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The Iranian crisis created a laboratory in which to examine the foreign affairs powers of the branches of the United States government. In this Article, Mr. McGreevey begins his analysis with a study of the litigation waged by Chase Manhattan Bank and other American parties for control of Iranian assets. Foreign sovereign immunity from pre-judgment attachment is an important issue in this litigation, and is treated in Part II. Part III examines the posture of the executive during the pendency of the assets litigation. The Article concludes with a discussion of the foreign affairs powers of the President in light of the agreement that was reached between Iran and the United States on January 19, 1981.

In 1978 and 1979, Iran underwent a revolution that toppled its monarchy and vested the Islamic clergy with the ultimate say in the country's political affairs. The resulting cutoff of oil production sent world crude oil prices to a level that would have been unthinkable a year earlier. Events in Iran reflected the patterns of other revolutions. The rash of executions following the downfall of the Shah was reminiscent of the French Revolution, with firing squads replacing the guillotine. The power struggle among the Iranian student militants, clergy

* Member of Illinois Bar. Ohio State University, B.A. (1970), J.D. (1976). Many of the cases involving the Iranian assets litigation are unreported as of yet; for that reason, cases discussed in this article are cross-referenced to the Iranian Assets Litigation Reporter which compiles many litigation matters pertaining to Iran. Citation to the Reporter is indicated by "IALR".

and secular sector had overtones of the rivalries among the Bolsheviks, Mensheviks and Octobrists of the Russian Revolution.

Perhaps a valid detailed account will someday be made of the Shah's overthrow and the ensuing power struggle among the clergy, the leftists and the secular moderates.[1] This article, however, is not about the Iranian revolution. Nor is it about the implications under international law of the seizure of the American embassy in Tehran and the use of diplomatic personnel as hostages; that subject has already been addressed elsewhere.[2] Rather, this article is an examination of the American response to certain problems presented by the Iranian revolution: the reactions of the executive branch, the judiciary and the private sector to the Iranian crisis; the divergent interests of those groups; and the resolution under U.S. law of these conflicting interests.

One phase of the crisis concluded on January 19, 1981, when the two nations agreed to an assets and claims settlement. The agreement, set out in several documents,[3] will be referred to throughout the article as the "Accord." Challenges to the executive action implementing the terms of the settlement surfaced two days after the Accord was signed.[4] The legal attacks on the President's authority by private claimants reflect the continuing friction between the judiciary, the executive branch and the private sector—a friction that has persisted.

On November 14, 1979, the Carter administration froze all assets which were held by United States persons and in which the Government of Iran or any Iranian governmental entity had an interest.[5] That

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[1] Several recent studies have examined the Iranian Revolution. *See generally* M. FISCHER, IRAN: FROM RELIGIOUS DISPUTE TO REVOLUTION (1980); N. KEDDIE, IRAN: RELIGION, POLITICS, AND SOCIETY (1980); B. SABEL, IRAN: A PEOPLE IN REVOLUTION (1980).

[2] *See* Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395 (1980); Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609 (1980).

[3] The two most important of these documents are reprinted at the end of this article as Appendix I and Appendix II.

[4] On January 21, a claimant sought a temporary restraining order before Judge Gerhard Gesell of the District of Columbia circuit court to block the transfer of some $51 million to the Federal Reserve Bank of New York. The judge stated that the power of the President to agree to transfer the funds "is without question," and that "it would be contrary to the public interest for the court to intervene." N.Y. Times, Jan. 22, 1981, at A-11, col. 1; Wall St. J., Jan. 22, 1981, at 2, col. 2.

In another January 21 decision, a federal district court in San Francisco agreed to block the transfer of $91 million from the Bank of America to the Federal Reserve Bank of New York. The bank contended that by the terms of the agreement it would be forced to pay excessive interest on the $2.4 billion in Iranian deposits that it had held in its overseas offices. N.Y. Times, Jan. 23, 1981, at A-9, col. 1; Wall St. J., Jan. 23, 1981, at 2, col. 2.

[5] Exec. Order No. 12170, 44 Fed. Reg. 65,729 (1979). Authority for this order derives from the International Emergency Economic Powers Act, § 202, 50 U.S.C. §§ 1701-06 (Supp. I 1977,

order came 10 days after approximately 66 U.S. citizens were taken hostage at the United States Embassy in Tehran, and immediately following the announcement by Iranian Economic and Foreign Minister (and later President) Abolhassen Bani-Sadr that Iran planned to withdraw all of its funds held on deposit in U.S. banks.[6] The U.S. freeze order was not unprecedented; in the past, the U.S. had frozen the assets of the People's Republic of China, North Korea, Cambodia, Vietnam, and Cuba.[7] The amounts involved, however, were unprecedented.

Supp. II 1978 & 1980 Supp.), and the National Emergencies Act, § 101, 50 U.S.C. §§ 1601-51 (1976, Supp. I 1977 & Supp. II 1978). *See also* Trading With the Enemy Act, 50 U.S.C. app. § 5(b) (Supp. I 1977 & Supp. II 1978).

The Senate Report accompanying the International Emergency Economic Powers Act states as its purpose:

> to revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies. The bill is a response to two developments: first, extensive use by Presidents of emergency authority under section 5(b) of the Trading With the Enemy Act of 1917 to regulate both domestic and international economic transactions unrelated to a declared state of emergency, and second, passage of the National Emergencies Act of 1977 which provides safeguards for the role of Congress in declaring and terminating national emergencies, but exempts section 5(b) of the Trading With the Enemy Act from its coverage.

S. REP. NO. 466, 95th Cong., 1st Sess. 2 (1976), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4541.

According to the Senate Report accompanying the National Emergencies Act, enactment of this legislation

> would end the states of emergency under which the United States has been operating for more than 40 years. It would also insure that the extraordinary powers which now reside in the hands of the Chief Executive—powers delegated by the Congress to seize property and commodities, organize and control the means of production, assign military forces abroad and restrict travel—could be utilized only when emergencies actually exist, and then, only under safeguards of congressional review. Reliance on emergency authority, intended for use in crisis situations would no longer be available in non-crisis situations. At a time when governments throughout the world are turning with increasing desperation to an all-powerful executive, this legislation is designed to insure that the United States travels a road marked by carefully constructed legal safeguards.

S. REP. NO. 1168, 94th Cong., 2d Sess. 2 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2289. Moreover, the Act is "clearly not intended to grant additional authority to the President," for "the legislation is directed solely to Presidential declarations of emergency." *Id.* at 4, *reprinted at* 2290-91.

The term "frozen assets" is descriptive, but those words are not used in the Iranian Assets Control Regulations, 31 C. F.R. § 535 (1979), which were promulgated pursuant to the President's order. Section 535.201 of these regulations provides:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

The terms "property" (§ 535 311), "transfer" (§ 535.310) and "person subject to the jurisdiction of the United States" (§ 535.329) are defined broadly so as to give the maximum effect to the regulations.

[6] N.Y. Times, Nov. 15, 1979, at 1, col. 5.

[7] Under the Foreign Assets Control Regulations, 15 Fed. Reg. 9040 (1950), as amended at 18 Fed. Reg. 2079 (1953), and at 45 Fed. Reg. 7224 (1980) (current version at 31 C.F.R. § 500.201-.205 (1980)), transactions with North Korea, Cambodia, and North and South Viet-Nam are pro-

The total amount of frozen Iranian assets was first estimated at between $8 and $9 billion dollars,[8] one hundred times greater than the estimated amount of Chinese assets frozen between 1950 and 1979.[9] In fact, the frozen Iranian assets actually exceeded $10 billion.[10]

Several lawsuits had been filed against various Iranian entities prior to the hostage crisis and the ensuing freeze order.[11] After the freeze order was issued, more than 390 cases were instituted against the Islamic Republic of Iran and its various government corporations and instrumentalities. Banks,[12] insurance companies,[13] petroleum service

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hibited except by specific license of the Department of the Treasury. The prohibitions of, *inter alia*, "[a]ll transfers of credit and all payments between, by, through, or to any banking institution" (§ 500.201), "dealing in any security" (§ 500.202), and "[i]mportation of and dealings in . . . merchandise" (§ 500.204), effectively block assets of the designated countries and their nationals. The 1980 amendment deleted mainland China from almost all prohibitions. *See* 45 Fed. Reg. 7224 (1980). Cuban assets are similarly blocked by the Cuban Assets Control Regulations (current version at 31 C.F.R. § 515.201 (1980)). The leading case upholding the constitutionality of such regulations is Sardino v. Fed. Res. Bank of N.Y., 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) (Cuban resident seeking New York savings; *held*, not a taking without due process in violation of Fifth Amendment). The President's statutory power for the actions taken was § 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. § 5(b)(1) (1976). It is not necessary that a designated foreign country be an "enemy," United States v. Yoshida Int'l, Inc., 526 F.2d 560, 575 (C.C.P.A. 1975); United States v. Broverman, 180 F. Supp. 631 (S.D.N.Y. 1959). *See* Clark v. Uebersee Finanz-Korp., 332 U.S. 489 (1947). The Trading With the Enemy Act has had a "knotty" history, *Yoshida, supra*, 526 F.2d at 573, n.16, especially after it was amended by Congress to include any "period of national emergency declared by the President," Emergency Banking Act of 1933, 48 Stat. 1. *See* note 5 *supra*; notes 231-36 *infra*.

[8] N.Y. Times, Nov. 20, 1979, at 13, col. 2. This was an estimate by the United States Treasury Department which has since taken a formal survey of Iranian claims and assets in the United States. 45 Fed. Reg. 24,408 (1980). The results of that survey will provide a more precise calculation of the amount of Iranian assets held by United States persons, as well as the size of their claims. Unverified reports have stated that the amount of frozen Iranian assets were as high as $13 billion. N.Y. Times, Nov. 20, 1979, at 13, col. 2.

[9] [1979] 277 INT'L TRADE REP. U.S. EXPORT WKLY (BNA) at C-1. The claims settlement agreement between China and the United States put the amount of frozen Chinese assets in the United States at $80.5 million. *Id.*

[10] Wall St. J., Jan. 20, 1981, at 3, col. 1.

[11] Many of these earlier cases concerned attempts by American companies to enjoin American banks from making payment on standby letters of credit opened in favor of the Government of Iran or Iranian entities. *See, e.g.*, American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979) (preliminary injunction sought barring American bank from making any payment under a letter of credit to an Iranian bank; denied because company failed to show it lacked an adequate remedy at law). In fact, the standby letter of credit device was used as a performance guarantee, and companies that had been forced to abandon their operations in Iran because of the revolution were afraid that the new government would demand payment on the credits. *See generally* Note, *"Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution*, 93 HARV. L. REV. 992 (1980); Comment, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189 (1980). According to the latter article, 23 such cases were filed before the President's freeze order. *Id.* at 248-52.

[12] *See* text accompanying notes 31-35 *infra*.

[13] See note 125 *infra*.

contractors,[14] electronics companies,[15] shipping companies,[16] an airline,[17] an aircraft manufacturer,[18] a university,[19] a tobacco company,[20] and an accounting firm[21] were among the plaintiffs. All were vying for the billions of dollars in Iranian bank accounts held in the United States, principally in New York City, and for other Iranian assets located throughout the U.S.[22] Iranian assets were also tied up by litigation in the United Kingdom,[23] West Germany,[24] and France.[25]

The U.S. government had a keen interest in the frozen assets and the claims of the plaintiffs in the Iranian cases. The assets, as well as the claims, were the bargaining chips in the negotiations for release of the American hostages. Iran held hostage U.S. diplomatic personnel; the United States held hostage $10 billion in Iranian assets. More than 14 months after the embassy seizure, in the closing hours of the Carter administration, an agreement was reached whereby Iran would return the hostages, the U.S. would return Iran's assets, and all commercial claims would be resolved by negotiation or, failing agreement, by binding arbitration before a international arbitral tribunal; all litigation against Iran in U.S. courts would be terminated, and all court orders—attachments, injunctions, and even final judgments—would be nullified.[26]

The Iranian crisis created a laboratory in which to examine the foreign affairs power of the United States government, each branch of which is constitutionally accorded certain prerogatives in the manage-

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14 *See, e.g.*, Santa Fe Int'l Corp. v. Nat'l Iranian Oil Co., 79 CV 6693 (S.D.N.Y. 1979).

15 *See* note 62 *infra*.

16 *See, e.g.*, Hadley Shipping Co. v. Iran, 79 CV 6840 (S.D.N.Y. 1979).

17 *See, e.g.*, Pan American World Airways, Inc. v. Bank Melli Iran, 79 CV 1190 (S.D.N.Y. March 30, 1979), [1979] 254 INT'L TRADE REP. U.S. EXPORT WKLY. (BNA) at 0-1.

18 *See, e.g.*, Lockheed Corp. v. Iran, 79 C 4697 (C.D. Cal. 1979).

19 *See, e.g.*, Trustees of Columbia Univ. v. Iran, 80 CV 0241 (S.D.N.Y. 1980).

20 *See, e.g.*, R.J. Reynolds Tobacco Co. v. Iran C.A. 80-0593 (M.D.N.C. 1980).

21 *See, e.g.*, Touche Ross & Co. v. Iran, 80 C 0128 (C.D. Cal. 1980).

22 For example, a Boeing 747 ordered by Iran was attached in the Western District of Washington. IALR at 58 (Feb. 8, 1980). Also, on December 19, 1979, in American Int'l Group, Inc., v. Islamic Republic of Iran, Civ. No. 79-3298(H) (D.D.C. July 10, 1980), the court granted a writ of attachment as to certain art which belongs to the Government of Iran and which was (and still is) on display at the National Gallery of Art in Washington, D.C. The pieces included "Woman Three," a William de Kooning painting, and "La Deputation," a series of five sculptures by Jean Dubuffet.

23 *See* discussion accompanying text at notes 45-50, 80-92 *infra*.

24 Morgan Guaranty Trust Company sued Iran in West German courts and attached Iran's interest in Fried, Krupp G.m.b.H. and Deutsche Babcock A.G. Wall St. J., Nov. 29, 1979, at 5, col. 1.

25 *See* discussion accompanying text at notes 87-92 *infra*.

26 For the text of the United States-Iran agreement, *see* App. I & II.

ment of foreign affairs. The federal courts are granted "judicial power" with respect "to Controversies . . . between Citizens . . . and foreign States, Citizens or subjects."[27] "Congress shall have the Power . . . To regulate Commerce with Foreign nations . . . ."[28] The President is said to have "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations . . . ."[29] The potential for conflict is obvious, and that potential was realized in the Iranian assets litigation. This article will analyze the activities of the three branches as it follows the chronological development of the events of the crisis.

Part I of this article provides a case study of the Iranian assets litigation. The Chase Manhattan Bank litigation in the Southern District of New York, has been chosen to illustrate the array of issues involved in the hundreds of U.S. lawsuits against Iran and Iranian entities. The issue of whether immunity from pre-judgment attachment under the Foreign Sovereign Immunities Act existed in the context of the Iranian assets cases is discussed in Part II. Part III examines the conduct of the executive branch and the response of the judiciary in the course of the litigation. Part IV concerns the power of the President to enter into and implement the Accord between the United States and Iran.

I. The Chase Case

The Chase Manhattan Bank case and the other suits brought against Iran and its governmental entities represent the reaction of the private sector to the Iranian crisis. The banks, contractors and traders reacted by suing every Iranian entity subject to service and grabbing all available assets. The reaction of the judges before whom those cases were brought was predictably methodical and analytical. Several dubious decisions resulted, however, particularly in the handling of the issue of sovereign immunity from pre-judgment attachment.[30] The executive branch was curiously schizophrenic. While on one hand purporting to "license" the prosecution of the Iranian cases, the government repeatedly sought to stay the cases; argued in favor of the sovereign immunity defense of Iranian defendants; and supported Iran's attempts to consolidate the cases before a multidistrict litigation panel. The executive branch sought to exercise all possible control over

27 U.S. Const. art. 3, § 2.
28 U.S. Const. art. 1, § 8.
29 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
30 *See* text accompanying notes 100-48 *infra*.

the Iranian cases, even though its actions may have benefited the defense strategy of Iran's lawyers and frustrated the plaintiffs in the private sector. The judiciary was generally very cool toward the government's intervention in the Iranian cases. Nevertheless, as of the writing of this article the executive branch apparently has had the final word on the disposition of the Iranian assets and the resolution of the claims against Iran.

Of the 390 cases brought in U.S. courts against the government and governmental entities of Iran, 96 were filed by banks.[31] A fair degree of duplication was involved since some plaintiffs filed identical complaints in two or more districts for attachment purposes. The largest claims were made by 22 plaintiffs who were the lenders in 17 syndicated loans to various Iranian governmental entities.[32] Twenty of those cases were filed in the Southern District of New York and were dubbed the "Jumbo Loan Cases" by counsel in the Iranian litigation.[33] The suit by Chase Manhattan Bank[34] involved 11 of the 17 syndicated loans and was the largest of the Jumbo Loan Cases.[35]

A. The Complaint

Chase named 23 defendants in its original complaint filed December 4, 1979. They include the Islamic Republic of Iran, Bank Markazi (the central bank of Iran), seven Iranian government joint stock companies, a dozen Iranian banks, a German bank 61 per cent owned by Iranian interests, and an Iranian joint venture oil company 50 per cent owned by the National Iranian Oil Company (NIOC).[36] On April 24, 1980, Chase amended its complaint by, *inter alia*, dropping the German bank as a defendant, and by adding a total of 24 additional defendants, 12 additional Iranian joint stock companies and 12 additional Iranian banks.[37]

The Chase claims exceeded $355 million.[38] Chase claimed that the

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31 Transcript of hearing before Panel on Multidistrict Litigation at 1, In re Litigation Involving Iran, MDL Docket No. 435 (June 26, 1980). An additional 2000 claims have been registered with the Treasury Department. N.Y. Times, Jan. 22, 1981, at 1, col. 1.

32 Transcript of hearing before Panel on Multidistrict Litigation, *supra* note 31, at 2, 20.

33 *Id.* at 20.

34 Chase Manhattan Bank v. Iran, 79 Civ. 6644 (TPG) (S.D.N.Y., filed Dec. 4, 1979) [hereinafter cited as "Chase Case"].

35 Transcript of hearing before Panel on Multidistrict Litigation, *supra* note 31, at 2.

36 Complaint of Plaintiffs at Caption and paras. 5-12, Chase Case, *supra* note 34.

37 *Id.* paras. 5-10.

38 *Id.* paras. 25-29. The amount breaks down as follows:

—$50 million lent to the State of Iran;

—$150 million lent to six Iranian banks;

defendants defaulted on their loan obligations.[39] The complaint pleaded the embassy seizure, President Carter's ban on imports of Iranian oil,[40] Bani-Sadr's subsequent threat to withdraw all Iranian funds from the U.S., the Iranian assets freeze, and Bani-Sadr's November 23, 1979 statement repudiating all of Iran's foreign debts.[41] In support of its expropriation claim, Chase pleaded the June 7, 1979 decree of the Islamic Revolutionary Council whereby all Iranian banks were nationalized.[42]

Chase's First and Second Claims for Relief set forth further facts.[43] Chase stated that, as of the effective date of the assets freeze, it was holding in its London branch almost $385 million for the benefit of Bank Markazi and approximately $77 million for the benefit of NIOC. The amounts were cleared through the Chase head office in New York before being credited to the accounts in the London branch. Chase claimed to have offset those accounts against the debts of the defendants in accordance with "applicable principles of law and equity, the arrangements with Markazi and NIOC . . . and established banking practices . . . ."[44] On November 29, 1979, Bank Markazi brought suit in London against Chase seeking the return of approximately $320 million from the Bank Markazi account at Chase's London branch. The commencement and pendancy of the London case was pleaded in Chase's amended complaint.[45]

In its prayer for relief in the initial complaint, Chase sought an injunction against prosecution by Bank Markazi of the London action. In the event that Chase ultimately was not able to offset the Bank

—$86 million lent to four Iranian government corporations;
—$17 million lent to nine Iranian joint stock companies;
—$17 million for letter of credit obligations of Chase undertaken on behalf of four Iranian banks and one Iranian joint stock company;
—$10 million lent to the joint venture oil company, 50 percent of which was guaranteed by NIOC;
—$6 million in loan repayment guarantees made by two Iranian banks;
—$19 million as compensation for expropriation of Chase's interest in two Iranian banks; and
—$2.5 million in overdrafts by three Iranian banks.

