attachment required by section 1610(d) of the FSIA.[163] Nevertheless, the court went on to note that the strict waiver requirements of the FSIA did not abrogate the Treaty of Amity[164] because the FSIA was ex-

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> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

*Id.*, art. XI(4), 8 U.S.T. at 909.

158. 79 Civ. 1711 (S.D.N.Y. June 12) (order of attachment), *remanded*, 610 F.2d 94 (2d Cir. 1979).

159. *Id.* at 1.

160. *Id.* at 2-3.

161. *See* LaBella, *supra* note 19, at 208-14.

162. 475 F. Supp. 383 (D.N.J. 1979). *Behring* involved a suit brought by an international freight forwarder to recover the expenses for services rendered to the defendants. The plaintiff, "faced mostly with unknowns," *id.* at 387, received a writ of attachment of defendant's property located at the Behring warehouse in Edison, New Jersey. *Id.*

163. *Id.* at 393.

164. *Id.* at 393-94.

pressly made subject to any preexisting treaties.[165] After emphasizing that under the Treaty Iran had waived its immunity from "taxation, suit, execution of judgment, *or other liability to which privately owned and controlled enterprises are subject therein*,"[166] the court concluded that the Treaty contained an *implicit* waiver of immunity from prejudgment attachment.[167] The court thus denied defendants' motion for release of its property.[168]

In the second case, *Reading & Bates Corp. v. National Iranian Oil Co.*,[169] the United States District Court for the Southern District of New York rejected the analysis of both *Behring* and *Electronic Data Systems* and refused to confirm an order of attachment.[170] The court found that 1) in order for a sovereign to waive its immunity from attachment, it must do so explicitly[171] and that 2) the Treaty of Amity did not satisfy this requirement.[172] This court, in direct opposition to the *Behring* court, reasoned that the "other liability" language of the Treaty could *not* be construed as a waiver of immunity from prejudgment attachment.[173]

Thus, in three cases with virtually identical facts, the courts issued vastly differing opinions.[174] The courts never had the opportunity to reconcile these distinctive interpretations of explicit waiver. The Algerian Accords entered into by the United States and Iran on January 19, 1981 terminated all pending Iranian litigation.[175] All legal debates arising out of

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165. *Id.*

166. *Id.* at 394 (emphasis in original).

167. *Id.* at 394-95.

168. *Id.* at 396. The court found that even though section 1610(d) requires an explicit waiver of immunity from prejudgment attachment, this immunity may nevertheless be implicitly waived by treaty. *Id.* at 394; *see also Reading & Bates*, 478 F. Supp. at 728 (analysis of this reasoning).

169. 478 F. Supp. 724 (S.D.N.Y. 1979).

170. *Id.* at 729.

171. *Id.* at 728.

172. *Id.* at 729.

173. *Id.* The court explained: "It is hard to imagine that a sovereign nation, in entering a treaty supposedly to promote commerce, would at the same time even suggest that it would evade a lawful judgment arising out of its commercial activities." *Id.*

174. For a general discussion of these cases, see McGreevey, *The Iranian Crisis and U.S. Law*, 2 NW. J. INT'L L. & BUS. 384, 400-11 (1980).

175. Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* 20 I.L.M. 224 (1981). All disputes between American nationals and the Government of Iran would be resolved by an international arbitral tribunal.

the crisis, including the prejudgment attachment questions, were eventually rendered moot by the United States Supreme Court's opinion in *Dames & Moore v. Regan*.[176]

The issue of interpreting the FSIA prejudgment attachment provision was resurrected, however, shortly thereafter in litigation unrelated to the Iranian crisis. In one post-crisis case, *Libra Bank Ltd. v. Banco Nacional de Costa Rica*,[177] the United States Court of Appeals for the Second Circuit held that the defendant had explicitly waived its sovereign immunity from prejudgment attachment.[178] The court found that the requirements of section 1610(d) had been met when the bank signed notes worth U.S.$40 million containing a waiver of any right to immunity from "legal proceedings."[179]

Less than a year after *Libra Bank*, the Second Circuit reached a different result in *S & S Machinery Co. v. Masinexportimport*,[180] a case involving an immunity clause similar to the one in *Libra Bank*.[181] In contrast to its decision in *Libra Bank*, the court in *S & S Machinery* found that waiver from "other liability" in a treaty between the United States and Romania did *not* amount to explicit waiver under FSIA section 1610(d).[182] In view of these conflicting cases, it is evident that some legislative action must be taken to resolve this confu-

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176. 453 U.S. 654 (1980). In *Dames & Moore* the Supreme Court upheld the constitutional and statutory authority of the President to implement an agreement such as the Algerian Accords. *Id.* at 674.

177. 676 F.2d 47 (2d Cir. 1982). For a detailed examination of the *Libra Bank* decision, see Burrows & Newman, *Prejudgment Attachment—Sovereign Immunity*, N.Y.L.J., Apr. 23, 1982, at 1, col. 1.

178. 676 F.2d at 50.

179. *Id.* at 49-50. The exact words "explicit waiver" were not necessary under section 1610(d) where, as in this case, the parties' intention was unambiguous.

180. 706 F.2d 411 (2d Cir. 1983).