Id. at para. 25. Amid the plethora of six-, seven-, and eight-figure numbers in Chase's various claims of indebtedness was the following allegation: "[Bank] Iranshahr was overdrawn in its account at Chase on November 14, 1979, in the amount of $464.87 with accrued interest of $3.58." *Id.* para. 25(41).

39 Whether a default actually occurred became one of the issues in the case. *See* text accompanying notes 77-78 *infra*.

40 Presidential Proclamation No. 4702, 44 Fed. Reg. 65,581 (1979).

41 Amended Complaint of Plaintiffs at paras. 13-20, Chase Case, *supra* note 34.

42 *Id.* para. 28.

43 *Id.* paras. 30-37.

44 *Id.* para. 34.

45 *Id.* para. 31.

Markazi and NIOC funds against the defendants' indebtedness, Chase sought judgment against all defendants, jointly and severally, for the full amount of its unsatisfied claims.[46]

When Chase filed its suit in New York on December 4, 1979, it obtained a temporary restraining order which purported to prevent Bank Markazi from prosecuting the London suit. However, after a hearing on January 31, 1980 on Chase's motion for a preliminary injunction, Judge Thomas Griesa vacated the temporary restraining order.[47] On February 15, 1980, he denied Chase's motion for a preliminary injunction and stated:

> From a fair and objective legal standpoint, the crucial connection of the controversy with England must be recognized. Perhaps the ultimate legal question involved is whether the President's blocking order, and the regulations thereunder, are valid under English law with respect to an English branch of an American bank. It is reasonable, to say the least, for Bank Markazi to seek a determination of this question in an English court.[48]

Chase then counterclaimed against Bank Markazi in the London suit.[49] The prayer for relief in Chase's amended complaint asked for "an injunction enjoining Markazi from enforcing any judgment that might be obtained against Chase in the London action," as well as a declaration that Chase could combine and offset the Bank Markazi and NIOC funds against the debts of the other defendants.[50] The complaint also sought joint and several liability of all defendants for those debts;[51] individual liability against Iran, on the basis of conversion, expropriation, unjust enrichment, and interference with economic and contractual relationships;[52] and individual liability against Bank Markazi, on the basis of interference with economic and contractual relationships

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46 *Id.* paras. 32, 34.

47 Chase Case, *supra* note 34 (Jan. 31, 1980) (temporary restraining order vacated).

48 *Id.* slip. op. at 9-10 (S.D.N.Y. Feb. 15, 1980) (motion for preliminary injunction denied). It would have been equally reasonable to suggest that the United States government retains jurisdiction, if it cares to exercise it, over the disposition by United States persons of United States dollars held abroad. Those dollars represent an obligation of the United States government, and the government arguably has the sovereign power to repudiate or suspend that obligation in either a plenary or a selective manner. On the other hand, one might argue that the United States has consented to and participated in the "internationalization" of the dollar as the primary medium of exchange on world markets so that the United States government has effectively abdicated jurisdiction over its dollars held beyond its territorial reach. This is a very neat question of international law and monetary policy—a question that perhaps should have been analyzed more closely by Judge Griesa before deferring so readily to the English courts.

49 Points of Defense and Counterclaim of Defendants, Bank Markazi Iran v. Chase Manhattan Bank, 1979-B-No. 5873, filed Feb. 29, 1979; IALR at 266 (March 7, 1980).

50 Amended Complaint at paras. 33, 37, and 38, Chase Case, *supra* note 34.

51 *Id.* para. 41.

52 *Id.* paras. 43, 49.

and breach of its guarantees of the convertibility and free transfer of funds under various loan agreements.[53]

B. Issues in the Chase Case

Chase, although the plaintiff, followed a defensive strategy. Normally, the plaintiff in a lawsuit seeks money in the hands of the defendant; normally, the defendant in order to keep the plaintiff at bay, raises a panoply of issues in its jurisdictional, procedural, and substantive defenses. In the Chase case, however, the situation was reversed. Chase was holding money of the non-indebted defendants (Bank Markazi and NIOC) sufficient to cover the claims against the indebted defendants. In order to keep Bank Markazi and NIOC away from their funds for as long as possible, Chase forced these entities and their money into the center of the case by combining their funds and then setting off those funds against the indebtedness of the other defendants. Chase accomplished this by claiming to pierce the government corporate veil under the alter ego or "Big Mullah" theory.[54] This strategy also served to protect the Chase deposits from attachment by other plaintiffs in the Iranian cases.

A second issue in the Chase case, raised in the press rather than the pleadings, was whether the loans to the Government of Iran were enforceable, in spite of the failure of the Iranian parliament explicitly to approve the loans as required by Article 25 of the Iranian Constitution.[55] Both the Big Mullah theory and the Article 25 defense are discussed below.[56]

1. The "Big Mullah" Theory

Chase's claim of joint and several liability among all defendants and its claimed right to combine and offset the funds of Bank Markazi and the NIOC against the indebtedness of the other defendants were based on the Big Mullah theory. Chase alleged:

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[53] *Id.* paras. 45, 47.

[54] "Mullah" means "a teacher or expounder of the law and dogmas of Islam." WEBSTER'S NEW COLL. DICTIONARY (1977). In Islamic countries, it is a title given to religious leaders. There are no requirements for acquisition of the title, but normally individuals called "mullahs" have had formal training in a *madrash* or religious school. In the Iranian litigation, Big Mullah referred to the Ayatollah Ruhollah Khomeini who was cast as having ultimate and absolute control over all governmental matters in Iran so that any government agency or organization could be said to be the alter ego of any other state agency or organization. In view of the vast sums of money at stake in the Iranian cases, that theory had an appropriate homonymous meaning in American slang: "Big Moolah."

[55] THE IRANIAN CONST. OF 1906, art. XXV (translated by A.P. Saleh).

[56] *See* text accompanying notes 57-76 *infra*.

> Each of the defendants other than Iran is wholly owned, dominated and controlled by Iran, is an agency or instrumentality of Iran . . . and is the alter ego of Iran; [and]
> Defendants other than Iran are all parts of the same single entity, Iran. None has an independent existence separate and apart from the others or from Iran. Each is, in effect, a division of Iran and each is jointly and severally liable for the claims asserted herein.[57]

This theory was expressly pleaded in 81 of the complaints against Iran and Iranian entities.[58] As explained by one of the defense lawyers, the alter ego theory rested on the assumption "that last summer the Government of Iran nationalized the banks in such a way as to obliterate their separate juridical entity status—that it's all one great pocket."[59]

On its face, the alter ego allegation was based on a monolithic view of the present Iranian government and its various branches, ministries, and organizations—"all parts of the same single entity, Iran." The alter ego theory as expressed by Chase conveyed a sense of order and central direction: "Each of the defendants other than Iran is wholly owned, dominated and controlled by Iran . . . ." In view of the factional disputes among the secular bureaucrats, the workers' committees, the student militants, the Islamic clergy and various revolutionary councils, however, one might argue that the monolithic Big Mullah theory was overstated.[60] The government of Iran was certainly more cohesive and monolithic before the 1979 revolution; a "Big Shah" theory might have been more plausible than Big Mullah. The extreme notion that any Iranian entity with money should be liable for the debts of any and all other Iranian entities would be no less than a random rape of the corporate veil.[61]

This is not to suggest, however, that the alter ego theory is necessarily invalid under every circumstance. In fact, that theory was expressly recognized in two of the Iranian cases. As an alternative conclusion of law in *Electronic Data Systems Corp. v. Social Security Organization of Iran*,[62] Judge Porter of the Northern District of Texas

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57 Amended Complaint of Plaintiff at paras. 11-12, Chase Case, *supra* note 34.

58 Transcript of hearing before Panel on Multidistrict Litigation, *supra* note 31, at 3 (Statement by Eric Lieberman, attorney for Bank Markazi).

59 *Id.*

60 *See* U.S. NEWS & WORLD REP., Aug. 11, 1980, at 31.

61 United States banking regulations impose limits on the amount of money that a United States bank may lend to any one entity. *See* 12 C.F.R. §§ 1500-05 (1980). If the Big Mullah theory were accepted, then the Chase loans to over twenty Iranian borrowers may have been in violation of the banking regulations if all of those borrowers were actually, as Chase claims, "all parts of the same single entity, Iran."

62 No. CA3-79-218-F (N.D. Tex., filed June 21, 1979) [hereinafter cited as EDS v. Iran].

employed the alter ego theory to impose liability on the Government of Iran for breach of a contract by the Social Security Organization of Iran ("SSO") even though the SSO was deemed to be "a juridical entity having legal existence and identity separate from the Government."[63] The court found:

> The Ministry [of Health and Welfare of the Government of Iran] is alternatively liable as the alter ego of SSO on the contract. The alter ego theory is invoked upon proof that a parent entity dominates a subsidiary so that the subsidiary is an instrumentality or agent of the parent, in which case the Court may disregard the fiction of separateness. In such a case, the parent may be held on the contract obligations of its subsidiary. The evidence demonstrated for purposes of the transaction there was but one entity . . . . [W]here authorization for payments was effectively controlled by the Ministry, it should not be permitted to hide behind the shield of nominal separation.[64]

The court also held that the Ministry was indistinguishable from the Government of Iran, and "consequently, liabilities adjudged against the Ministry run as well against the Government."[65] Accordingly, SSO, the Ministry, and the Government were found jointly and severally liable for the plaintiff's breach of contract claim.[66]

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[63] *Id.* slip op. at 10 (May 2, 1980) (interim order).

[64] *Id.* at 11-12 (citations omitted).

[65] *Id.* at 10-11. The Ministry, the Government of Iran, and the SSO were subject to suit in United States courts because of the commercial activity exception under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2). As one of his conclusions of law, Judge Porter wrote:

> This action is based upon a commercial activity carried on in the United States by the Ministry and by the SSO, upon an act performed in the United States in connection with a commercial activity by the Ministry and by the SSO, and upon an act outside the territory of the United States in connection with a commercial activity of the Ministry and of the SSO elsewhere that caused a direct effect in the United States.

Id. at 10. The court's statement closely tracks the language of the commercial activity exception in the statute:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

28 U.S.C. § 1605(a)(2). *See also* note 93 *infra*.

[66] EDS v. Iran, *supra* note 62 (May 9, 1980) (final judgment). As an interesting sidelight, note that the plaintiff in this case was awarded substantial attorneys' fees and prejudgment interest, totalling almost $4 million. The authority for the award of both fees and interest was the Code of Civil Procedure of Iran. *Id.* slip op. at 13-14 (May 2, 1980). *Query* whether the court applied the correct conflict of laws rule in determining that the Iranian civil code was a proper basis for awarding attorneys' fees and pre-judgment interest. A federal court sitting in a diversity action applies the conflict of laws rules of the state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In Texas, although a recent decision followed the principles of the Restatement in the law of torts, the law of contracts remains under the regime of the Restatement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); Comment, *Abandonment of Lex Loci Delicti in Texas: The Adoption of the Most Significant Relationship Test*, 33 SW. L.J. 1221, 1233 (1980).

Similarly, Judge Hart of the District of Columbia, in granting partial summary judgment in favor of plaintiffs on the issue of liability in *American International Group, Inc. v. Iran*,[67] asserted jurisdiction over and assessed liability against the Islamic Republic of Iran with respect to the Iranian government insurance company, Central Insurance of Iran ("CII") on the rationale of the alter ego theory.[68] Both of the above decisions asserting the alter ego theory were appealed[69] but, in view of the Accord between the U.S. and Iran, are not likely to be decided.[70]

2. The Article 25 Defense

Article 25 of the 1906 Constitution of Iran, which was in effect prior to the fall of the Shah, stated, "No State loan at home or abroad may be raised without the knowledge and approval of the National Consultative Assembly."[71] Without express approval from the Iranian parliament, four loans totaling $1.3 billion were made to Iran during 1977 and 1978.[72] Chase was the lead bank for those loans, in which more than 30 banks participated. Because of Article 25, Chase's local counsel in Tehran would give only a qualified opinion as to the enforceability of the loan obligations against the Government of Iran.[73] The Iranian parliament was advised of the terms of the loans, however, and thus could be said to have given its tacit approval of them.[74] Chase did secure the unqualified opinion of the Minister of Justice, Iran's

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Generally in contract, Texas tends to look to the place of performance, *see, e.g.* Castilleja v. Camero, 414 S.W.2d 424, 426 (Tex. 1967), Frey v. Estate of Sargent, 533 S.W.2d 142, 144 (Tex. Ct. App. 1976). *But see* Taylor v. Sec. Nat'l Bank, 20 Ariz. App. 504, 508, 514 P.2d 257, 261 (1973) (attorneys' fees), and Busik v. Levine, 63 N.J. 351, 363-73, 307 A.2d 571, 578-82, *appeal dismissed*, 414 U.S. 1106 (1973) (pre-judgment interest), which suggest that attorneys' fees and pre-judgment interest are procedural and should be determined by the law of the forum. *See also* RESTATEMENT OF CONFLICT OF LAWS § 585 (1934).

67 American Int'l Group, Inc. v. Iran, 493 F. Supp. 522 (D.D.C. 1980) [hereinafter cited as AIG v. Iran].

68 *Id.* at 526. The court held that the government of

> . . . Iran, which is inseparable from CII and of which CII is the alter ego with respect to the matters relevant here, is subject to the jurisdiction of this Court to the same extent as CII. Iran and its instrumentality (CII) are 'in effect one person, one juridical person.'

Id.

69 EDS v. Iran, No. CA3-79-218-F (N.D. Tex. May 9, 1980), *appeal pending*, No. 80-1641 (5th Cir. May 3, 1980); AIG v. Iran, 493 F. Supp. 522 (D.D.C. 1980), *appeal pending*, Nos. 80-1779, 80-1891, (D.C. Cir. July 10, 1980).

70 *See* App. I *infra*.

71 THE IRANIAN CONST. OF 1906 art. XXV (translated by A.P. Saleh, 1961). The present Iranian Constitution which took effect on October 12, 1979, replaced the 1906 Constitution.

72 Wall St. J., March 28, 1980, at 1, col. 6.

73 *Id.*

74 *Id.*

highest legal officer, that "all necessary action to authorize borrowing of loans" had been taken, as well as a representation from the Iranian government that the loan agreement "constitutes legally binding obligations of the borrower enforceable in accordance with its terms."[75] The Iranian legal opinion also stated that:

> . . . although we have found no controlling precedent, it is our opinion that the courts of Iran may accord considerable significance to such opinion of the Minister of Justice that this is a reasonable basis for his opinion and that it would not be imprudent for you to rely on such opinion in connection with making the loans contemplated by the credit agreement.[76]

The Article 25 defense is now moot, since the U.S. - Iran Accord provided for the immediate repayment of all syndicated loans to Iran. That a U.S. court would have permitted the Article 25 defense to bar recovery from Iran by the banks seems unlikely. First, there was the question of whether Iranian law would apply in an action on the debt. If it would not apply, then the validity of the loans under Iranian constitutional law would have been irrelevant. Second, the Government of Iran apparently resisted efforts to bring the loans formally to the attention of the National Consultative Assembly. In light of the Minister of Justice's unqualified opinion as to the validity and enforceability of the loans, principles of fairness and equity would require that Iran be estopped from raising the Article 25 defense. Third, even if the loan agreements had been held invalid and unenforceable, the banks still would have had a valid cause of action against Iran for unjust enrichment.

3. Other Issues

A number of other issues were raised by the Chase case, although a meaningful discussion of any of them is beyond the scope of this article. The most fundamental issue was whether Bani-Sadr's repudiation of Iran's foreign debts constituted a default by Iranian entities of all loan agreements. If there was a default, Chase's acceleration of the due dates of the loans was justified. Could the defendants avail them-

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75 Though Chase's local counsel advised the bank that the loans violated Article 25 of the Iranian Constitution and therefore might not be enforceable, Chase sought reassurances from the Minister of Justice and other lawyers and then went ahead with loans totaling $1.3 billion. *Id.*

76 The Wall Street Journal, in an article regarding the Chase loan, *see* note 72 *supra*, asserted that the bank "quietly disregarded the Iranian Constitution and lent hundreds of millions of dollars to Iran without specific approval of the loans by that nation's parliament." In a press release issued by Chase on the same day, the bank charged that the article was "inaccurate in its substance . . . and selective in its presentation of facts." Press Release by Chase Manhattan Bank (March 28, 1980), *reprinted in* IALR at 443 (April 4, 1980).

selves of a force majeure defense?[77] Did the Bank Markazi, NIOC, and the Government of Iran have valid sovereign immunity defenses? Were their funds immune from attachment or from set-off?[78] These questions are posed to illustrate the complexities raised by the Chase complaint.

Another, even more complex issue concerned jurisdiction over the dollar deposits of Bank Markazi and NIOC at Chase's London branch. Jurisdiction could be premised upon either judicial process or the reach of the Iranian Assets Control Regulations.[79] The question of where those assets were located presented an almost metaphysical dilemma in light of the fact that Chase was able to transfer those funds from London to New York merely by an electronic data transfer effected from Chase's New York office. Courts in both London and Paris also confronted this question.

C. The London and Paris Cases

As noted earlier, Chase was a defendant in a suit brought in London by Bank Markazi seeking the return of $320 million on deposit at the Chase's London branch. Similar suits were brought against five other U.S.-based banks, bringing the total amount sought in the London cases to over $3 billion.[80] In Paris, Bank Markazi sued Citicorp and Bank of America. Other U.S. branch banks in Paris, including Chase, could have been, but were not, sued by Bank Markazi in the French courts.[81] The claims filed totaled $155 million, and additional claims against the other American banks could have amounted to more than $250 million.[82] The Iranian Assets Control Regulations[83] purported to block Iranian accounts held by foreign branches of U.S. banks.[84] Suits by Bank Markazi in London and Paris sought to test whether the extraterritorial effect of those regulations was valid under

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77 Note that the Iranian Assets Control Regulations would not have prohibited the defendants from making payments on their loans. 31 C.F.R. § 535.904 (1979).

78 The Foreign Sovereign Immunities Act states that the property "of a foreign central bank or monetary authority held for its own account" is "immune from attachment and from execution" unless there has been an explicit waiver of such immunity. 28 U.S.C. § 1611(b) (1976). Query whether the property of a central bank enjoys a similar immunity from a bank setoff.

79 31 C.F.R. § 535 (1980).

80 *See* IALR at 530 (April 18, 1980). The other five cases were against Citibank, Bank of America, Manufacturers Hanover Trust Co., Bankers Trust Co., and Irving Trust Co. *Id.*

81 *Id.* at 11-12 (Feb. 8, 1980).

82 *Id.*

83 31 C.F.R. § 535 (1980).

84 Of the $6 billion of Iranian funds on deposit with United States banks, $4 billion were held in overseas branches. BUS. WEEK, Dec. 3, 1979, at 112.

the laws of England and France.[85] The issue was not resolved, however. In what conceivably may have been the result of diplomatic efforts by the United States, the London and Paris cases were neatly sidetracked onto a general study of Eurodollar currency flows.[86]

The Paris case against Citicorp was pleaded before the First Chamber of the Paris Tribunal. Prosecution by Bank Markazi of the Bank of America suit and the other suits was put off pending decision in the Citicorp case.[87] A panel of experts was appointed by the Paris court on April 23, 1980, and given four months to prepare a report on the Eurodollar market.[88] Additional time was then consumed by the judges in studying the report and its impact on their decision. Beyond this, no further action took place in the Paris suit, and as a result of the Accord between the U.S. and Iran, the need to decide the case has been obviated.

In London, the Bank Markazi cases against the six U.S. banks were consolidated and scheduled to go to trial on all issues on November 3, 1980.[89] The London court, however, decided to deconsolidate the six cases and to take evidence first only on the customs, usages and practices in the Eurodollar market,[90] thus delaying consideration of the extraterritorial effect of the Iranian Assets Control Regulations and other sensitive issues including the Big Mullah theory raised by Chase in its London counterclaim. Further delay arose when Bank Markazi's attorneys sought a postponement until April 1981, to prepare their case.[91] The London cases also have been mooted by the Accord.

No court in Europe was overly eager to define the extent to which U.S. branch banks abroad and their Eurodollar deposits are subject to the jurisdiction of the United States. This reluctance is understandable. The Eurodollar market has become a key factor in international commercial financing. The market is working well, and one is naturally reluctant to disturb its operations. The courts of France and England

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85 *See* Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979) [hereinafter cited as "Extraterritorial Impact"].

86 Eurodollar currency flows are the creation and transfer of foreign currency deposits, denominated in dollars but held by host countries in Western Europe. *See generally* R. MCKINNON, MONEY IN INTERNATIONAL EXCHANGE (1979).

87 *See* IALR at 11-12 (Feb. 8), 366-67 (March 21, 1980).

88 *Id.* at 968 (June 6, 1980).

89 Bank Markazi Iran v. Chase Manhattan Bank, 1979-B-No. 5873 (Q.B.Div., filed Nov. 29, 1979); IALR at 442 (April 4, 1980). The Queen's Bench Division is a trial court with original jurisdiction over criminal, admiralty and common law matters.

90 IALR at 1340 (Aug. 15, 1980).

91 *Id.* at 1561 (Oct. 3, 1980).

certainly did not want to reach a decision that might have discouraged the U.S. banks from keeping funds on deposit in Paris and London. On the other hand, the French and English were probably also reluctant to accede to the extraterritorial jurisdiction of the United States over affairs within their sovereign territories.[92] The emergence of a diplomatic solution relieved the courts from making hard decisions which might have had unforeseeable and far-reaching impact, and confirmed the prudence of the courts' initial restraint.

II. Sovereignty Immunity from Pre-Judgment Attachment

The Foreign Sovereign Immunities Act (FSIA)[93] provides that a foreign state, including its agencies and instrumentalities, is immune from suit except under certain circumstances set forth in the FSIA. Those circumstances in which immunity is lost include cases where

> the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[94]

The "commercial activity" exception and the FSIA's other exceptions to sovereign immunity from suit in general are based upon the nature and effect of the foreign state's activity giving rise to the suit. Immunity of a foreign sovereign's property from attachment or execution, on the other hand, is determined on the basis of whether the for-

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92 The U.K. Protection of Trading Interests Act of 1980 reflects British annoyance with the extraterritorial effect of United States antitrust laws. The Act provides, *inter alia*, that multiple damage awards (e.g., treble damage awards in United States antitrust actions) are not enforceable in the U.K. and that the U.K. government may direct persons in the U.K. *not* to comply with foreign discovery requests for documents outside the territorial jurisdiction of the authority making the discovery request. *See* Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws (J. Griffen ed. 1979); Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 Nw. J. Int'l L. & Bus. 476 (1980); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 Int'l Law. 151, 161-63 (1980). *See also Extraterritorial Impact, supra* note 85.

93 Pub.L. No. 94-583, 90 Stat. 2892 (1976) (codified at 28 U.S.C. §§ 1602-11 (1976)). As an interesting sidelight, it would appear that Islamic law does not recognize the doctrine of sovereign immunity. "The State as such does not enjoy anything that could be called a prerogative right in Islamic law. The very concept of sovereignty as Western thought understands it, is alien to Islamic law . . . ." Schacht, *Islamic Law in Contemporary States*, 8 Am. J. Comp. L. 133, 144 (1959).

94 *Id.* § 1605(a)(2) (1976). For a discussion of the "commercial activity" exception to sovereign immunity, *see* Brower, Bristline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 Am. J. Int'l L. 200, 204-06 (1979); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Trans. L. 33, 48-54 (1978). The district court in EDS v. Iran, note 62 *supra*, applied the commercial activity exception in determining that the Social Security Organization of Iran, the Iranian Ministry of Health and Welfare, and the government of Iran had no sovereign immunity defense.

eign state has waived the immunity. With respect to the sufficiency of the waiver, the FSIA distinguished between pre-judgment and post-judgment remedies. Immunity of a foreign state's property from post-judgment attachment may be waived either explicitly or implicitly.[95] However, a waiver of immunity from pre-judgment attachment must be explicit; it cannot be implied.[96]

In enacting the FSIA, Congress did not intend to change the effect of pre-existing treaties by the United States.[97] Accordingly, the operative provisions of the Act were made "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act . . . ."[98] This would include the 1955 Treaty of Amity between Iran and the United States, which contains a waiver of immu-

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95 28 U.S.C. §§ 1610(a)(1), (b)(1) (1976). Note, too, that the nature of the property can be determinative of its immunity. For example, property "of a foreign central bank held for its own account" and a foreign state's property which is "of a military character" are generally immune from attachment and execution. 28 U.S.C. § 1811.

96 Thus property of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachments prior to the entry of judgment in any action brought in a court of the United States or of a State . . . if . . . the foreign state has *explicitly* waived its immunity from attachment prior to judgment.

Id. § 1610(d) (emphasis added). Property used in a commercial activity on which a claim is based is one of the exceptions to immunity from attachment or execution. *Id.* § 1610. A commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act . . . . The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* § 1603. *See* United Euram Corp. v. Union of Soviet Socialist Rep., 461 F. Supp. 609 (S.D.N.Y. 1978) (contracts with impresario to arrange cultural exchange with Great Britain and the United States were a commercial activity despite artistic purpose); Outboard Motor Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978) (firm controlled by Polish government involved in the manufacture of golf carts not immune from attachment). *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 (1980).

97 H.R. REP. NO. 1487, 94th Cong., 2d Sess. 17-18 (1976) *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6616, accompanying the FSIA stated:

> All immunity provisions in sections 1604 through 1607 are made subject to 'existing' treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes. Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

This legislative explanation was itself a response to criticism; *see, e.g.*, Atkeson, Perkins & Wyatt, *H.R. 11315—the Revised State-Justice Bill on Foreign Sovereign Immunity*, 70 AM. J. INT'L L. 298, 308-310 (1976).

98 28 U.S.C. §§ 1604, 1609 (1976).

nity from "taxation, suit, execution of judgment or other liability" in cases where a publicly owned or controlled enterprise of one of the countries is engaged in "commercial, industrial, shipping or other business activities" in the territory of the other country.[99] Thus, in the Iranian assets cases it was necessary to examine both the FSIA and the Treaty of Amity in order to determine whether Iran had waived immunity from pre-judgment attachment.

In construing and applying the FSIA and the Treaty of Amity, the courts followed varying approaches and reached varying results.[100] In *Electronic Data Systems Corp. v. Social Security Organization of Iran*,[101] the first of the Iranian cases to consider immunity from pre-judgment attachment, Judge Brieant of the Southern District of New York ordered attachment of bank funds.[102] The court reasoned that the Treaty of Amity constituted a waiver of immunity from pre-judgment attachment.[103] On appeal to the Second Circuit, the case was remanded to the District Court for reconsideration "[i]n light of the rapidly changing relationship between the United States and the Is-

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[99] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 901, 909 (1955); T.I.A.S. No. 3853 [hereinafter cited as "Treaty of Amity."] The treaty provides in part:

> 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 for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Id. The courts have consistently treated the Treaty of Amity as still in force and thus imposing obligations on the Islamic Republic of Iran as the successor to the Shah's imperial regime. Reading & Bates Drilling Co. v. Nat. Iranian Oil Co., No. 79 Civ. 6034 (S.D.N.Y. Nov., 29, 1979); Behring Int'l Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 390 (D.N.J. 1979). For a general discussion of the law of state succession with respect to treaty rights and obligations, *see* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 636-37 (1973); R. Lavalle, *Dispute Settlement Under the Vienna Convention on Succession of States in Respect of Treaties*, 73 AM. J. INT'L L. 407 (1979); Comment, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 VA. J. INT'L L. 885 (1979). *See also* note 117 *infra*.

[100] In one case, the court avoided the pre-judgment attachment issue under the FSIA by employing another remedy, the preliminary injunction, to arrive at a result similar to a pre-judgment attachment. Pfizer Inc. v. Iran, C.A. No. 80-2791 (D.D.C. Nov. 26, 1980) (order granting preliminary injunction); IALR at 1966 (Dec. 5, 1980). The Government of Iran and all of its political subdivisions, agencies or instrumentalities were enjoined from removing any property from the jurisdiction of the United States (except for Iran's foreign currency reserves on deposit with the Federal Reserve Bank in New York) to the extent that such property may have been needed to satisfy the plaintiffs' claims of approximately $23 million. *Id.*

[101] C.A. No. 79-1711 (S.D.N.Y. May 23, 1979). This case involved the same parties and claims as EDS v. Iran, *supra* note 62, which went to final judgment in the Northern District of Texas.

[102] *Id.* (Order of Attachment at 2-3) (S.D.N.Y. May 23, 1979).

[103] *Id.*

lamic Republic of Iran"[104] and in light of the position taken and documents presented by the U.S. Department of State as amicus curiae in the appeal.[105]

In July 1979, the issue of Iran's immunity from pre-judgment attachment arose again in *Behring International, Inc. v. Imperial Iranian Air Force*.[106] The plaintiff, Behring, had a freight-forwarding contract with the Imperial Iranian Air Force and, as a result of the political turmoil in Iran, was not paid on invoices of approximately $400,000 for services rendered. The Islamic Republic Iranian Air Force (IRIAF) appeared to defend the suit as the successor to the Imperial Iranian Air Force. Behring had sought to attach property in its warehouse that had been purchased by, but not delivered to, the Imperial Iranian Air Force. The IRIAF asked the court for an order requiring delivery of the property and thus raised the "quite narrow legal question whether the Foreign Sovereign Immunities Act of 1976 prohibits the attachment of the property of a foreign sovereign prior to judgment under the circumstances of this case."[107]

As a preliminary matter, Judge Fisher found that the court had subject-matter jurisdiction under the FSIA because of the "commercial activity" exception and because sovereign immunity from suit had been waived under the Treaty of Amity.[108] Concerning the attachment sought by the plaintiff, the court held that there had been no explicit waiver of immunity from pre-judgment attachment. Therefore, on its terms, the FSIA would prohibit pre-judgment attachment.[109] The

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104 610 F.2d 94, 95 (2d Cir. 1979). The seizure on the hostages occurred on November 28; the Second Circuit remanded the very next day.

105 In the *amicus curiae* brief before the Second Circuit, the U.S. Department of State took the position that the Treaty of Amity had waived immunity for Iran's publicly owned commercial enterprises, but not for its noncommercial government agencies, even when those agencies were engaging in commercial activities. Brief of United States as Amicus Curiae at 7, Elec. Data Sys. Corp. v. Soc. Sec. Org. of Iran, 610 F.2d 94 (2d. Cir. 1979). That position was adopted by Judge Grady of the Northern District of Illinois in Chicago Bridge & Iron Co. v. Iran, No. 80-C-2864 (N.D. Ill. Nov. 12, 1980).

106 475 F. Supp. 383 (D.N.J. 1979).

107 *Id.* at 388.

108 *Id.* at 389-90.

109 *Id.* at 391-93. *Query* whether Judge Fisher was correct in concluding that a waiver of immunity from "other liability to which privately owned and controlled enterprises are subject" is not also an explicit waiver of immunity from pre-judgment attachment. *Id.* at 394. The waiver is explicit; that is, it is express. And pre-judgment attachment is certainly "[an]other liability to which privately owned and controlled enterprises [in the United States] are subject." *Id.* Thus, the Treaty of Amity arguably constitutes an explicit waiver of immunity from pre-judgment attachment even though the actual words "pre-judgment attachment" are not used. Yet, if the Iranian Air Force property in the Behring warehouse were "of a military character," the property would have nonetheless been immune from attachment under the FSIA. Section 1611(b)(2) of the

court went on to note, however, that the FSIA is subject to the terms of pre-existing treaties, including the Treaty of Amity.[110] In construing that treaty, the court held that the words "or other liability to which privately owned and controlled enterprises are subject" implicitly include liability to pre-judgment attachment.[111] Thus, Judge Fisher reasoned, it was the intention of the United States and Iran when they signed the Treaty of Amity to waive, in the context of commercial activities, their immunity from pre-judgment attachment.[112] Because the Treaty of Amity controls over any conflicting provisions of the FSIA, pre-judgment attachment of the Iranian Air Force property was valid.[113]

In *Reading & Bates Corp. v. National Iranian Oil Company*,[114] Judge Duffy of the Southern District of New York reached a contrary result five weeks before seizure of the U.S. embassy in Tehran. The court refused to confirm the order of attachment because "the plaintiff has failed to establish a need to continue the levy under the circumstances of this case."[115] The decision was based solely on New York attachment law, and Judge Duffy stated that he therefore "need not decide the issue of NIOC's immunity from pre-judgment attach-

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FSIA provides that property of a foreign state which is "of a military character" and "is, or is intended to be, used in connection with a military activity" is absolutely immune from attachment regardless of any waiver. As the House Report accompanying the FSIA explained:

> Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense authority. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of the United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.
>
> The second condition is intended to protect other military property, such as food, clothing, fuel, and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 31 (1976), *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 6604, 6630.

110 475 F. Supp. at 390.

111 *Id.*

112 *Id.*

113 *Id.*

114 478 F. Supp. 724 (S.D.N.Y. 1979).

115 *Id.* at 727.

ment."[116] He nevertheless analyzed the issue and concluded that Judge Fisher's construction of the Treaty of Amity was incorrect.[117] Judge Duffy believed that a waiver of sovereign immunity from pre-judgment attachment "should not be lightly implied" and "should be explicit whether it be by statute or by international agreement."[118] In a burst of dicta, Judge Duffy concluded:

> Whatever 'other liability' might cover, it is clear that it did not mean to the sovereign nations using it in the Treaty of Amity that it would subject either one of them to pre-judgment attachment for security purposes only in a suit brought by a private citizen. 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.[119]

The waiver of immunity issue arose again in *E-Systems, Inc. v. Iran*.[120] Relying on Judge Duffy's reasoning, Judge Patrick E. Higginbotham of the Northern District of Texas concluded: "It is thus unreasonable to infer from less than exact language that the signatories [to the Treaty of Amity] intended to permit pre-judgment attachment as to assets of the commercial enterprises of the foreign sovereign by the Treaty."[121]

Others were not persuaded by Judge Duffy's analysis. In *Reading & Bates Drilling Co. v. National Iranian Oil Co.*,[122] Judge Haight of the Southern District of New York found that the Treaty of Amity constituted a waiver of Iran's immunity from pre-judgment attachment. His analysis tracked the reasoning of the *Behring* case, and he granted an attachment order after considering "the most recent cases in this district and elsewhere."[123] Judge Haight was apparently alluding to the deci-

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116 *Id.*

117 *Id. See* Treaty of Amity, note 99, *supra*. The treaty between the U.S. and Iran provided for the reciprocal granting of most-favored-nation status for trade, shipping, and access to courts. It also established protection of property held by the parties, national treatment for internal taxation, limitations on foreign exchange controls, the normalization of customs regulations, government procurement on commercial considerations, and all the privileges and immunities for consular employees in accord with international law.

118 478 F. Supp. at 728-29.

119 *Id.* at 729.

120 No. CA-3-79-1487-G (N.D. Tex. June 21, 1980). This case involved the attachment of two airplanes which the plaintiff had agreed to repair under a contract with the Imperial Iranian Government Ministry of War. Also, performance guarantees in the form of standby letters of credit had been given by plaintiff. *See* notes 11 and 109 *supra*.

121 *Id.* slip op. at 11 (order dissolving attachment).

122 No. 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979). The case before Judge Duffy, note 114 *supra*, was brought by Reading & Bates Corp.; the one before Judge Haight, by Reading & Bates Drilling Co. The former corporation is the parent of the latter.

123 *Id.* (order granting attachment).

sion two months earlier by Judge Duffy in *Reading & Bates Corp. v. National Iranian Oil Co.*[124] Similarly, in *American International Group, Inc. v. Iran*, the insurance nationalization case, Judge Hart of the District of Columbia issued writs of attachment and thus, although the issue was not explicitly addressed, apparently concluded that the Treaty of Amity constituted a waiver of immunity from pre-judgment attachment.[125]

Judge Duffy later reconsidered the issue of Iran's immunity from pre-judgment attachment, and—without reversing his interpretation of the FSIA and the Treaty of Amity—came to a conclusion contrary to the result he had reached a year earlier in the *Reading & Bates* case. Under New York law an order of attachment granted without notice becomes void unless the plaintiff moves for an order confirming the attachment.[126] Also, a defendant may move for an order vacating the attachment.[127] Accordingly, the New York plaintiffs in the Iranian cases moved for confirmation of their attachment orders, and the defendants moved to vacate the orders. All such motions in the Southern District of New York were transferred to Judge Duffy for determination, and a total of 96 cases were before him on the confirmation issue.

In the confirmation proceedings, Judge Duffy found that Iran no longer enjoyed sovereign immunity from pre-judgment attachment and confirmed the attachment orders subject to a case-by-case determination of the likelihood of success on the merits.[128] The judge did not, however, retreat from his earlier opinion in *Reading & Bates*, maintaining that the Treaty of Amity did not constitute a waiver of immunity from pre-judgment attachment and ". . . that a waiver of pre-judgment attachment, whether by statute or by international agreement, must be explicit."[129] Disagreeing with Judge Fisher who had held in *Behring* that "[o]rdinary principles of construction are all that I need apply. . . ,"[130] Judge Duffy determined that principles of strict construction must apply when dealing with provisional remedies such as pre-judgment attachment and when determining whether a traditional

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124 *See* notes 114 and 122 *supra*. Judge Duffy issued his opinion on Sept. 27, 1979.

125 C.A. No. 79-3298. (D.D.C. Dec. 19, 1979) (order issuing writs of attachment).

126 N.Y. CIV. PRAC. LAW § 6211(b) (McKinney 1980). The state law of attachment applies in federal court pursuant to federal procedural law. *See* FED. R. CIV. P. 64.

127 *Id.* § 6223.

128 New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., Civ. No. 79-6380 (S.D.N.Y. Sept. 26, 1980).

129 *Id.* slip op. at 14.