181. *Id.* at 416-17. The waiver clause contained in the United States-Romania trade agreement stated that each party waived immunity "from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions. . . ." *Id.* at 417 (citing Agreement on Trade Relations Between the United States and the Romanian Government, April 2, 1975, art. IV, para. 2, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159).

182. *Id.* at 418. Because of the "delphic character of the phrase 'other liability,'" the court refused to find that the Romanian Bank and Masin had explicitly waived their immunity from prejudgment attachment. *See also* O'Connell Machinery Company, Inc. v. M.V. "Americana," 734 F.2d 115 (2d Cir. 1984) ("any other liability" provision in the treaty between the United States and Italy did not constitute waiver of immunity from prejudgment attachment).

sion.[183]

## III. *PREJUDGMENT ATTACHMENT UNDER S. 1071*

The proposed amendment of the FSIA prejudgment attachment provision[184] would have two major effects. First, it would eliminate much of the confusion surrounding the present prejudgment attachment provision. Second, it would greatly increase the potential use of this provisional remedy and further the interests of all private litigants who fear the removal of foreign government-owned assets in the United States.[185] The proposed amendment recognizes the economic realities prevailing in many foreign nations by distinguishing between foreign government property and property of a foreign government agency or instrumentality engaging in commercial activity in the United States.[186] With regard to the property of a foreign government, the proposed amendment would retain the existing requirement of explicit waiver for prejudgment attachment.[187] However, no waiver, explicit *or* implicit, would be required under the proposed amendment in order to attach property of any agency or instrumentality of a foreign government as long as the agency or instrumentality has engaged in commercial activity in the United States.[188] Em-

183. This confusion was further highlighted by a more recent case, Banque Compafina v. Banco de Guatemala, 583 F. Supp. 320 (S.D.N.Y. 1984). As in *Libra Bank*, the defendant had signed a number of bank notes, some of which contained a section waiving any immunity "relative to any action or proceeding deriving from this promissory note. . . ." *Id.* at 324. Unlike *Libra Bank*, though, this court found the phrase did not constitute an explicit waiver of immunity from prejudgment attachment under § 1610(d). *Id.* at 325; *see* Burrows & Newman, *Central Bank Property: Protection From Attachment*, N.Y.L.J., Apr. 20, 1984, at 1, col. 1 (general discussion of the *Banque Compafina* decision).

184. S. 1071, sec. 4(11), 131 CONG. REC. S5372. Section 1610 of title 28, United States Code, is amended by adding at the end thereof the following:

> (d)(1) In addition to subsection (c), [formerly § 1610(d)], any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment or injunctive relief prior to the entry of judgment in any action brought in a court of the United States or of a State. . . .

*Id.*

185. *Id.*, 131 CONG. REC. S5371 (remarks by Sen. Mathias). The amended prejudgment attachment provision "will provide a better balance between the due process of litigants and the foreign policy concerns of the U.S. Government." *Id.*

186. *Id.* sec. 4(11), 131 CONG. REC. S5372.

187. *Id.*

188. *Id.*

phasizing the importance of this provision, the author of S. 1071 explained, "[w]e don't want litigants in our courts to be the 'hit and run' victims of an outmoded concept of sovereign immunity."[189]

Although the proposed amendment removes the strict requirements of the present section 1610(d),[190] it would not transform prejudgment attachment into a means of harassing foreign sovereign entities.[191] Various safety measures contained in S. 1071 protect the legitimate foreign policy concerns of the United States[192] while improving the aggrieved claimant's chances of using this vital remedy.[193]

The property that the claimant seeks to attach must otherwise be subject to execution upon the entry of a final judgment.[194] The purpose of the attachment must be only to secure the satisfaction of a possible judgment and not to obtain jurisdiction.[195] The property of a private party must be subject to attachment in similar circumstances.[196] The moving party must post a bond greater than fifty percent of the value of the property or any higher amount required by applicable law.[197] Finally, the moving party must show a probability of success on the merits and a probability that the assets will be removed from the United States absent prejudgment attachment.[198] These conditions should ensure that the prejudgment attachment procedure is not abused.

## *CONCLUSION*

One of the more significant aspects of the FSIA is its recognition that foreign governments are now engaging in commercial activities that were traditionally carried on by private parties. In many instances, the Act limits the grant of sover-

189. *Id.*, 131 CONG. REC. S5371 (remarks of Sen. Mathias).
190. *See supra* notes 134-36 and accompanying text.
191. *See* ABA REPORT, *supra* note 22, at 4.
192. *See supra* notes 125-26 and accompanying text.
193. *See supra* note 188 and accompanying text.
194. S. 1071, sec. 4(11), 131 CONG. REC. S5372.
195. *Id.*
196. *Id.* The prerequisites for attaching private property would be determined by the law prevailing in the jurisdiction where the attached property lies. *See supra* note 1.
197. S. 1071, sec. 4(11), 131 CONG. REC. S5372.
198. *Id.*

eign immunity extended to a government agency or instrumentality carrying out these activities. However, with regard to prejudgment attachment of foreign sovereign assets to protect an anticipated judgment, the Act still extends virtually complete immunity to *all* sovereign entities. The United States Congress should conform the prejudgment attachment provision to the rest of the Act and allow attachment of the assets of a foreign agency or instrumentality.

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