130 475 F. Supp. 383, 394. The court made this assertion without any supporting authority. *See* text accompanying notes 108-112 *supra*.

immunity has been waived.[131] Accordingly, Judge Duffy concluded that "the language of the treaty is not sufficient to authorize a pre-judgment attachment of Iranian assets."[132]

The court then considered an issue of first impression in the area of sovereign immunity: whether the Presidental assets freeze order affected Iran's immunity from pre-judgment attachment. In ordering the Iranian assets freeze[133] the President declared a national emergency under the International Emergency Economic Powers Act (IEEPA).[134] Judge Duffy observed that, in cases of national emergency, this statute gives the President the power to "nullify, void, prevent or prohibit" a sovereign's exercise of "any right, power, or privilege [including sovereign immunity] with respect to" any property in which it has an interest; stating that "sovereign immunity is a privilege enjoyed by a foreign nation rather than an inalienable right to which it can lay claim," Judge Duffy concluded:

> In reviewing the President's order blocking all Iranian assets, as well as the legislative history of the Emergency Powers Act upon which the order relies, there can be no question that whatever immunity from pre-judgment attachment existed prior to November 14, 1979, was unequivocally suspended by the President.[135]

Judge Duffy's analysis is subject to several criticisms. First, his narrow reading of the waiver provision in the Treaty of Amity is inconsistent with his broad interpretation of the President's freeze order. On the one hand, the court applied principles of strict construction in determining that the waiver of immunity in the Treaty of Amity from "other liability to which privately owned and controlled enterprises are subject" does not include waiver of immunity from pre-judgment at-

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131 *See* Penovar v. Kelsey, 150 N.Y. 77, 79-80, 44 N.E. 788, 789 (1896), and United States v. New York Rayon Importing Co., 329 U.S. 654, 659 (1947), *cited in* New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., Civ. No. 79-6380, slip op. at 15-16 (S.D.N.Y. Sept. 26, 1980); IALR at 1569-70 (Oct. 3, 1980).

132 *Id.* slip op. at 17; IALR at 1569-70.

133 For the President's order freezing Iranian assets, *see* note 3 *supra*.

134 50 U.S.C. §§ 1701-06 (Supp. I 1977, Supp. II 1978 & 1980 Supp.). The Act provides that when there is an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States," the President may:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, *or exercising any right, power, or privilege* with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . .

Id. § 1702(a)(1)(B) (emphasis added).

135 *See* note 128 *supra*, slip op. at 23. Although Justice Marshall's opinion in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), came to be cited as authority for an inherent-right theory of immunity, it rested on consent of the host nation. For a more recent case, *see* Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964) *cert. denied*, 381 U.S. 934 (1965).

tachment. On the other hand, the court held that the President suspended Iran's sovereign immunity by means of an assets freeze order which nowhere mentions sovereign immunity. This is particularly anamolous in view in the language of the IEEPA which states that any action taken by the President thereunder is to be "by means of instructions, licenses or otherwise . . . ."[136] Neither the President nor the Treasury Department expressly instructed or licensed the suspension of Iran's immunity from pre-judgment attachment. It would be stretching the rules of construction to conclude that the term "otherwise" includes a possibly unintended result inferred by broad implication.[137]

Judge Duffy's reasoning is flawed in a second respect. The IEEPA was passed barely more than a year after Congress enacted the FSIA which expressly vested responsibility in the judiciary, not in the executive, for making sovereign immunity determinations.[138] In enacting the IEEPA, Congress nowhere stated an intent to vest the President with the power to "nullify, void, prevent or prohibit" or suspend a foreign nation's sovereign immunity. Such an intention should not be inferred from silence, especially since one of the express purposes of the FSIA was to remove the executive branch from involvement in issues of sovereign immunity.[139] In his opinion Judge Duffy recognized the intent of Congress in passing the FSIA:

> Prior to the FSIA, the traditional practice was that, when faced with a claim of sovereign immunity, a court would defer consideration of the claim until the State Department had stated its position. This was done because it was believed that the question of whether a sovereign was entitled to immunity was essentially a political, rather than a judicial, deter-

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136 50 U.S.C. § 1702(a)(1) (1980 Supp.).

137 Alternating strict and narrow construction may effect "the likely intention of the parties" to the 1955 Treaty of Amity, *see* New Eng. Merch. Nat. Bank, note 128 *supra*, slip op. at 17. Arguably, in a treaty nations would concede their sovereignty only guardedly, whereas in an emergency the President would intend to exercise his powers to the fullest. *But see* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); as to the freeze order, Stanley Sommerfield, former Chief Counsel and Director of the Treasury Department's Office of Foreign Assets Control and one of the principal drafters of the Iranian Assets Control Regulations, stated that Judge Duffy's conclusions were inconsistent with the intention of the drafters of those regulations. Remarks by Stanley Sommerfield, John Bassett Moore Society of Int'l Law Conference on the Iranian crisis, Univ. of Va. School of Law, Charlottesville, Va. (Nov. 1, 1980).

138 The FSIA, 28 U.S.C. §§ 1602-11 (1976), was passed Oct. 21, 1976; the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (Supp. I 1977), was passed Dec. 28, 1977.

139 As the House Report of the FSIA stated:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. REP. No. 94-1487, *supra* note 109, at 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 6606.

> mination. Consequently, as it developed, the State Department's 'position' was viewed as quite persuasive by the courts and would often carry the day. . . . [C]ourts are now directed [by the FSIA] to reach their own independent determination of the claim of immunity . . . . Thus, not only does the responsibility of determining a claim of sovereign immunity reside exclusively with the judiciary, but now there is a uniform standard against which the claim of immunity is to be tested. This, of course, adds a dimension of predictability to the doctrine of sovereign immunity which had been absent when the determination was made, at least primarily, by the State Department.[140]

On the one hand, Judge Duffy perceived that determinations of sovereign immunity now "reside exclusively with the judiciary;" on the other hand, he allows an action of the executive branch to determine the issue, thus distorting "the dimension of predictability."

A third problem with Judge Duffy's decision was its failure to discuss clearly what would happen upon the revocation of the President's assets freeze order. The Judge's decision stated clearly that attachments of Iranian property made during, but not prior to, the issuance of the freeze order were valid and would remain valid "for as long as the President's order is in effect [and] the sovereign immunity normally granted to Iran is suspended . . . ."[141] However, whether those attachments would remain valid, or whether they would become automatically void upon the lifting of the freeze was unclear given the logic of the decision.

Judge Duffy stated that "the individual levies are necessary to secure plaintiffs' judgments and establish a priority vis-a-vis the individual claims, should the President's freezing order be lifted,"[142] thus clearly implying that a pre-judgment attachment would have remained valid after the freeze was rescinded. However, rescission of the freeze order removed the basic premise of the decision. If Judge Duffy was correct in stating that "absent Executive Order 12170 [the Iranian assets freeze order] or prior to it, no valid levy of a prejudgment attachment could lie,"[143] then is it not logical to conclude that upon the lifting of the freeze the attached Iranian property would regain its immunity to attachment? If so, how then would the attachment remain valid? Judge Duffy's opinion does not answer this critical question. However, one could infer from his reasoning that once the freeze was lifted and the property was again immune from attachment, any attachments made while the immunity was suspended would then be dissolved.

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140 No. 79 Civ. 6034 *supra* note 122, slip op. at 7-8.

141 *Id.* slip op. at 24-25; IALR at 1573.

142 *Id.* slip op. at 34; IALR at 1577.

143 *Id.* slip op. at 31-32; IALR at 1576.

Pre-judgment attachment is not a static event but a continuing, on-going "provisional remedy"[144] which arrests property pending the outcome of litigation. Its validity is determined on a moment-by-moment basis; it is not a case of, once-valid, always valid. A validly obtained pre-judgment attachment will dissolve if the underlying complaint is dismissed or if the judge finds that the requisite grounds for attachment under state law no longer exist. Similarly, when attached property regains immunity from attachment, the attachment is no longer valid.[145]

The logic of this opinion slides into a metaphysical morass. In short, the decision was wrong. Perhaps the court sought to reach a result confirming the attachment orders without offending the dicta in *Reading & Bates*. If so, this case demonstrates the pitfall of a court's opining on issues unnecessarily.[146]

On December 22, 1980, Judge Duffy certified four questions to the Second Circuit Court of Appeals with respect to his determination of immunity from pre-judgment attachment.[147] Most likely that appeal

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144 *Id.* at 15-16; IALR at 1567.

145 To use an analogy, assume that a foreign state's sovereign immunity from suit is suspended by the President. An American citizen then files suit against the foreign state in a United States court and obtains a preliminary injunction that prohibits the foreign state from withdrawing any property from the United States. The President then rescinds his suspension of the foreign state's sovereign immunity; the foreign state is again immune from suit in United States courts. The court would no longer have jurisdiction, and the preliminary injunction would become invalid immediately. The same logic should apply in the case of pre-judgment attachments.

146 Perhaps Judge Duffy's reluctance to do so stems from the fact that eleven treaties in force between the United States and foreign sovereigns contain disclaiming language similar to that in the Treaty of Amity with Iran. *See* Brief of United States as Amicus Curiae at 6-7, Elec. Data Sys. Corp. v. Soc. Sec. Org. of Iran, No. 80-1614 (5th Cir. 1980). Those countries might be reluctant to keep any funds on deposit in United States banks or to keep other assets in the United States if those funds and assets will be subject to pre-judgment attachment. In other words, the implicit waiver theory may be bad for business.

147 New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., No. 79 Civ. 6380, slip op. at 2-3 (Dec. 22, 1980); IALR at 2090 (Jan. 2, 1981). The questions certified under 28 U.S.C. 1292(b) (1976) were:

1. Did Executive Order No. 12,170 (November 14, 1979), 44 Fed. Reg. 67729, the Treasury Regulations promulgated thereunder and President Carter's subsequent reports to Congress suspend, dissolve or terminate the immunity from prejudgment attachment that would otherwise be available to defendants under the Foreign Sovereign Immunities Act of 1976 and the Treaty of Amity?
2. If the answer to No. 1 above is yes, does the International Emergency Economic Powers Act (50 U.S.C. §§ 1701, *et. seq.*) authorize the suspension, dissolution or termination of defendants' immunity from pre-judgment attachment in the manner that the Court found had occurred here?
3. If the answers to Nos. 1 and 2 above are yes, is the International Emergency Economic Powers Act constitutional as applied?
4. Whether sovereign immunity of the defendants under the Foreign Sovereign Immunities Act with respect to prejudgment attachment has been waived, terminated or suspended by virtue of (a) the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, or (b) the severance of diplomatic relations between the United States and Iran and actions taken by Iran in violation of international law.

will not be decided because of the Accord between the U.S. and Iran. The lower court was also asked to certify the question of whether the pre-judgment attachment orders would remain in effect if the President's assets freeze order were lifted. In refusing to certify that question, Judge Duffy admitted that he had not resolved the issue in this earlier decision:

> I did not rule in my previous opinions, as the above question suggests, on what may happen in the event the President lifts the freeze presently in effect. Such a contingency is simply not a 'case or controversy' properly before any court at the present time. Since the question is not presently a justiciable issue, I will not certify it to the Court of Appeals.[148]

With the Iranian litigation terminated or mooted by the executive order implementing the Accord, the appellate courts will not have an opportunity to harmonize the conflicting lower court decisions. Foreign states and litigants in the United States will remain uncertain as to the scope of sovereign immunity from pre-judgment attachment. In this instance, the FSIA may have operated contrary to the interests of clarity and efficiency in the conduct of foreign policy. As one commentator predicted:

> The FSIA was intended to free the Department of State from undesirable political pressures concerning routine commercial transactions; in fact, the Act may turn out to be a straitjacket hindering the effective conduct of foreign affairs.[149]

Indeed, the actions of the executive branch in the Iranian cases may aptly be described as frantic squirmings to escape from that straitjacket.

III. The Conduct of the U.S. Executive Branch in the Iranian Cases

A great irony of the Iranian cases was that the position of the executive branch before the courts was consistent with the defense strategy of Iran's lawyers. In the international arena the United States responded to the Iranian crisis with forceful executive action. President

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Id. at 2-4; IALR at 2092.

148 *Id.* slip op. at 3; IALR at 2092.

149 Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1063-64 (1979). Before the passage of the FSIA, Professor Henkin observed that:

> Judge-made law, the courts must recognize, can only serve foreign policy grossly and spasmodically; their attempts to draw lines and make exceptions must be bound in doctrine and justified in reasoned opinions, and they cannot provide flexibility, completeness, and comprehensive coherence.

L. Henkin, Foreign Affairs and the Constitution 220 (1972).

Carter imposed economic sanctions on Iran[150] and prompted other nations to do likewise,[151] fiercely and successfully assailed Iran's actions before the International Court of Justice[152] and the United Nations Security Council,[153] deployed military personnel and equipment to the Indian Ocean, and ordered the use of military force in an attempted rescue of the hostages. Domestically, however, the executive branch showed a totally different face. Although the motives of the government lawyers certainly differed from those of defense counsel, the U.S. government appeared in all of the Iranian cases and made "suggestions of interest" that at certain points coincided identically with the results sought by the defense.[154]

A. Multidistrict Consolidation

The first major defensive move in the Iranian litigation was to seek consolidation of all cases by the Judicial Panel on Multidistrict Litigation (MDL).[155] The Government of Iran moved for the transfer of 69 cases from 15 federal judicial districts to the Southern District of New York where 90 other cases against Iran and Iranian entities already were pending.[156] The Government of Iran asked that all 159 of those

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150 *See* note 3 *supra*.

151 Wall St. J., May 19, 1980, at 6, col. 2; *see* note 3 *supra*. The United States government also took measures to improve its military capabilities in the Persian Gulf in early January 1980. The measures included a naval buildup in the Indian Ocean and the establishment of military bases in Oman, Kenya, and Somalia. N.Y. Times, Jan. 11, (1980) at 12, col. 4; *id*., Feb. 12, 1980, and 1, col. 6.

152 Case Concerning United States Diplomatic Consular Staff in Tehran, Judgment, [1980] I.C.J. 3, *reprinted in* 18 INT'L LEGAL MAT. 553 (1980). The International Court of Justice delivered its judgment on May 24, 1980. The fifteen judges held as follows:

1) That Iran has violated and is still violating obligations owed by it to the United States (13-2);
2) That these violations engage Iran's responsibilities (13-2);
3) That the government of Iran must immediately release the U.S. nationals held as hostages and place the premises of the Embassy in the hands of the protecting power (15-0);
4) That no member of the U.S. diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as witnesses (15-0);
5) That Iran is under an obligation to make reparations for any injury caused to the United States (12-3); and
6) That the form and amount of such reparation, failing agreement between the parties, shall be settled by the Court (14-1).

153 S.C. RES. 457, 30 U.N. SCOR, Supp. (No. 60) 40, U.N. DOC. A/2134 (1979), *reprinted in* 18 INT'L LEGAL MAT. 1644 (1979).

154 *See* note 105 *supra*.

155 Motion for an Order Transferring Related Actions for Consolidated or Coordinated Pretrial Proceedings, In re Litigation Involving Iran, MDL No. 425 (March 5, 1980); IALR at 223 (March 7, 1980).

156 Brief of the Islamic Republic of Iran in Support of its Motion for an Order Transferring Related Actions for Consolidated or Coordinated Pretrial Proceedings at 6, In re Litigation Involving Iran, MDL No. 425 (March 5, 1980); IALR at 245, 246 (March 7, 1980).

cases be consolidated for purposes of pretrial discovery and motions.[157] Attorneys for Iran argued that all of the cases concerned common questions of fact relating to political developments in the wake of the Iranian revolution.[158] Iran also asserted the commonality of the "many complex, important and potentially dispositive threshold questions of sovereign immunity and Federal jurisdiction which will arise at an early stage of the pretrial proceedings in all of these actions."[159]

The United States Justice Department appeared as amicus curiae in support of Iran's consolidation motion.[160] The U.S. agreed with Iran's contention "that these cases involve a substantial number of common questions of fact" and further asserted that "coordination or consolidation will further important public and foreign policy interests."[161] The U.S. argued that the determination of the various common factual questions raised in the Iranian cases would have foreign policy implications

> relating not only to the United States' relations with Iran, but also to relations between the United States and other nations . . . . Inconsistent results could lead to uncertainty that would disturb current economic and diplomatic arrangements with these nations.[162]

The appearance of the executive branch in support of consolidation of the cases was also prompted by its desire to participate effectively in the Iranian cases. Proceeding in numerous courts throughout the country made it difficult and costly for the Justice Department to keep abreast of the litigation. Consolidating the cases into one forum would permit government attorneys in Washington to monitor events more easily and to provide timely input from the executive branch.[163]

The plaintiffs resisted the motion for MDL transfer. They argued that the various cases did not present predominantly common questions of fact, and that whatever common legal issues existed would have to be resolved in light of the varying factual patterns.[164] A brief

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157 *Id.*; IALR at 246.

158 *Id.*

159 *Id.*

160 Amicus Curiae Memorandum of the United States Regarding the Government of Iran's Motion for an Order Pursuant to 28 U.S.C. § 1407, In re Litigation Involving Iran, MDL No. 425 (March 31, 1980); IALR at 454 (April 4, 1980).

161 *Id.* at 4; IALR at 455.

162 *Id.* at 8-9; IALR at 457-58.

163 *Id.* at 16; IALR at 461.

164 Response of Certain of the New York Plaintiffs to Defendant's Motion to Transfer Cases Under 28 U.S.C. § 1407 at 3-4 In re Litigation Involving Iran, MDL No. 425 (March 28, 1980); IALR at 463 (April 4, 1980).

filed by 38 of the plaintiffs in the Southern District of New York summarized the argument as follows:

> The actions which are the subject of the motion do not arise from a single event, scheme or conspiracy. Rather, they arise from the breakdown in commercial relations between the United States and Iran over the past two years, and reflect the variety and complexity that characterized those relations. Thus, the actions are for the most part separate contract actions, by different claimants against numerous defendants, based upon breaches of, or defaults under, hundreds of separate loan agreements, service contracts, construction agreements, letters of credit, letters of intent, debt instruments and other written contracts. The factual issues in any one of the 159 actions are predominantly unrelated to the issues in the others. Further disparity arises from those actions which include claims for conversion, wrongful withholding of Social Security payments, bank overdrafts, repudiation of obligations under court judgments, expropriation or nationalization of property, corporate waste, and tortious interference. Moreover, the actions involve the substantive laws of a number of different states and several countries, as well as the laws on provisional remedies of a number of states.[165]

Judge Duffy of the Southern District of New York went on record as opposing multidistrict consolidation. The Government of Iran had moved to stay the proceedings in the cases consolidated before him for determination of motions to confirm attachment orders. The Justice Department had also requested a stay. In denying those requests and setting a briefing and hearing schedule, Judge Duffy said:

> I see no reason to delay the proceedings to await any determination by the Multi-District Panel . . . . Indeed, it would appear to me that the cases should not be consolidated. The 95 cases which are now before me all involve the law of the State of New York. However, those actions commenced outside this state necessarily involve the law of whatever state in which the action was brought. The cases involved in this proceeding are only consolidated in part and only for the purposes of the confirmation hearings. Should cases from other states be added to this proceeding, all would be unnecessarily delayed and the common thread which now binds them would be snapped.[166]

The Judicial Panel on Multidistrict Litigation found that consolidation was not appropriate. The Panel held, without elaboration, "that proponents of transfer have not met their burden of demonstrating that all actions included in the motion involve common questions of

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165 *Id. Query* whether these arguments against consolidation undercut the plaintiff's "Big Mullah theory."

166 New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., Civ. No. 79-6380, slip op. at 2 (April 7, 1980) (order denying consolidation) (citations omitted); IALR at 535 (April 18, 1980).

fact."[167] The Panel's order left open the possibility, however, of MDL consolidation of subgroupings of the Iranian cases: "[o]ur decision is without prejudice to the right of any party to move for transfer of any subgroup of actions . . . ."[168]

The attorneys for 32 Iranian banks took the cue and moved for MDL transfer and consolidation of 96 cases in which the banks were named as defendants.[169] A week later, the Government of Iran also moved in the same MDL proceeding for transfer and consolidation of 178 cases—essentially all of the cases on file at that time which named Iran or an Iranian entity as a defendant.[170] This time, however, Iran's lawyers suggested various subgroupings for consolidation. Again, the United States appeared as amicus curiae in support of the Iranian consolidation motions.[171] In addition to the foreign policy considerations asserted in its earlier amicus brief, the Justice Department argued that the need for a consistent legal standard required consolidation:

> . . . [F]oreign central banks are deeply concerned with the issue of whether assets they hold in this country are subject to prejudgment attachment . . . . Decisions on this issue could affect the willingness of foreign central banks to hold assets in this country and/or in dollars, and thus could have a significant impact on the strength of the dollar. Therefore, it is very important that cases that involve prejudgment attachment issues be measured by a consistent legal standard.[172]

Unpersuaded by the arguments of Iran, the Iranian banks, and the Justice Department, the Panel on Multidistrict Litigation held that it could discern no differences between the issues before it in this consolidation motion and in the motion previously denied.[173]

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167 In re Litigation Involving Iran, MDL No. 425, slip op. at 2 (May 7, 1980) (order denying consolidation); IALR at 763 (May 16, 1980).

168 *Id.*; IALR at 763.

169 Motion of Certain Iranian Commercial Banks for an Order Transferring Related Actions to the Southern District of New York for Consolidated or Coordinated Pretrial Proceedings, In re Litigation Involving Iran (No. II), MDL No. 435 (May 21, 1980); IALR at 922 (June 6, 1980); *see* [1980] 310 INT'L TRADE REP. U.S. EXPORT WKLY. (BNA) at C-2.

170 Motion for an Order Transferring Related Actions for Consolidated or Coordinated Pretrial Proceedings, In re Litigation Involving Iran (No. II), MDL No. 435 (May 28, 1980); IALR at 956 (June 6, 1980); *see* [1980] 310 INT'L TRADE REP. U.S. EXPORT WKLY. (BNA) AT C-2.

171 Amicus Curiae Memorandum of the United States. In re Litigation Involving Iran (No. II), MDL No. 435 (June 12, 1980); IALR at 1017 (June 20, 1980). *See also* [1980] 313 INT'L TRADE REP. U.S. EXPORT WKLY. (BNA) AT C-1.

172 *Id.* at 13; IALR at 1024.

173 In re Litigation Involving Iran (No. II), MDL No. 435 (July 8, 1980) (order denying consolidation); IALR at 1119 (July 18, 1980). *See also* [1980] 313 INT'L TRADE REP. U.S. EXPORT WKLY (BNA) at C-1. The Panel asserted:

> . . . [W]e find that the issues raised in the matter now before the Panel are virtually the same as those before the Panel when it denied transfer in MDL-425; and movants have failed to offer any distinctions that would warrant transferring any of the actions currently before us.

The rulings denying consolidation were undoubtedly correct. Multidistrict litigation is appropriate when various cases arise out of an identical factual event such as an airplane crash or an antitrust conspiracy.[174] The controversies in the Iranian cases, however, arose out of widely diverse factual events, including different loan agreements, different construction contracts, and different choice-of-law clauses. It would have been neither surprising nor unfair if different results had been reached in the different cases. That sovereign immunity and "alter ego" were critical issues in many of the Iranian cases was not sufficient justification for multidistrict consolidation. Rather, the validity of those issues had to be decided on a case-by-case basis in light of the various factual backgrounds of the disputes.

Assuming that multidistrict consolidation of the Iranian cases was obviously inappropriate, what justification was there for the United States to appear before the MDL Panel to urge an incorrect decision? Stated more pointedly, was it appropriate for government attorneys to seek an obviously incorrect legal result before a court of law, merely to further the foreign policy goals perceived by the executive branch?

B. Requests to Stay Proceedings

After the flood of lawsuits following the seizure of the American embassy in Tehran, the executive branch began to seek stays of the Iranian cases. In the cases before Judge Duffy, for example, the United States Attorney for the Southern District of New York filed a Suggestion of Interest requesting a 60-day stay of those proceedings. The government's suggestion was accompanied by a letter to the U.S. Attorney General from the Legal Adviser of the State Department strongly supporting a stay of the proceedings in the interest of the foreign relations of the United States. The letter stated:

> The United States Government has been making the most diligent efforts, through a variety of different channels, including diplomatic channels and the United Nations, to bring about the release of the hostages. Developments in the Iranian assets cases now pending before Judge Duffy could complicate these continuing efforts of the United States Government to reach a solution to the crisis. In short, since future actions in the Iranian assets cases could have serious repercussions for the United States foreign policy, we are strongly of the view that a 60-day stay of all pro-

Id.; IALR at 1119.

174 Consolidation is appropriate when the various actions involve "one or more common questions of fact" and when consolidation "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a) (1976). *See, e.g.*, In Re Air Crash Disaster in Ionian Sea on Sept. 8, 1974, 407 F. Supp. 238 (J.P.M.D.L. 1976); In Re Uranium Industry Antitrust Litigation, 458 F. Supp. 1223 (J.P.M.D.L. 1978).

> ceedings in those cases would be in the best interests of the United States.[175]

The Government of Iran had also filed a motion for a 60-day continuance.[176] Judge Duffy granted the stay, but ordered a briefing schedule during the continuance.

Initially, most other courts were agreeable to the 60-day stay requests filed by the government.[177] On March 11, 1980, the Justice Department filed additional suggestions of interest that sought to stay all proceedings in the 16 district courts where Iranian cases were pending.[178] The government's action was again supported by a letter from the Legal Adviser of the State Department, who advanced two reasons for granting further stays. First, the Legal Adviser proposed that, "[t]he present stage of diplomacy is both delicate and critical. We believe that a further stay of the Iranian assets litigation is very important to ensure that this process is not prejudiced by any development in these proceedings."[179] Second, he asserted the desirability of consolidation of the cases before a multidistrict litigation panel and suggested that all proceedings be stayed until the Judicial Panel on Multidistrict Litigation ruled on the MDL transfer motion that had recently been filed by the Government of Iran.[180]

Again, most of the courts granted the stay requests; some, however, began to break ranks. Judge Will of the Northern District of Illinois refused a stay request, stating that he did not believe that continued pleading in the case would interfere with the hostage situation.[181] Judge Duffy went ahead with the motions to confirm attachments in the Southern District of New York. Judge Porter of the Northern District of Texas entered judgment against Iran, its Ministry of Health and Welfare and its Social Security Organization.[182] Judge Greene of the District of Columbia and Judge Pereira in the Central

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175 Letter of Robert B. Owen, Legal Adviser, U.S. Dep't of State, to Benjamin R. Civiletti, U.S. Att'y Gen., Jan. 4, 1980, appended to Suggestion of Interest of the United States (S.D.N.Y., filed Jan. 7, 1980).

176 Transcript of proceedings at 18, New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., Civ. No. 79-6380 (S.D.N.Y. Jan. 7, 1980).

177 *See, e.g.*, IALR at 57-58 (Feb. 8, 1980); at 163 (Feb. 22, 1980). Stays ordered in Western District of Washington, District of Massachusetts and Northern District of Illinois.

178 *Id.* at 362-63 (March 21, 1980).

179 Letter from Robert B. Owen, Legal Adviser, U.S. Dep't of State, to Benjamin R. Civiletti, U.S. Att'y Gen. (March 6, 1980), *reprinted in*, IALR at 382 (March 21, 1980).

180 *Id.*

181 IALR at 362 (March 21, 1980).

182 *See* note 66 *supra*.

District of California also denied stay requests.[183] Judge Hart of the District of Columbia entered partial summary judgment againt Iran and its central insurance company.[184] The initial success of the Government's efforts to delay court action in the Iranian cases thus began to erode.

After the MDL Panel denied transfer and consolidation of the Iranian cases for the second time, the Justice Department devised a new strategy to stall the progress of the Iranian cases. This time, suggestions of interest were accompanied by classified affidavits of Deputy Secretary of State Warren Christopher and Secretary of the Treasury G. William Miller, which the government asked the courts to review in camera and return to the government with any discussions about the affidavit to be held ex parte.[185] The government stated, "[t]he United States is deeply concerned that a decision at this time on the issues now pending before the Court will create a serious risk of prejudicing the continuing efforts of the United States Government to resolve the hostage crisis."[186] Judges Caffrey and Keeton of the District of Massachusetts denied the stay requests and refused to accept the in camera submission of the classified affidavits.[187] Judge Beer of the Eastern District of Louisiana also denied the stay request.[188] Although Judge Duffy accepted the in camera submissions, he nonetheless proceeded to rule on the pre-judgment attachment issue. The government then again went to the well with Judge Duffy and requested leave to intervene in the Iranian cases before him, moved for certification to the Second Circuit Court of Appeals of his denial of the government's request for an indefinite stay, and requested a stay pending that appeal. All of the government's motions were denied.[189] Judge Duffy noted:

> Certification is appropriate only where it would 'materially advance the ultimate termination of the litigation . . . .' Here the government does not seek to advance the ultimate termination of the litigation. Instead, the

183 IALR at 980 (June 20, 1980); *see* [1980] 362 INT'L TRADE REP. U.S. EXPORT WKLY. (BNA) at C-3.

184 *See* note 67 *supra*.

185 Suggestion of Interest of the United States, New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., Civ. No. 79-2352 (S.D.N.Y. July 29, 1980); IALR at 1289 (August 1, 1980).

186 *Id.* at 1; IALR at 1289-90.

187 Chas. T. Main v. Iran, 79-24-04-C (D. Mass. July 30, 1980) (Caffery, J.); New Eng. Merchants Nat'l Bank v. Iran, No. 79-2352-K (D. Mass. July 30, 1980) (Keeton, J.); IALR at 1284 (Aug. 1, 1980).

188 First Nat'l Bank of Chicago v. Iran, CA No. 79-5099 (E.D. La. —, 1980); Blount Bros. v. Iran, CA No. 79-5094 (E.D. La. —, 1980); IALR at 1399 (Sept. 5, 1980).

189 New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 79 Civ. No. 6380 (Nov. 3, 1980) (memorandum and order).

> Department of Justice wishes solely to *delay* it. There is nothing presented that would be proper to certify under governing law.[190]

Judge Harold Greene of the District of Columbia granted a 70-day stay but refused the government's request for an indefinite stay which, he said would amount to an unconstitutional denial of access to the courts to vindicate an alleged property right.[191] He concluded by stating, "An immobilization of the judicial system through the grant of an indefinite stay under these circumstances would simply add the American system of law and justice to the hostage rolls."[192]

In short, during the early months of the hostages' captivity, the judiciary was generally willing to accede to the executive branch's desire to stay the Iranian cases. The same attitude prevailed, to some extent, while the consolidation motions before the MDL Panel were pending. As the delays continued, however, many judges grew understandably annoyed with the government's repeated stay requests, and began to permit many of the major Iranian cases to move forward despite efforts by the executive branch to delay the litigation while diplomatic means of solving the crisis were being pursued.

C. The Assets Control Regulations

The Iranian Assets Control Regulations, and the IEEPA, upon which those regulations rely, were stressed heavily by government counsel in stay requests and in amicus curiae briefs[193] in the appeals of the two judgments entered by U.S. courts against Iran and Iranian entities.[194] The government lawyers contended, in effect, that the IEEPA gives the President power to suspend or prohibit litigation in cases of declared emergency.[195] That position, it may be argued, goes beyond the authority that supports the Assets Control Regulations, and ultimately may amount to an unconstitutional usurpation of judicial power.

The Iranian Assets Control Regulations prohibited the "trans-

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190 *Id.*, slip op. at 3 (emphasis in the original) (citations omitted).

191 Nat'l Airmotives Corp. v. Iran, 499 F. Supp. 401 (D.D.C. Oct. 16, 1980) (denial of request for indefinite stay); IALR at 1772 (Nov. 7, 1980).

192 *Id.* slip op. at 9, n.11; IALR at 1775. *Query* whether this conclusion follows. If a stay is in fact appropriate in order to avoid serious repercussions for U.S. foreign policy, *see* text at note 175 *supra*, and such repercussions will remain likely until the occurrence of events that cannot be definitely predicted, why is an indefinite stay less appropriate?

193 Brief for United States as Amicus Curiae at 17, n.6, EDS v. Iran, No. 80-1641, *appeal pending* (5th Cir., filed Sept. 15, 1980).

194 *See* notes 62-90 *supra*.

195 *See* note 193 *supra*.

fer"[196] of any "property"[197] (both broadly defined) in which Iran or an Iranian held an interest, unless such transfer was licensed.[198] The regulations specifically conferred a general "license" for the prosecution of judicial proceedings with respect to Iranian property, but purported to prohibit the "entry of any judgment or of any decree or order of similar effect" in cases involving Iranian property.[199] Pre-judgment attachment, so long as no property was paid over to a court, marshall, sheriff, or claimant, was permitted.[200]

In entering partial summary judgment against Iran in the insurance nationalization case,[201] Judge Hart apparently felt unconstrained by those particular provisions of the Iranian Assets Control Regulations. Judge Porter did not even allude to the regulations when he entered final judgment in the Iranian social security case, and in a later opinion on a preliminary injunction motion in the same case, discussed *infra*, Judge Porter seriously questioned the constitutionality of any executive action that would interfere with "the valid exercise of the judicial power by Article III courts."[202] Appeals in both the Fifth Circuit and the D.C. Circuit addressed that concern. The Justice Department filed substantially identical amicus briefs in the appeals, asking for stays pending resolution of the hostage crisis, or, in the alternative, reversal of the district court decisions on the basis that entry of judgment was contrary to the Iranian Assets Control Regulations.[203] On this latter point, the government relied on the sweeping powers of the President under the IEEPA.[204] The government contended that the executive branch had merely given its "consent to permit the litigation to go forward;"[205] its briefs implied that the President could have prohibited judicial proceedings in the Iranian cases for as long as the declared emergency was in effect.[206] The government stated pointedly that "the effect of these regulations, collectively and individually, is to

196 Transfer is defined as including "the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." 31 C.F.R. § 535.310 (1980).

197 Property is defined broadly as including "any sort of property or property interest." *Id.* § 535.311 (1980).

198 *Id.* § 535.201 (1980).

199 *Id.* § 535.504 (1980).

200 *Id.* § 535.418 (1980).

201 AIG v. Iran, note 67 *supra*.

202 EDS v. Iran, note 62 *supra*. *See also* text accompanying notes 321-324 *infra*.

203 *See* note 193 *supra*.

204 *See* notes 134-37 *supra*.

205 *See* note 193 *supra* at 17, n.6. Note the similarity between this position and the opinion of Judge Duffy in New England Merchants Nat'l Bank, *see* text accompanying notes 134-140 *supra*.

206 *See* note 193 *supra*, at 17, n.6.

bar litigants from obtaining valid and enforceable judgments."[207]

Again, as in the consolidation motions, the executive branch asserted a clearly erroneous position before the courts. The IEEPA[208] delegates broad and sweeping authority to the President only with respect to foreign-owned property. The operative provision of IEEPA is qualified by the phrase "with respect to . . . any property in which any foreign country or national thereof has any interest . . . ."[209] It does not extend "to Controversies . . . between . . . Citizens . . . and foreign States, Citizens or Subjects"[210] insofar as those controversies exist independently of the property over which the President has control. Except in purely *in rem* matters, a lawsuit or a cause of action exists apart from and independent of the property which could potentially be affected by attachment or execution on a judgment. The IEEPA can be invoked to affect rights in foreign-owned property which may become the subject of legal process through attachment or execution, but it cannot be used to affect the underlying cause of action or the right to bring the lawsuit. Thus, the statute arguably authorized the President to prohibit the attachment of or execution on Iranian property in the U.S.,

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207 *Id.* at 18.

208 *See* note 134 *supra*.

209 Section 1702(a)(1) of the IEEPA provides:

> At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
> (A) investigate, regulate, or prohibit—
> (i) any transactions in foreign exchange,
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
> (iii) the importing or exporting of currency or securities; and
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country of a national thereof has any interest;
> by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1) (1976). The legislative history of the IEEPA fails to the support the proposition that the statute authorizes the prohibition or suspension of legal proceedings. The Act concerns rights in property rather than incorporeal legal rights. For example, the Senate Report states that section 203(a)

> would grant the President emergency authority to regulate foreign exchange transactions, transfers of credit or payments between banking institutions where a foreign interest is involved, import or export of currencies or securities, and to control or freeze property transactions where a foreign interest is involved, and to require records to be kept or produced as necessary to the exercise of authorities under this title.

S. REP. No. 466, 95th Cong., 1st Sess. 5 (1976), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4540, 4543.

210 U.S. CONST. art. III, § 2, cl. 1.

but it did not authorize him to ban all lawsuits against Iran and its entities.[211]

The proposition that the President can unilaterally prohibit or indefinitely suspend the prosecution of lawsuits may be acceptable when plaintiffs have been afforded an alternative forum such as a claims commission, but no such alternative is required by the logic of the government's briefs in the Iranian assets cases. It strains the notions of due process to suggest that the executive branch can foreclose the judicial remedies of United States claimants for an indefinite period without providing for a substitute form of relief.[212] It strains the notions of separation of powers to suggest that while the determination of sovereign immunity resides in the courts, the executive branch can set the immunity aside. The President does, however, have foreign affairs powers that can significantly affect the claims of United States citizens against foreign governments, and their agencies and instrumentalities. Indeed, the executive branch continually stressed before the courts the foreign affairs implications of those proceedings. The dimensions of the President's foreign affairs power are discussed in the next section.

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211 Therefore, the provisions of the Iranian Assets Control Regulations prohibiting the entry of judgment against Iran and its entities were not authorized by the IEEPA. Whether the President could reach such a result by means of his foreign affairs power is discussed in Part IV, *infra*.

Judge Duffy, in his decision of November 3, 1980, agreed that the President could suspend the Iranian litigation. This led him to perceive a paradox in the government's position, and to deny a motion for an indefinite stay:

> The situation whereby the President invoked his extraordinary powers under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, in effect, suspended all litigation involving the frozen Iranian assets. Those lawsuits are permitted by a general license issued by the executive. 31 C.F.R. Part 535. That license can be suspended by the executive acting alone. Such a suspension would effectively stay all of this litigation. Thus, the executive has within its sole power the means to obtain all of the relief it now seeks. To request this Court to stay proceedings for which the executive branch has issued a special license, revocable at will, is explicable only in terms that could not properly be expressed in a judicial forum.

New Eng. Merchants Bank v. Iran Power, *supra* note 189, slip op. at 2-3. In other words, if the executive branch had the power to prohibit the judicial proceedings in the Iranian cases, as asserted in the government's amicus briefs to the appellate courts, and if the executive branch had wanted to stay the Iranian cases while diplomatic negotiations were being held, as asserted in the repeated stay requests, then why didn't the executive branch merely order the stays? Perhaps the answer is that the government doubted the constitutionality of such a course; but there could be other reasons as well, as Judge Duffy's opinion indicated. To deny a class of American claimants access to the courts for an indefinite period would put the President on a constitutional collision course with the judicial branch on an issue about which the judicial branch would have the final say. The reluctance of the executive branch to launch on that course is understandable.

212 *See* text accompanying notes 191-192 *supra*.

IV. The Foreign Affairs Power of the President and the Claims and Assets Agreement

A. Negotiating History and the Terms of the Accord

Resolution of the Iranian crisis began to unfold in the fall of 1980.[213] In a September 12, 1980 radio announcement, Ayatollah Khomeini stated that the hostages "will be released by giving back the property of the defunct Shah, cancellation of all American claims against Iran, guaranteeing U.S. political and military nonintervention in Iran and freeing all our assets."[214] In response, President Carter offered to lift the trade embargo and the assets freeze.[215] However, that

213 Initially, the Iranian government was totally unresponsive to diplomatic condemnation of the hostage seizure, *see* note 153 *supra*; to the judgment of the International Court of Justice, *see* note 152 *supra*; and to the economic sanctions imposed by the United States and the E.E.C., Wall St. J., May 19, 1980, at 6, col. 2. Iran's internal economic needs may have contributed more to the resolution of the crisis than external political and economic pressures.

Iran's crude oil exports before the revolution were approximately 5 million barrels per day; after the revolution, Iran's leaders decided to cut crude oil exports to between 3 and 3.3 million barrels per day. Wall St. J., June 20, 1979, at 48, col. 1; Platt's Oilgram News, Mar. 9, 1979, at 4, col. 2. Iran was unable to reach that goal and therefore projected exports at the reduced level of 2 million barrels per day for its fiscal 1980 budget; the resulting oil revenues were estimated at $22.4 billion. Middle East Econ. Survey, July 28, 1980, at II-IV. However, due to technical problems, poor logistical planning, trade embargoes, and the lack of spare parts, Iranian petroleum exports in August 1980 were averaging only 800,000 barrels per day, and the forecasted income for fiscal 1980 was reduced to $11 billion. Platt's Oilgram News, Aug. 11, 1980, at 3, col. 1. The governor of the Iranian Central Bank stated that oil revenues could fall below $10 billion for the budget year. Middle East Econ. Survey, Aug. 4, 1980, at 2. The cost to Iran for imported oil field services and equipment during 1980 was estimated at $15 billion, and one report concluded that Iran would have to exhaust its foreign exchange reserves to meet the bills. Platt's Oilgram News, Aug. 11, 1980, at 3, col. 1. Another report in mid-1980 stated that Iranian industrial output had dropped to 15% of capacity and that "Iran's former non-oil exports . . . have dried up entirely." Fin. Times (London Ed.) June 25, 1980, at 1, col. 3.

That was before the Iraq-Iran war. *See* Wright, *Implications of the Iraq-Iran War*, 59 For. Aff. 275 (1980). Before the war, Iran's export sales were falling significantly short of its foreign exchange needs. The war transformed that serious problem into a crisis. There was speculation that significant crude oil exports would not resume for several years and that the loss of the Abadan refinery would force Iran to import refined petroleum products during the next few years. Petroleum Intelligence Wkly., Oct. 20, 1980, at 4. In fact, Iran continued to export 150,000 to 200,000 barrels of oil per day throughout the fourth quarter of 1980, Middle East Econ. Survey, Dec. 29, 1980, at 6, and crude oil exports during the first quarter of 1981 may have reached 600,000 barrels per day, Petroleum Intelligence Wkly., Feb. 9, 1981, at 1. The importation of petroleum products from abroad, repairs to its oil installations, and the need for oil field equipment would have necessarily increased Iran's need for hard currency. The hostilities with Iraq and the resulting need for military equipment and spare parts also exacerbated Iran's foreign exchange requirements. Thus, the billions of dollars frozen in the United States must have become increasingly important to Iran during the fall of 1980.

214 N.Y. Times, Sept. 13, 1980, at 1, col. 3; an unofficial translation of the Khomeini statement is quoted *id.*, at 6, col. 2. The statement, attributed to Khomeini, was in fact read by a radio announcer.

215 Wash. Post, Oct. 21, 1980, at 1, col. 5.

alone would not have freed all of the Iranian funds, most of which were tied up otherwise, either by attachments, injunctions, or offset claims.

Iran rejected Carter's offer. Khomeini then said he would defer to the Iranian parliament, which, following Khomeini's four point formulation, demanded the "[u]nfreezing [of] all Iranian assets in and outside the United States."[216] The Iranian Parliament clearly intended the "unfreezing" to include the dissolution of any attachment orders affecting the Iranian property:

> All legal procedures must be taken to void the Presidential order concerning the confiscation of Iranian properties by the United States courts. Guaranteeing the security and free transfer of these properties must be made. No private U.S. citizen or resident of the U.S. may make a claim against these properties.[217]

With respect to the claims against Iran the parliament demanded:

> Cancellation and annulment of economic and financial actions and measures against the Islamic Republic of Iran must be made. Legal procedures should be implemented to cancel and annul all claims against Iran. These claims might be presented by an official or unofficial citizen, an American company or the American Government.[218]

The United States initially agreed "in principle" to Iran's demands,[219] but of course those principles had to be reduced to a detailed agreement.[220] On November 11, 1980, the United States formally responded to Iran's demands by offering to issue a series of presidential orders and declarations upon release of the American hostages.[221]

After considering this proposal, Iranian officials responded by posing a series of questions which were delivered to the United States by the Algerian intermediaries on November 26, 1980.[222] The response to those questions, dated December 3, 1980, stated that the United States

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216 N.Y. Times, Nov. 3, 1980, at 16, col. 1 (unofficial translation).

217 *Id.* at 16, col. 6.

218 *Id.*

219 N.Y. Times, Nov. 21, 1980, at 1, col. 1.

220 *Id.* The negotiations were particularly time consuming because they were conducted through Algerian intermediaries.

221 N.Y. Times, Dec. 29, 1980, at 6, col. 1. According to the official proposal, those orders and declarations would, *inter alia*:

1) unblock all Iranian assets;
2) make available to Iran $2.5 billion of Iranian property held by the Federal Reserve Bank of New York;
3) remove all legal restrictions on the return of approximately $3 billion of Iranian funds on deposit with U.S. banks abroad;
4) revoke the trade embargo against Iran; and
5) commit the United States to join with Iran in a claims settlement procedure which would "lead to" the cancellation of all judicial orders and attachments relating to Iran's assets in the United States and the cancellation and annulment of all claims of U.S. nationals and the U.S. government against Iran.

222 *Id.*

would agree, subject to release of the hostages, to require U.S. banks to cancel any setoffs against Iranian assets and to transfer all Iranian deposits to Iran.[223] In addition, the U.S. would agree

> to terminate all legal proceedings in the U.S. courts involving claims of U.S. persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein and to prohibit all future litigation by U.S. persons and institutions based on existing claims against Iran, when Iran agrees to submit all existing claims of U.S. persons and institutions [except for claims arising out of the embassy seizure] to an international claims settlement process for the determination and payment of such claims.[224]

The settlement process was conceived of as an attempt to resolve each claim by mutual agreement and then, failing agreement, by binding third-party arbitration. This mechanism was premised on the understanding that Iran would honor its debts and would make good all other outstanding commercial claims against it.

Iran responded to the U.S. proposal with unacceptable demands in dollar amount and terms,[225] but signaled its approval of the U.S. formula for the settlement of private claims. Iran agreed "to pay the bona fide loan installments on loans and credits contracted in the past . . . ."[226] With respect to other private claims, Iran stated:

> Since the Government of the Islamic Republic of Iran undertakes to settle its bona fide debts to American persons or institutions, the Iranian Government accepts that the claims of American entities and citizens against Iran, and the claims of Iranian nationals and institutions, be settled, in the first stage through agreement between the parties and, failing such agreement, through arbitration acceptable to the respective parties.[227]

The Accord that was reached on January 19, 1981 followed the principles established in the December communications between the parties. In the assets agreement, attached as Appendix I, the parties agreed generally that the United States would restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979. The parties stated generally that it was their purpose to terminate all litigation as between the government of each party and

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223 *Id.*

224 *Id.*

225 Iran demanded that, before the hostages would be released, the United States transfer assets and post cash guarantees totalling $24 billion; Algeria was to hold the assets and guarantees which would become immediately available to Iran once the hostages were released. Official translation of the text of Iran's reply to the United States' response to the November 2, 1980 resolution of the Consultative Assembly of Iran concerning conditions for release of the 52 American hostages, *reprinted in* N.Y. Times, Dec. 21, 1980, at 8, col. 1.

226 *Id.*

227 *Id.*

the nationals of the other, settling claims through binding arbitration. The United States agreed to

> terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[228]

Specifically, the parties agreed that Iranian assets held by the Federal Reserve Bank of New York and by foreign offices of U.S. banks would be transferred to Iran immediately upon the release of the hostages. Half of the assets held by domestic offices of United States banks would be transferred to a fund, up to an amount of $1 billion, to be used to settle claims against Iran. Iran agreed to replenish the fund whenever it fell below $500 million, until such time as all claims were settled within the terms of the claims agreement. The other half of the assets held by domestic offices of U.S. banks and all other Iranian assets would be transferred to Iran in due course as the Accord was implemented. The U.S. agreed to revoke all trade sanctions against Iran; to withdraw all claims pending before the International Court of Justice; and to waive all claims of the United States and U.S. nationals arising out of the seizure of the American embassy in Tehran, the detention of the hostages, and damages caused during the Iranian revolution which were not acts of the Iranian government.

In the claims settlement agreement, attached as Appendix II, the parties agreed to establish the Iran-United States Claims Tribunal, for the purpose of resolving claims and counterclaims arising out of contract, debt, expropriation, or other measures affecting property rights, whether or not filed with any court.[229] Two classes of claims were excluded: claims by the hostages against Iran, and claims "arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts." Time limits were set for the filing of claims. The Tribunal was given great latitude in selecting the principles of international and commercial law to be applied in the arbitration process. The Tribunal is intended to have final and binding power to decide the

228 *See* App. I, "General Principles," para. A.

229 The settlement of disputed international claims by the United States through bilateral commissions has a long history, dating back to 1794. *See, e.g.*, Treaty of Amity, Commerce and Navigation (Jay Treaty), concluded Nov. 19, 1794; ratification advised by the Senate with amendment June 24, 1795; ratified by the President Oct. 28, 1795; proclaimed Feb. 29, 1796. 8 Stat. 116 (1846), T.S. No. 105. The Jay Treaty was the final step in concluding peace between the United States and Great Britain following the Revolutionary War.

commercial claims of nationals of both countries as well as the official claims of both governments.

The Accord was implemented by nine executive orders issued on the morning of January 20, 1981.[230] The International Emergency Economic Powers Act is cited as one of the legislative authorities for the issuance of the executive orders.[231] The IEEPA grants to the President authority to deal with any "unusual or extraordinary threat"[232] emanating from a source wholly or substantially outside the U.S., which he deems to constitute a national emergency. The legislative history of the IEEPA indicates that the Act was actually intended to constrict the ability of the President to regulate international economic transactions.[233] Prior to the IEEPA, the President had the power to regulate economic transactions during declared emergencies under section 5(b) of the Trading With the Enemy Act, but that Act was amended by Title I of the IEEPA to restrict the exercise of section 5(b) authority to periods of wartime.[234] The Senate report accompanying the IEEPA criticized the "extensive use by Presidents of emergency authority under section 5(b) of the Trading with the Enemy Act to regulate domestic as well as international economic transactions unrelated to the declared state of emergency."[235] The report cited instances of abuse of the statutory power.[236]

In addition to the IEEPA, President Carter also relied upon an 1868 Act of Congress "concerning the rights of American citizens in

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230 Exec. Orders Nos. 12276 through 12284, 46 Fed. Reg. 7913-30 (1981). The orders are dated January 19, 1981, but apparently were not issued until the following day, after the termination of President Carter's term, when the hostages were released. The delayed issuance has cast a shadow over the validity of the orders. *See, e.g.*, Judge Porter's opinion in EDS v. Iran, notes 321-22 *infra*.

231 50 U.S.C. § 1701 *et seq.* (1980 Supp.)

232 *Id.* 50 U.S.C. § 1701(a).

233 *See* IEEPA, *supra* note 5, at 4540.

234 50 U.S.C. § 1702 (1980 Supp.); *cf.* 50 U.S.C. App. § 5(b) (1980 Supp.). The Trading With the Enemy Act, which applies only during wartime, gives the President the power to vest title to enemy property in the United States, whereas the International Emergency Economic Powers Act does not give the President vesting authority. S. REP. NO. 95-466, 95th Cong., 1st Sess. 5 (1976), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4540, 4543. The broad language of the Trading With the Enemy Act incorporated in the International Emergency Economic Powers Act has withstood constitutional attack. United States v. Yoshida Int'l, Inc., 526 F.2d 560, 573 n.16 (Ct. Cust. App. 1975); Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721, 722 n.2 (1949).

235 [1977] U.S. CODE CONG. & AD. NEWS at 4541-42.

236 For example, the report cited President Johnson's controls on U.S. direct investment abroad, which began in 1968 and did not end until 1974. Johnson relied upon President Truman's declaration of a national emergency in 1950, during the Korean war, as the source of his emergency authority to establish controls. *Id.* at 4542. *See* Roth, *Statutory Basis for the Iranian Asset Freeze*, 3 CORP. L. REV. 165, 169 (1980). *See also* note 5 *supra*. On the evolution of the IEEPA, *see* Gordon, *The Blocking of Iranian Assets*, 14 INT'L LAW. 659, 662-71 (1980).

foreign states" (Hostage Act).[237] That Act grants the President wide power in circumstances where an American citizen has been "unjustly deprived of his liberty by or under the authority of any foreign government." If the citizen is not released upon the demand of the President, "it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release."[238] Although it is well settled that the Act calls on the President's foreign affairs power, the cases have not determined the extent of that power.[239]

One line of cases has approved executive action taken under the language in the IEEPA adopted from the Trading With the Enemy Act. For example, in statements of interest filed in anticipation of challenges to the U.S.-Iran Accord, the government relied on *Orvis v. Brownell*,[240] a 1952 case as precedent for the President's authority to terminate lawsuits already in progress. In *Orvis*, the President had ordered transactions with Japan blocked, relying upon the Trading With the Enemy Act. The Supreme Court apparently assumed without discussion that the President had acted within his authority, holding that an attachment obtained after the presidential freeze did not create an interest or a right sufficient to compel satisfaction of the petitioner's claim in full.[241] Another line of cases, also relied on by the government in support of the Accord,[242] recognizes broad foreign affairs powers in the President under the Constitution. Some of the most striking of these cases arose in connection with American recognition of the U.S.S.R. in 1933.

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237 Act concerning the Rights of American Citizens in Foreign States 1868, 15 Stat., ch. 249 at 223 (1869) (codified at 22 U.S.C. § 1731-1732 (1976)).

238 22 U.S.C. § 1732 (1976).

239 *E.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); Agee v. Vance, 483 F. Supp. 729, 732 (D.D.C. 1980) (distinguishing regulation under which plaintiff's passport revoked, *held* invalid); Redpath v. Kissinger, 415 F. Supp. 566, 568 (W.D. Tex. 1976) (relief under 22 U.S.C. § 1732 is diplomatic and thus completely within discretion of President and cannot be granted by court through mandamus or otherwise).

240 345 U.S. 183 (1952). *See, e.g.*, Statement of Interest of the United States, NL Industries, Inc. v. Islamic Republic of Iran, No. 80 Civ. 6250 (TTH) (S.D.N.Y.) (filed Nov. 3, 1980) at 6-7.

241 345 U.S. at 189. The issue was treated as one of statutory construction of the Trading With the Enemy Act.

242 Opinion Letter of Benjamin R. Civiletti, U.S. Att'y Gen., to James E. Carter, President of the U.S., at 5 (Jan. 19, 1981) (citing *Pink*, *infra* note 245; *Belmont*, *infra* note 257; The Schooner Peggy, 5 U.S. 103 (1801) (copy on file at the offices of the Northwestern Journal of International Law & Business).

B. The Litvinov Assignment Cases[243]

The power of the President to waive claims of U.S. nationals against foreign sovereigns has been said to be beyond peradventure, whether or not the claimant has sought espousal of that claim by the government through diplomatic channels.[244] As Justice Douglas asserted in *United States v. Pink*, "Settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . ."[245] Most frequently, the executive branch has dealt with the claims of U.S. nationals in the context of lump sum settlements with foreign countries.[246] Sometimes without the consent of, consultation with or exclusive regard for the interests of individual citizens, the United States has been a party to many such settlements.[247] A well-known Supreme Court opinion described the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[248]

Despite criticism of the doctrine that the President has a monopoly over the conduct of foreign affairs,[249] the plenary power of the President in the field of foreign relations was reaffirmed by the courts twice

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243 The author is grateful to Mr. Dan Magraw of the District of Columbia bar for the benefit of his research and analysis of the issues discussed in the next two sections.

244 "The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 213 (1965). Professor Lillich cogently describes the predicament of a private party with a claim against a foreign sovereign:

> Suppose, however, the American investor whose property is taken does not want government espousal of his claim, but prefers to negotiate a settlement himself with the foreign country or seek redress against it in municipal courts. Here the executive branch has it two ways. Although normally the investor retains control over his claim, this control is subject to the executive's power to adopt the claim as its own and waive or settle it without the investor's consent . . . . Thus, while the investor cannot compel espousal, often he may have it forced upon him to his detriment.

R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 192 (1965).

245 United States v. Pink, 315 U.S. 203, 229 (1942). The case involved the recognition of the Soviet Union; Douglas declared that the power of the President to recognize a foreign sovereign carries with it the power to settle any claims that may stand in the way of recognition. For a discussion of United States v. Pink, *see* text accompanying notes 266-71.

246 R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 10-25 (1975).

247 L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262-63 (1972).

248 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). It remains unclear to what extent *Curtiss-Wright* is dictum, and, even to the extent it is not, what it properly authorizes. *Curtiss-Wright*, decided shortly after Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and Schechter Poultry Co. v. United States, 295 U.S. 495 (1935), may hold only that power delegated to the President in foreign affairs need not be stated as explicitly as delegations to administrative agencies in domestic affairs. *See, e.g.*, Lofgren, *United States v. Curtiss-Wright Export Co.: An Historical Reassessment*, 83 YALE L.J. 1, 3-5 (1973).

249 *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

during the Carter administration.[250] The existence of this plenary power raises numerous questions: what of the litigant's right to due process, and the federal judiciary's power to decide controversies brought before its courts? In the Iranian cases, what of the banks' statutory right of setoff, and the interests of the plaintiffs with respect to the prejudgment attachments, injunctions, and final judgments which have been ordered by the courts and which gave those plaintiffs certain inchoate rights in the Iranian assets? May the claims of the hostages be waived altogether? These considerations are significant in view of the overriding principle that the President's foreign relations power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[251] The Litvinov cases provide guidance in these questions.

After the Bolshevik revolution, the U.S.S.R. in 1918 and 1919 decreed the dissolution of Russian private firms and the expropriation and nationalization of their properties wherever situated. As Justice Frankfurter described it, the rush to the courthouse, and the legal controversies that followed, were not dissimilar to what has occurred in the Iranian cases:

> The expropriation decrees of the U.S.S.R. gave rise to extensive litigation among various classes of claimants to funds belonging to Russian companies doing business or keeping accounts abroad. England and New York were the most active centers of this litigation. The opinions in the many cases before their courts constitute a sizeable library. . . . One cannot read this body of judicial opinions . . . and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision.[252]

The United States did not recognize the Soviet government until 1933. This was accomplished by an exchange of notes between President Roosevelt and the Soviet Commissar for Foreign Affairs, Maxim

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250 *See* Dole v. Carter, 444 F. Supp. 1065 (D. Kan. 1977) (refusing to enjoin the President from returning to the People's Republic of Hungary the Hungarian coronation regalia which had been kept in the United States since the end of World War II); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), (En banc Court of Appeals held that President's inherent foreign relations powers included the right to terminate the mutual defense treaty with the Republic of China) *vacated on other grounds and remanded with direction to dismiss*, 444 U.S. 996 (1979). Although the latter decision was vacated by the Supreme Court, the persuasive power of the Circuit Court's reasoning is arguably undiminished. Note that the Court in *Goldwater* cited *Curtiss-Wright* as authoritative. *See* Gordon, *American Courts, Int'l Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297, 303 (1980).

251 United States v. Curtiss-Wright Export Corp., 299 U.S. at 318 (1936).

252 United States v. Pink, 315 U.S. 203, 234-35 (1942) (Frankfurter, J. concurring).

Litvinov.[253] In connection with the recognition of the U.S.S.R., and as an initial step in the settlement of all claims between the U.S., the Soviet Union, and their respective nationals, the U.S.S.R. assigned to the government of the United States all of its claims "for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations."[254] When the U.S. went to court to collect the nationalized Russian property, it met predictable resistance, and the Litvinov Assignment cases landed in the U.S. Supreme Court on five occasions.

In *United States v. Belmont*,[255] the government sought funds from a New York bank account which had belonged to a Russian corporation prior to its dissolution and the nationalization of its assets. The district court dismissed the complaint, and the Second Circuit affirmed because, the court reasoned, it would be contrary to the public policy of New York and the United States to recognize the Soviet nationalization decree and thereby give effect to an act of confiscation.[256] The Supreme Court said that the public policy of New York was irrelevant because "no state policy can prevail against the international compact here involved."[257] The Court noted that a treaty is the supreme law of the land[258] and that, although the exchange of letters regarding the Litvinov Assignment did not constitute a treaty,

> the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.[259]

The Court further ruled that it would be improper to question the na-

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253 Exchange of Notes Between the President of the United States and the People's Commissar for Foreign Affairs of the U.S.S.R., Nov. 16, 1933, A.D. 364, 11 Bevans 1248.

254 315 U.S. at 212.

255 301 U.S. 324 (1937).

256 United States v. Belmont, 85 F.2d 542 (2d Cir. 1936).

257 301 U.S. at 327.

258 *Id.* at 322. The Constitution affords treaties the status of federal law. U.S. CONST. art. VI.

259 301 U.S. at 331. Although the quoted language suggests that an executive agreement and a treaty enjoy a "similar dignity," United States v. Pink, 315 U.S. 203, 223, 230 (1942), subsequent cases have drawn distinctions between the legal effect of an executive agreement and the effect of a treaty. For example, a treaty will supersede a prior, conflicting act of Congress, Thomas v. Gay, 169 U.S. 264, 271 (1898), but an executive agreement may not contravene prior legislation dealing with foreign commerce, United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). Also, a treaty constitutes withdrawal by the United States of its consent to be sued in the Court of Claims, Hannevig v. United States, 114 Ct. Cl. 410 (1949), but an executive agreement does not constitute such withdrawal, Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955). *See generally* Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 AM. J. INT'L. L. 362 (1955).

tionalization decree since it was a sovereign act; that "every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory."[260] The federal policy raised by the defendant was the fifth amendment prohibition against taking property without just compensation.

The Court held, however, that there was no fifth amendment issue in this case. The only rights affected by the decree were those of the Russian corporation, which, according to the Court, must look to its own government, not the U.S., for redress. The Court added "[I]t will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceedings, it shall be made to appear that they are so affected as to entitle them to relief . . . ."[261]

The United States was less successful in the *Moscow Fire Insurance Co.* case, which meandered through the labyrinths of federal and New York state courts for six years.[262] In *Moscow Fire Insurance*, the United States sought custody of surplus funds resulting from the liquidation of five Russian insurance companies. The first suit was brought in federal court in the Southern District of New York for an accounting against the Bank of New York & Trust Company where the surplus funds were on deposit. The district court dismissed the complaint. The U.S. Supreme Court eventually upheld the lower court, reasoning that, in the interest of comity between state and federal courts and in the

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260 301 U.S. at 327, *citing* Underhill v. Hernandez, 168 U.S. 250 (1897) and Oetjen v. Central Leather Co., 246 U.S. 297 (1918). Today, that statement of the "act of state" doctrine would not be totally accurate. Under 22 U.S.C. § 2370(e) (1976) (known as the Hickenlooper Amendment), United States courts *will* sit in judgment upon the acts of the government of another sovereign state if the case involves "a confiscation or other taking . . . in violation of international law" unless "the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." *Query* whether the act of state doctrine and the Hickenlooper Amendment would have emerged as issues in the Iranian assets cases, particularly with respect to the nationalization of banks and insurance companies in Iran. *Cf.* Libyan Am. Oil Co. v. Libya, 482 F. Supp. 1175 (D.D.C. 1980), *appeal pending*, Nos. 80-1207 and 80-1252 (D.C. Cir.) (arbitral award not enforced on basis of act of state doctrine).

261 301 U.S. at 332. *Cf.* Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (an "alien friend" enjoys the constitutional privilege against the taking of private property without just compensation). The fifth amendment guarantees extend to all persons within the United States with the exception of enemy aliens. The *Russian Fleet* case was cited for this proposition most recently in Matthews v. Diaz, 426 U.S. 67, 77 (1976).

262 United States v. Bank of N.Y. & Trust Co., 10 F. Supp. 269 (S.D.N.Y. 1934) (complaint dismissed), *aff'd*, 77 F.2d 866 (2d Cir. 1935), *aff'd*, 296 U.S. 463 (1936); *intervenor claim filed*, Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co., 161 Misc. 903, 294 N.Y.S. 648 (Sup. Ct. 1937), *aff'd per curiam*, 253 A.D. 644, 3 N.Y.S.2d 653 (1938), *aff'd*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd per curiam*, 309 U.S. 624 (1940).

orderly administration of justice, federal courts should abstain from interfering with funds already under the control of the New York courts in the liquidation proceedings.[263] The proper forum for the government's claim was the state court; accordingly, the U.S. then intervened in the liquidation proceedings. The New York courts determined that the U.S. claim under the Litvinov Assignment was meaningless because the U.S.S.R. decree nationalizing all Russian insurance companies was of no legal effect outside the Soviet Union, and thus could not vest the U.S.S.R. with any interest in property located in New York. Because the Soviet Union had acquired no assignable interest, the Litvinov Agreement could not assign to the United States government an interest in the Russian-owned New York insurance company.[264] This judgment was affirmed without opinion by an evenly divided Supreme Court; three Justices took no part in the decision.[265]

The authority of *Moscow Fire Insurance* was severely questioned in *United States v. Pink*,[266] the last of the Litvinov Assignment cases to reach the U.S. Supreme Court.[267] Agreeing that the facts in the *Moscow Fire Insurance Co.* case were nearly identical to those in *United States v. Pink*, the Court nonetheless did not find the earlier case to be controlling:

> The *Moscow* case is not *res judicata*, since respondent was not a party to that suit . . . . Nor was our affirmance of that judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.[268]

The Court then held that irrespective of New York law and public policy, the U.S.S.R. nationalization decree did have an extraterritorial effect and did vest the U.S.S.R. with the requisite interest in the New York insurance assets.[269] In short, the *Moscow Fire Insurance Co.* case had been decided wrongly. In *Pink*, the judgment of the New York court was reversed.

Justice Douglas' opinion for the Court in *United States v. Pink* is

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263 United States v. Moscow Fire Ins. Co., 309 U.S. 624, 625 (1940).

264 Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co., 208 N.Y. 286, 20 N.E.2d 758 (1939).

265 United States v. Moscow Fire Ins. Co., 309 U.S. at 625.

266 315 U.S. 203 (1942).

267 The other United States Supreme Court case involving a Litvinov Assignment claim is Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), in which the Court held that the government claim was barred by the New York statute of limitations.

268 315 U.S. at 216.

269 *Id.* at 233-34, *citing* United States v. Belmont, 301 U.S. 324 (1937).

most significant for the emphasis it places on the absolute supremacy of the President's foreign relations power over the laws and policies of the states:

> Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals . . . . We would usurp the executive function if we held that that decision was not final and conclusive in the courts.[270]

Justice Frankfurter's concurring opinion restates the point more directly and in language that could be equally applicable to the claims/assets settlement between Iran and the United States:

> That the President's control of foreign relations includes the settlement of claims is indisputable . . . . The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations . . . .
>
> That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable. . . . Recognition of a revolutionary government normally involves the removal of areas of friction. As often as not, areas of friction are removed by the adjustment of claims pressed by this country on behalf of its nationals against a new regime.[271]

United States v. Pink was criticized mercilessly shortly after it was announced,[272] but many of the concerns of the critics were modified by subsequent developments[273] or merely never materialized.[274] Nevertheless, *Pink* and *Belmont* appear to remain valid precedent for the

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270 315 U.S. at 229-30 (citations omitted). The quoted language refers to *Curtiss-Wright*, note 248 *supra*.

271 315 U.S. at 240-41 (Frankfurter, J., concurring).

272 *See, e.g.*, Borchard, *Extraterritorial Confiscations*, 36 AM. J. INT'L. L. 275 (1942):

> [T]he court has upset and parted with international law, as heretofore understood, gravely impaired or weakened the protection to private property afforded by the Fifth Amendment of the United States Constitution, endowed a mere executive agreement by exchange of notes with the constitutional force of a formal treaty, misconstrued the agreement, and, it is respectfully submitted, confused that foreign policy of the United States in whose alleged support this revolutionary decision was thought necessary.

See also Jessup, *The Litvinov Assignment and the Pink Case*, 36 AM. J. INT'L. L. 282 (1942).

273 *See* notes 261-66, *supra*.

274 Re-examination of *United States v. Pink* in the light of subsequent cases seems to indicate that the alarm with which the Supreme Court's decision was initially greeted has proved to be largely unwarranted. The *Pink* case did not require and the courts have not regarded it as requiring that all decrees of a recognized foreign government be given extraterritorial effect . . . . Nor does there seem any substantial support in the *Pink* case or its progeny for the proposition that the Fifth Amendment limitation on the operation of treaties and executive agreements as municipal law has been removed.

Note, *United States v. Pink—A Reappraisal*, 48 COLUM. L. REV. 890, 899 (1948).

proposition that an executive agreement will supersede and preempt conflicting state law or policy.[275] This is significant in the Iranian litigation, even though most of the cases were brought in federal court. The pre-judgment attachments, although granted by federal judges, were issued in accordance with the procedures and pursuant to the policies of state law.[276] Similarly, the banks' alleged right of setoff was a matter of state law. Furthermore, most of the claims in the Iranian cases were based on state law causes of action such as breach of contract or conversion. In light of the precedents established by the Litvinov decisions, the attachments,[277] setoffs, and even the causes of actions themselves[278] may have to yield to the Accord, which calls for dissolution of the attachments, revocation of the setoffs, and the transfer of the claims to another forum.

In an opinion letter to President Carter, Attorney General Civiletti cited *Belmont* and *Pink* as constitutional authority for the Accord and the implementing executive orders.[279] This is not surprising because those cases have frequently been invoked as justification for a broad reading of the President's foreign affairs power.[280] When limited to

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275 At least this is true when recognition of a foreign government is involved:

> [T]he *Belmont* and *Pink* decisions . . . must be regarded as declaring that an executive agreement, at least where it accompanies recognition of a foreign government, will override state law and policy. The extent to which this rule is dependent on the factor of recognition awaits authoritative determination.

Id. at 896.

276 "[A]ll remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held . . . ." FED. R. CIV. P. 64.

277 As discussed *supra*, at note 209 and accompanying text, the statutory language of the International Emergency Economic Powers Act, 50 U.S.C. § 1702 (1976), would apparently give the President the power to void the attachments by executive order. Note that the Trading With the Enemy Act, 50 U.S.C. App. § 5(b) (1976), which contains provisions nearly identical (except for vesting) to those in the International Emergency Economic Powers Act, has consistently withstood attack on constitutional grounds. United States v. Yoshida Int'l, Inc., 526 F.2d 560, 573 n.16 (Ct. Cust. App. 1975); Bishop, *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721, 722 n.2 (1949). Thus, the President arguably has two valid bases—the *Belmont* and *Pink* precedents, plus the International Emergency Economic Powers Act—for dissolving the pre-judgment attachments of Iranian property.

278 This argument, that an executive agreement can abrogate a cause of action, is overly simplistic when the action is brought under the FSIA. If the FSIA is viewed as merely a jurisdictional statute implementing the citizen-foreign state diversity provision of art. 3 § 2 of the Constitution, then the same rationale would apply: the federal court would be applying state law as in any other diversity case, and that state law would have to yield to the supremacy of an executive agreement by the President. If, however, the FSIA is viewed as creating separate federal question jurisdiction, then a problem arises: does the executive agreement take precedence over the prior conflicting federal statute?

279 *See* note 242 *supra*.

280 *See* text accompanying notes 244-61 *supra*.

their facts, however, the decisions are not nearly as broad as their oft-quoted dicta, and they are readily distinguishable from the situation presented by the Iranian cases and the Accord.

The Litvinov Assignment cases may be limited to instances where the President exercises his power to recognize a foreign government. The claims that were settled by the Litvinov Assignment had "for years been one of the barriers to recognition of the Soviet regime by the Executive department."[281] The recognition power was not used during the Iranian crisis. The position of the State Department was that the recognition of the Imperial Government of Iran carried over to the Islamic Republic of Iran as the successor government without the need for a formal declaration.[282] The Accord may have been part of a "complicated negotiation to restore normal relations;"[283] however, it was not entered into in order to "remove. . .obstacles to full recognition,"[284] which were the circumstances in *Belmont* and *Pink* from which the claims settlement authority followed. Therefore, if *Belmont* and *Pink* do nothing more than affirm the President's recognition power, they would be inapposite in the Iranian situation and would not support the proposition that the President may waive U.S. nationals' claims against Iran.

Belmont and *Pink* may also be read merely as overruling the lower courts' failure to apply the act of state doctrine by refusing to give effect to the Russian nationalization of the insurance industry.[285] In other words, those cases can be interpreted as a preemption of the New York State policy against recognition of nationalization decrees by the overriding federal policy expressed in the act of state doctrine.[286] If so interpreted, *Belmont* and *Pink* are of limited relevance to the present discussion, first, because of changes in the act of state doctrine by the Hickenlooper Amendment,[287] and second, because the act of state doc-

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281 315 U.S. at 227.

282 N.Y. Times, Feb. 13, 1970, col. 1, at 1. *See also* note 99 *supra*.

283 *See* text accompanying note 271 *supra*.

284 315 U.S. at 229.

285 *See, e.g.*, Cardozo, *The Authority in Internal Law of International Treaties*, 13 SYRACUSE L. REV. 544, 522 (1962); Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 COLUM. L. REV. 710, 724 (1951).

286 In this context it should be recalled that *Belmont*, which the Court found to control *Pink*, 315 U.S. at 268, was written by Justice Sutherland, who had written *Curtiss-Wright* only a year earlier, and had contended vigorously there and earlier that the foreign affairs power rested completely and only in the federal government, *see* G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919).

287 *See* text accompanying note 260 *supra*, and *cf.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

trine did not surface in the Iranian cases, with the exception of the insurance and bank nationalization claims.

Finally, the claimants who lost out by virtue of the Litvinov Assignment were not U.S. nationals.[288] The claims against Iran which were affected by the Accord, on the other hand, were held mostly by U.S. nationals, with full fifth amendment rights. This distinction may be crucial in determining whether *Belmont* and *Pink* do in fact grant the President the power to waive by executive agreement claims of Americans against foreign sovereigns.

C. Waiver of Claims and the Fifth Amendment

One would hope that the international claims settlement process agreed to by the U.S. and Iran will provide ultimately for adequate and effective compensation for U.S. nationals with legitimate claims against Iran and its instrumentalities. If not, a fifth amendment cause of action against the United States might lie, based on the proposition that the waiver of claims by the President constituted a taking of private property for a public purpose without just compensation.[289] Such an action would be cognizable in the Court of Claims which "shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution. . . ."[290]

There are several classes of claimants who might assert such a fifth amendment claim. For example, the former hostages and their families are barred by the Accord from suing Iran.[291] Although compensation for those individuals has been proposed and provided,[292] the hostages

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288 In *Belmont* the affected claimants were shown to be aliens, 301 U.S. at 332; in *Pink* that fact was assumed, 315 U.S. at 227.

289 "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

290 28 U.S.C. § 1491 (1976). Note, however, that such an action could not be brought if the waiver of claim were pursuant to a treaty. "[T]he Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." *Id.* § 1502.

291 The relevant section of the Accord reads:

> [T]he United States will promptly withdraw all claims against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claims of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of 52 United States nationals on Nov. 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after Nov. 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic revolution in Iran which were not an act of the Government of Iran . . . .

Assets Agreement, Point II and III, para. 11, *reprinted in* App. I.

292 Congress provided a mechanism for compensation in the Hostage Relief Act of 1980, Pub. L. 96-449, 94 Stat. 1967 (to be codified at 5 U.S.C. § 5561 (1980)). Title I of the Act permits

may nonetheless assert that such compensation was inadequate and that the President's waiver of their claims was, therefore, a taking without just compensation. Also, the Accord excludes from the international arbitration proceedings "all claims arising under a binding contract specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts."[293] The contracts of many American claimants contained such provisions, and the Accord and implementing orders appear to preclude those claimants from pursuing their remedies before U.S. courts.[294] Even though their claims were not waived by the Accord, those claimants might argue that recourse to an Iranian court would be futile and that they have therefore been denied, without just compensation, any meaningful means of collecting on their claims. Finally, the other claimants might allege a fifth amendment taking if the claims settlement process goes sour or if the special fund for payment of claims runs dry without replenishment by Iran.

Some judicial support exists for such a claim under the fifth amendment, although the cases are few and of uncertain precedential value. The Supreme Court has never passed on the validity of the theory;[295] the resolution of such an action would be problematic. But it is

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agency heads to establish a special savings fund for the pay and allowances of American hostages which would accrue interest equal to the average rate for three-month Treasury bills, compounded quarterly. This Title also creates special health and educational benefits for the hostages and any family member. Title II provides special tax treatment, exempting any compensation from gross income for any month during which the individual was in captivity, or was hospitalized as a result of such captivity. For a discussion of the legislative history of this Act, *see* H.R. REP. No. 96-1349, 96th Cong., 2d Sess. (1980) *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 7578. Exec. Order No. 12285, 46 Fed. Reg. 7931 (1981), issued simultaneously with the executive orders implementing the Accord, established the President's Commission on Hostage Compensation, which was directed to submit a report to the President on "whether the United States should provide financial compensation to United States nationals who have been held in capitivity outside the United States" and how such compensation should be determined.

293 Settlement of Claims Agreement, Art. II(1), *reprinted in* App. II.

294 But according to Mark Feldman, Dept. of State Deputy Legal Adviser, nearly every U.S. company and individual with a commercial claim against Iran will have a channel to seek compensation under the hostage agreement with Iran, either through international arbitration procedures set up in the Accord, or through lawsuits against Iran in the U.S. courts. N.Y. Times, Jan. 24, 1981, at A-5, col. 2.

Feldman interprets the provision of the Accord whereby the U.S. "will terminate all legal proceedings in the U.S. courts" involving private American claims against Iran, in the context of the overall agreement, as mandating the termination only of lawsuits brought by claimants who have access to the arbitration procedures. Regarding regulation of disputes under Iranian law or in Iranian courts, the *New York Times* quoted Mr. Feldman as saying, "I don't think any of our claimants bargained for a decision of the Ayatollah on their claims when they signed contracts providing for resolution of disputes under Iranian law or in Iranian courts." *Id.* Feldman's views were immediately disputed. *Id.*

295 *See. e.g.*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 263 (1972).

precisely this uncertainty, and the chance for a favorable outcome, which may lure to the United States Court of Claims disappointed claimants seeking to collect from their own government what they believe they should have received from Iran.

Precedent for the proposition that an uncompensated waiver of a claim violates the fifth amendment exists in *Gray v. United States*,[296] an 1886 advisory opinion of the Court of Claims. That case involved the waiver of claims against France under an 1800 treaty.[297] Prior to that treaty, French and American ships were regularly skirmishing on the high seas. As part of the treaty, the United States relinquished the claims of its citizens against France and against the responsible French vessels in return for a waiver by France of its claims against the United States. The Court of Claims stated:

> [T]he set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse in war the protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his Government.
>
> It seems to us that this "bargain" . . . which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.[298]

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296 21 Ct. Cl. 340 (1886).

297 *Id.* at 343. Convention Between the French Republic and the United States of America, Sept. 30, 1800. 8 Stat. 178 (1846), T.S. No. 85.

298 21 Ct. Cl. at 342-43. The same theory was propounded in an earlier Court of Claims decision, Meade's Case, 2 Ct. Cl. 224 (1866):

> The right of the government to take for public use or public welfare the property of a citizen by virtue of the right of eminent domain, and the obligation to make compensation to the citizen for it, are universally admitted as concurrent and correlative powers and duties. They are coexistent and coextensive.
>
> Was the release and cancellation of Meade's claim against Spain such an appropriation of private property to public use as comes within the rule of law and the provision of the Constitution? The court thinks it was. A man's *choses* in action, the debts due him, are as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle. And when taken for the public good, or released or cancelled to secure an object of public importance, are to be paid for in the same manner. In all such cases the right of the citizen and the obligation of the sovereign are perfect. The remedy is to be provided by the government. While the right cannot be destroyed, the remedy may be denied, or an inadequate one supplied.

Id. at 275. In affirming, 76 U.S. 691 (1866), the Supreme Court explicitly rejected this rationale as unnecessary for its decision; it is presented here only for its analytical value.

Although *Gray* was an advisory opinion, subsequent cases approved its rationale,[299] but commentators have split as to its persuasive authority.[300] With these divergences, *Gray* is a slim reed on which to rest a major claim against the United States. A strategy hinged on *Gray* also faces the ever-present possibility that Congress would withdraw the government's consent to be sued. Under current doctrine, the fate of the citizen whose claim against a foreign sovereign is waived by the President is ultimately a matter of congressional magnanimity or parsimony. "The power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."[301] Other views exist, however. One commentator has argued:

> Any doctrine which grants a government complete discretion to take or limit the property rights of its citizens deserves careful and continued examination. At a time when all efforts are being bent to accord individuals greater rights and remedies under international law, persons concerned with its development would be especially alert for such areas where the application of old fictions to new fact situations may harm the rights of many individuals.[302]

Five years after the *Gray* opinion was rendered, Congress appropriated funds to compensate the heirs of those whose claims were waived by the 1800 treaty with France.[303] It is unclear whether Congress believed that those appropriations were gratuitous, "payments as of grace and not of right,"[304] or were in fulfillment of a legal obligation as a matter "of constitutional duty and not merely as one of grace."[305]

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299 *See, e.g.*, Cushing v. United States, 22 Ct. Cl. 1 (1886); The Schooner Betsey, 44 Ct. Cl. 506 (1909).

300 *See, e.g.*, the opinion of the court in Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970), which held *Gray* to be nonbinding, with Judge Nichols' concurring opinion, *id.* at 1395-96:

> [*Gray*] is one of the most interesting and able decisions of our predecessors on the subject of fifth amendment takings, and respectfully I do not agree with the court's handling of it . . . [on the facts of Gray, m]any statesmen of the generation that wrote the Bill of Rights were of the opinion that a Fifth Amendment taking had occurred.

301 Maricopa Cty. v. Valley Nat'l Bank of Phoenix, 318 U.S. 357, 362 (1943). *But see* Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25, 149 (1974), which suggest that withdrawal of consent to be sued for a fifth amendment taking "might raise serious constitutional questions" concerning the government act (*e.g.*, legislation or executive order) purportedly authorizing or effectuating the taking.

302 R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 194 (1965). *See also* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 22 BUS. LAW. 3, 23-6 (1966), which takes the position that private parties should not have to bear the expense of the government's foreign policy decisions.

303 Act of March 3, 1891, 26 Stat. 908 (1891), T.S. No. 85.

304 Blagge v. Balch, 162 U.S. 439, 457 (1896).

305 W. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 221 (1941).

The issue remains open and may eventually be addressed by the courts as a result of the inevitable legal fallout from the Accord.

V. Concluding Observations

The Iranian cases raise the question of the proper role of the Executive—first, in lawsuits brought under the Foreign Sovereign Immunities Act (FSIA), and second, in negotiating and implementing an accord that waives claims and terminates pending litigation.

There was a long unbroken history dating back to 1812[306] of courts deferring to the executive branch on questions of sovereign immunity; thirty years ago, the determinations of the State Department on sovereign immunity were virtually conclusive.[307] Since then, the nature of sovereign activities has changed considerably. In the petroleum exporting states and the industrialized countries with centrally planned economies, the commercial activities of governments often predominate over their political and diplomatic affairs. Globally, this trend is continuing as the "Third World" modernizes. As more and more foreign sovereign entities have entered into trading and competition with the private sector in the Western world, our notions of sovereign immunity have changed, in part in response to the growing centralization of political and economic power. The FSIA purportedly removed the sovereign immunity defense from the realm of diplomacy; it is now a legal, not a political issue. This has been viewed generally as a healthy development.[308]

Prior to the passage of the FSIA, some argued that sovereign immunity determinations in suits against foreign states are inherently political because of their effect on foreign relations—an area committed exclusively to the executive branch.[309] The proponents of this argument asserted that the FSIA would be ineffective in achieving its stated

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306 The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

307 Ex Parte Republic of Peru, 318 U.S. 578 (1943); Mexico v. Hoffman, 324 U.S. 30 (1945).

308 *See, e.g.*, von Mehren, note 94 *supra*, at 66:

> Both the FSIA's substance and its procedure (judical rather than executive decision) are consistent with the practice now prevailing in most of the legally mature nations of the world. Its application should lead to more predictable and fairer decisions in the area of foreign sovereign immunity.

309 Michael H. Cardozo has probably been the leading proponent of this theory. *See Jurisdictions of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the House Subcomm. on Ad. Law and Govt'l Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 61 (1976) (remarks of Mr. Cardozo); Proceedings of the 70th Annual Meeting of the Am. Soc. Int'l Law 57 (1976) (remarks of Mr. Cardozo); Cardozo, *Judical Deference to State Dep't Suggestions: Recognition of Prerogative or Abdication to Usurper*? 48 Cornell L. Q. 461 (1963).

purpose to "depoliticize litigation against foreign states."[310] Determinations of sovereign immunity, it was said, necessarily present issues of foreign policy and international comity, which are political questions within the exclusive realm of the executive branch.[311] Since this line of reasoning was used principally as an argument against passage of the FSIA, it is of questionable relevance today.[312] However, the conduct of the executive branch in the Iranian cases may occasion a re-examination of that argument. Perhaps it is impossible to "depoliticize" litigation against foreign states, and perhaps the executive branch therefore has a responsibility to make its views known in those cases rather than to defer totally to the adversarial process of the courts. This is not, it is here asserted, the better view. The language and intent of the FSIA are clear: determinations of immunity under the FSIA are best handled as findings of fact as to the character of the sovereign's activities, rather than political judgments as to the effect of the litigation on foreign relations.[313] The FSIA's goal of "depoliticizing" suits against foreign states represents the will of the national legislature, as well as the judgment of the executive branch in calmer times.[314] The executive branch should,

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310 This phrase was used in a joint letter of transmittal to Congress from the Deputy Sec'y of State and the Deputy Att'y Gen. proposing enactment of the FSIA. 15 INT'L LEGAL MAT. 88 (1976). Note the irony of the executive branch's attempt to "politicize" the Iranian assets cases through its repeated stay requests, after having initially proposed the FSIA as a means of "depoliticizing" those types of cases.

311 The leading case concerning the political question doctrine is Baker v. Carr, 369 U.S. 186 (1962), in which the Supreme Court reviewed its earlier decisions to explain why the courts will not decide political questions. However, the opinion does not clarify whether the courts refuse to decide such questions out of compulsion or prudence. Similarly, in sovereign immunity cases prior to the FSIA, the Court never stated whether it deferred to the determinations of the executive branch out of compulsion or prudence.

The author of Baker v. Carr later wrote in another context: "The task of defining the contours of a political question . . . is exclusively the function of this Court. . . [R]elinquish[ing our] function to the Executive . . . can only be accepted at the expense of supplanting the political branch in its role as a constitutent of the international law-making community." First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 790 (1972) (Brennan, J. dissenting).

312 Acceptance of the notion that sovereign immunity determinations are inherently political and, therefore, must be left to the executive branch, leads to several alternative propositions: that the FSIA is an unconstitutional invasion of the President's foreign affairs power; that the Courts should read the FSIA as merely providing a general rule to operate in the absence of a more particular determination by the executive branch, *see* Cardozo, *Judicial Deference*, *supra* note 309, at 468-74; Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945); or that the FSIA should be repealed or severely modified. The validity of any of these propositions today seems doubtful.

313 *See* Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 907 (1969).

314 Although the State Department announced that it would restrict itself to the filing of amicus curiae briefs on questions of sovereign immunity arising under the FSIA, the Department nonetheless yielded to diplomatic pressure to support the position of the defendant in Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).

therefore, defer gracefully to and without interference with the courts in FSIA cases. As a matter of policy, the Executive should not only abstain from attempting to influence the determinations of immunity, but also should abstain generally from involvement in lawsuits between private litigants and foreign sovereign entities.[315] The executive branch should not frustrate the intended purpose of the FSIA to "depoliticize" suits against foreign states. That goal is attainable only if the executive branch exercises a high degree of restraint in those cases.

In the Iranian cases, however, the influential hand of the executive branch was unrestrained and ubiquitous. The government lawyers justified their intervention because of the delicate foreign affairs considerations involved, and because they did not want Iran to receive the wrong "signals" from the U.S. However, cases under the FSIA will always involve delicate foreign affairs considerations, particularly when property of the foreign sovereign located in the U.S. is concerned. The intervention of the Executive in matters that have been delegated by Congress exclusively to the Judiciary cannot be justified simply by the presence of foreign relations implications, even during a crisis.

The State Department's fear about the courts' giving erroneous signals to Iranian officials was exaggerated. To suggest that, after the President had frozen Iran's assets and ordered a trade embargo against Iran, the Iranian diplomats would be unduly outraged by the prosecution of individual lawsuits in U.S. courts against Iran and its entities, was overcautious if not absurd. Iranian officials and other foreign sovereigns certainly have at least a rudimentary knowledge of American government and therefore can and should be expected to recognize that the Judiciary operates separately and independently of the Executive. In all likelihood, foreign sovereigns realize that the actions of the courts do not necessarily reflect the policy of the executive branch. To assume that the Iranian officials were not aware of this fundamental separation of powers was both naive and condescending. Finally, the actions of the executive branch in the Iranian cases may have created a new set of "signals" and a bad precedent for the future. Subsequent FSIA cases will undoubtedly arise that involve pending government-to-government negotiations having delicate and significant foreign affairs ramifications. Will the executive branch appear in those cases and suggest that proceedings be stayed pending resolution of the matters on a government-to-government basis? If not, the foreign government may view the Iranian cases as a precedent for executive branch intervention

315 *See* note 310 *supra*.

in FSIA suits and might interpret the government's failure to follow that precedent as a "signal" of insincerity.

In short, the actions of the executive branch in the Iranian cases were inappropriate and generally ineffective.[316] Extraordinary foreign affairs agreements of the President will sometimes preempt conflicting domestic law. Under normal circumstances, however, foreign governments should be led to expect that commercial disputes with American nationals will be handled by the U.S. courts with the full benefits of fair trial and due process, but without influence from the executive branch. The best way to transmit that message is for the executive branch to abstain from involvement in FSIA cases as a matter of general policy. Otherwise, the executive branch will repeatedly find itself, as in pre-FSIA days, under political pressure from foreign states to intercede in the U.S. courts for purposes of obtaining delays, reconsiderations, or determinations favorable to the foreign sovereign.

Despite the diminution of the role of the executive branch in FSIA cases, the President retains broad, yet ill-defined powers in the conduct of foreign affairs. As a matter of international law, the actions of the Executive bind the nation and its citizens; beyond the boundaries of the United States, the Accord is unassailable.[317] As a matter of municipal law, however, the President's foreign affairs power has no solid foundation; it is based more on historical practice than on legal precedent. Aside from the treaty-making power, which is shared with the Senate, and the power to appoint ambassadors and consuls,[318] the Constitution grants to the President no explicit foreign affairs power. Furthermore, the Supreme Court's oft-quoted statements on the inherent foreign affairs power of the President are mainly dicta. Although *Belmont* and *Pink* were cited as authority for the President's power to enter into and implement the Accord,[319] those cases arose under circumstances quite different from the Iranian crisis and thus conceivably provide no au-

316 After criticizing the government's intereference in the Iranian cases, one lawyer suggested recently that the first one million dollars recovered from Iran be put in trust for a special annual award to be given to the person or organization that has done the most during the year to retard the development of international law. He suggested that it be called the "Kevin Thomas Duffy Award" and that it be given in the first instance to the executive branch of the United States government for its role in the Iranian cases. Remarks by a participant, John Bassett Moore Society of Int'l Law Conference on the Iranians, Univ. of Va. School of Law, Charlottesville, Va. (Nov. 1, 1980).

317 *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW 205 (1965):

> A waiver or settlement made by a state of which an injured alien is a national, whether made before or after an espousal of the claim by that state, is effective as a defense to an international claim asserted by that state for the injury.

318 U.S. Const., art. II, § 2.

319 *See* text accompanying note 279 *supra*.

thority for the President's actions with respect to the Accord.[320]

Within weeks after the signing of the Accord, its constitutionality was in fact brought into question by Judge Porter of the Northern District of Texas, who issued a preliminary injunction restraining the federal government from interfering in any way with the enforcement of the final judgment of that court in *EDS v. Iran*.[321] Judge Porter stated that the President's action implementing the Accord "suffers from serious constitutional deficiencies."[322] Although that holding was merely a preliminary conclusion of law as to the plaintiff's probability of success on the merits of its motion for a permanent injunction, the mere suggestion that the President does not have the constitutional power to carry out the terms of the Accord has far-reaching ramifications.

Judge Porter is understandably concerned about the separation of powers issue raised by the Accord, but there are compelling public policy reasons for enforcing the President's actions. As noted earlier, the Accord will be recognized by other countries as binding on the United States and its nationals.[323] If U.S. courts were to hold the Accord and the implementing executive orders to be unconstitutional and unenforceable in the United States, the result would be procedural chaos of an international dimension. Plaintiffs would be able to sue Iran in the United States, but the resulting judgments would be unenforceable in other countries as contrary to recognized principles of international law. Furthermore, the enforcement of judgments against Iranian assets in the U.S. might give rise to valid countersuits abroad by Iran for the value of the property taken in violation of the Accord. The international problems created by the recognition and enforcement of conflicting judgments are obvious. Moreover, the credibility of the United States would be severely undercut; foreign sovereigns would be reluctant in the future to enter into executive agreements with the President of the United States if it appeared that the American judiciary could void the agreement.

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320 *See* text accompanying notes 279-88 *supra*.

321 EDS v. Iran, *supra* note 62, (Feb. 12, 1981) (preliminary injunction order). For the background of this case, *see* notes 62-66 and 69 *supra*.

322 *Id.* slip op. at 28. The opinion questioned the validity of Exec. Order No. 12279, 46 Fed. Reg. 7919 (1981), which purportedly terminated all litigation against Iran, voided any final judgments against Iran, and ordered the transfer of all Iranian assets to the Federal Reserve Bank of New York. Judge Porter said about that order:

> [E]ven with the blessing of Congress, this intrusion of the Executive Branch into the carefully designed contours of Federal Court jurisdiction is untenable under the Constitution of the United States. . . . President Carter was without statutory or constitutional authority to order the vesting of foreign assets in the custody and control of the Executive Branch.

EDS v. Iran, *supra* note 62, slip op. at 28 (Feb. 12, 1981).

323 *See* note 317 *supra*.

On the other hand, the rights of U.S. citizens should not suffer as a result of the President's exercise of his foreign affairs power. Perhaps these competing policy considerations could be reconciled by giving full effect to the President's international agreements while providing compensation from the public treasury for nationals whose rights are adversely affected by those agreements. The traditional notion that the President has the power to waive claims of U.S. nationals should be upheld, and the President's executive agreements with foreign states and actions to implement those agreements should be enforced and accorded full recognition by the courts. However, if rights of U.S. persons are impaired by such an agreement, then full compensation should be accorded under the fifth amendment.[324] In other words, the rationale of the *Gray* opinion[325] should be adopted by the Supreme Court. An international agreement by the President should be declared unconstitutional only if it results in the deprivation of rights without recourse against the United States,[326] and then only reluctantly and with due consideration for the harm that such a decision might do to American foreign relations.

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[324] *See* text accompanying notes 289-305 *supra*. Note that to reach this result it would be necessary to construe the fifth amendment provision about taking private property more broadly than has been the case in the past.

[325] 21 Ct. Cl. 340 (1886).

[326] *See* Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974).

APPENDIX I

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

POINT I: NON-INTERVENTION IN IRANIAN AFFAIRS

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

POINTS II AND III: RETURN OF IRANIAN ASSETS AND SETTLEMENT OF U.S. CLAIMS

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central

Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this Declaration. All funds placed in escrow with the Central Bank pursuant to this Declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this Declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this Declaration shall be of no further force and effect.

Assets in the Federal Reserve Bank

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Banks

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon

through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claim settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable.

prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

Nullification of Sanctions and Claims

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

POINT IV: RETURN OF THE ASSETS OF THE FAMILY OF THE FORMER SHAH

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that

Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

Settlement of Disputes

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Initialed on January 19, 1981

by _____

Warren M. Christopher
Deputy Secretary of State
of the Government of the United States

by virtue of the powers vested in him by his Government as deposited with the Government of Algeria

APPENDIX II

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation of performance of any provision of that declaration.

ARTICLE III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its

business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out. The UNCITRAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality, or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.

Initialed on January 19, 1981

by_____

Warren M. Christopher
Deputy Secretary of State
of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria