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The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments

The Foreign Sovereign Immunities Act of 1976¹ (FSIA) was designed to balance the interests of private litigants with commercial or tortious claims² against foreign states³ with the interests of the United

¹ 28 U.S.C. §§ 1330, 1602-1611 (Supp. I 1976).

² The FSIA represents a codification of the "restrictive" principle of sovereign immunity. Under this theory, the immunity of a foreign state only extends to suits involving public acts (*jure imperii*) of the sovereign and not to suits involving private or commercial acts (*jure gestionis*) of the state. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as HOUSE REPORT].

This principle contrasts with the absolute theory of sovereign immunity, which protects a foreign state from the jurisdiction of another state regardless of the nature of the activity that gives rise to the cause of action. Chief Justice Marshall adopted this principle in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), based on the rationale of the "perfect equality and absolute independence of sovereigns." *Id.* at 137.

The restrictive theory represents the modern trend in international law. See generally Lowenfeld, *Claims Against Foreign States—A Proposal for Reforms of United States Law*, 44 N.Y.U. L. REV. 901, 906-07 (1969). The restrictive theory has been the official policy of the United States State Department since the issuance of the so-called "Tate Letter." Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984 (1952). The Tate Letter was influential in judicial decisions, since, prior to the FSIA, courts deferred to the State Department's individual determinations of sovereign immunity. HOUSE REPORT, *supra*, at 7.

Although the FSIA reaffirms the restrictive theory as embodied in the Tate Letter, the Act transfers from the State Department to the judiciary the function of deciding sovereign immunity questions, with the intent of eliminating considerations of political and foreign policy factors. *Id.*

³ 28 U.S.C. § 1603(a) (1976) defines a "foreign state" to include a political subdivision of a foreign state or an agency or instrumentality of a foreign state, except when used in § 1608 to describe the procedures for service of process. Reference to a "foreign state" in the text of this comment includes all of these enumerated entities. Subsection (b) defines an "agency or instrumentality of a foreign state," when that term is used in the statute as distinct from the foreign state itself, as any entity:

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen or a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

States in minimizing friction with foreign nations.⁴ The tightrope that the drafters of the Act⁵ walked is nowhere more apparent than in the area of attachment of foreign sovereign assets and execution of judgment. Prior to the Act, pre-judgment attachment of assets used for a commercial activity had served as a means of securing jurisdiction against a foreign sovereign.⁶ Such attachments had been a major source of irritation to foreign governments.⁷ To address this concern, the FSIA prohibits pre-judgment attachment for jurisdictional purposes.⁸ At the same time, the Act recognizes the plaintiff's interest in having the capacity to satisfy a judgment once it has been rendered. Thus, for the first time in United States law, the FSIA provides a remedy to the judgment creditor against a foreign state that seeks to avoid payment of a final judgment.⁹

The abandonment of jurisdictional attachments under the FSIA has created potential risks for a party that brings an action against a foreign sovereign. The attachment of assets prior to a judgment may serve a dual purpose. First, it provides a means of obtaining jurisdiction and second, it provides a means of securing assets upon which a judgment may be levied.¹⁰ The latter is referred to as a "provisional remedy" or a "protective attachment," since it ensures against the removal of assets during litigation.¹¹ Under the FSIA, a foreign state's property is immune from pre-judgment attachment except upon the explicit waiver of that government.¹² As a result, the foreign sovereign is free to remove its assets from the jurisdiction of the court in order to avoid payment of anticipated money damages.

⁴ According to the testimony of Monroe Leigh, Legal Adviser to the Department of State, before the House subcommittee considering the FSIA legislation, the drafters designed the bill "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 29 (1976) [hereinafter cited as *1976 Hearings*].

⁵ The Bill was drafted by the Departments of State and Justice. These departments consulted with members of the private bar and academic community in preparing the 1976 bill. Certain segments of the bar had objected to the administration's failure to provide them an opportunity to have input into the original formulation of the bill, introduced in 1973. The 1973 legislation never was reported out of committee. *1976 Hearings*, *supra* note 4, at 24 (statement of Monroe Leigh).

⁶ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965).

⁷ HOUSE REPORT, *supra* note 2, at 27.

⁸ See text accompanying notes 17-21 *infra*.

⁹ HOUSE REPORT, *supra* note 2, at 8.

¹⁰ *Id.* at 30.

¹¹ *1976 Hearings*, *supra* note 4, at 81 (statement of Cecil J. Olmstead).

¹² See text accompanying notes 32-35 *infra*.

Two recent federal district court cases¹³ have raised the issue of whether the Act permits courts to find that a foreign sovereign defendant has impliedly waived its immunity from pre-judgment attachment by an international agreement entered into prior to the statute. If implied waivers are valid under the Act, courts would have the flexibility to order pre-judgment attachment without the explicit consent of the foreign sovereign. The implied waiver theory could enable a plaintiff to ensure against the possible removal of assets by a sovereign seeking to frustrate a judgment.

This comment will examine those provisions of the FSIA relating to attachment and execution, with a focus on pre-judgment attachment for the purpose of securing satisfaction of a judgment that may ultimately be entered against the foreign state. The benefits and costs of the Act's restrictions on the use of the provisional remedy will be evaluated upon considerations of foreign policy as well as fairness to private litigants. Particular attention will be given to the danger faced by litigants that the foreign sovereign will remove its property from the United States to avoid payment of a judgment. The writer will argue, however, that an interpretation of the FSIA that would give courts the power to find an implied waiver of immunity from pre-judgment attachment is not an appropriate means of resolving this flight-of-assets problem.

The notion of an implied waiver of pre-judgment attachment immunity conflicts with the language and policy of the FSIA of avoiding undue harassment of foreign states. Nonetheless, in instances where there is evidence that removal of assets is imminent, pre-judgment attachment may be the only means of ensuring satisfaction of a judgment. Consequently, the recommended route is to amend the Act so as to permit courts to use the protective attachment remedy under such limited circumstances.

ATTACHMENT IMMUNITY AND EXCEPTIONS UNDER FSIA

Pre-Judgment Attachment for Jurisdictional Purposes

Prior to passage of the Act, there was no effective means of making service of process upon a foreign state.¹⁴ Pre-judgment attachment for the purpose of asserting in rem or quasi in rem jurisdiction¹⁵ was the

¹³ *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979).

¹⁴ Kahale & Vega, *Immunity and Jurisdiction: Toward A Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 215 (1979).

¹⁵ An action in rem is one in which the plaintiff seeks to affect the interests of all persons who

principal means of providing a foreign sovereign with notice of a pending action against it.¹⁶ The FSIA, however, prohibits jurisdictional attachments and, in its place, provides a mechanism for service of process upon a foreign state.¹⁷

may have claims to a specific piece of property. F. JAMES, CIVIL PROCEDURE § 12.7 (1965). There are two types of quasi in rem proceedings. The first kind concerns claims to particular property of specifically named persons made parties to the proceeding. The second type is based on a claim that does not relate to the property. The action is commenced by seizure of the property of the defendant, and such property is used to satisfy a judgment that may be rendered against the defendant. *Id.*

The United States Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), held that the mere presence of property unrelated to the cause of action is not sufficient to subject a defendant to the jurisdiction of the court under the Due Process Clause of the Fourteenth Amendment. The effect of this decision was to eliminate the use of attachment for the purpose of asserting quasi in rem jurisdiction in the absence of "minimum contacts" among the defendant, the forum state, and the litigation. *Shaffer* represents an extension of the doctrine of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), from in personam jurisdiction to in rem jurisdiction.

¹⁶ Kahale, *supra* note 14, at 215; see HOUSE REPORT, *supra* note 2, at 8.

¹⁷ 28 U.S.C. § 1608 (1976) provides for separate service of process procedures for a foreign state and for an agency or instrumentality of a foreign state. The section provides in part:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

The Act proscribes attachment as a means of commencing a lawsuit by establishing, in section 1609, the general rule that a foreign state's property located in the United States is immune from attachment arrest and execution, subject to exceptions provided in sections 1610 and 1611.¹⁸ Section 1610 permits, under certain conditions, execution of judgment and pre-judgment attachment to secure satisfaction of judgment that may be entered in the future.¹⁹ Section 1611 provides exemptions for certain types of foreign state property from attachment or execution.²⁰ No exception is provided in sections 1610 or 1611 for attachments for jurisdictional purposes.²¹

The force of the FSIA's policy against jurisdictional attachments is reflected in a provision governing suits in admiralty, where jurisdictional attachments had been used to bring actions to enforce maritime liens against vessels owned by foreign states.²² Section 1605(b) requires in such maritime lien cases that the plaintiff serve notice of the suit to the person in possession of the foreign-sovereign-owned vessel or his agent.²³ Notice to the foreign state is also required in order to establish an in personam claim against the state.²⁴ If the plaintiff obtains an arrest of the vessel or cargo pursuant to process, the Act provides as a sanction that the plaintiff loses the right to obtain thereafter an in personam remedy to enforce the lien.²⁵ Only when the plaintiff was una-

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

¹⁸ Section 1609 reads:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

¹⁹ See text accompanying notes 38-47 *infra*.

²⁰ 28 U.S.C. § 1611 (1976) provides for immunity from execution against property of organizations designated by the President as being entitled to privileges under the International Organizations Immunities Act; property of a foreign central bank or monetary authority, unless the bank or monetary authority has explicitly waived its immunity; and property used for a military activity that is of a military character or is under the control of a military authority.

²¹ See 28 U.S.C. §§ 1610-11 (1976).

²² See 1976 Hearings, *supra* note 4, at 97 (statement of Michael M. Cohen); see also Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L. J. 1009, 1014, 1021-22 (1979).

²³ 28 U.S.C. § 1605(b)(1) (1976).

²⁴ *Id.* § 1605(b)(2).

²⁵ *Id.* § 1605(b)(1); HOUSE REPORT, *supra* note 2, at 21. The requirement under this subsection that a party that secures a jurisdictional attachment lose its remedy was the subject of some criticism before the House subcommittee considering the bill. Written testimony submitted by the Committee on International Law of the Association of the Bar of the City of New York argued that this penalty was "draconian" in relation to the offense. The group stated:

ware that the vessel or cargo of a foreign state was involved is the arrest a permissible form of notice to the person in possession of the vessel.²⁶

Pre-Judgment Attachment for Security Purposes

The pre-FSIA law of sovereign immunity in the United States permitted pre-judgment attachment for the purpose of obtaining jurisdiction but not for the purpose of securing satisfaction of a judgment pending litigation.²⁷ Property that was attached to commence a lawsuit could not be sold in order to collect a judgment, since, prior to the Act, foreign state assets were immune from execution. Thus, it would have been fruitless for a court to order protective attachment.²⁸

The FSIA nearly reversed the law in this area. Jurisdictional at-

A provision calling for substantial punitive damages could equally deter without the arbitrary consequence of putting the plaintiff out of court. Indeed, a viable and perhaps preferable alternative could be the total elimination of arrest of state-owned vessels in maritime cases.

1976 Hearings, *supra* note 4, at 75 (written testimony from the Committee on International Law of the Association of the Bar of the City of New York).

²⁶ 28 U.S.C. § 1605(b)(1) (1976). Section 1605(b)(2) stipulates that the party who was unaware of the foreign state involvement must give notice to the foreign state in accordance with the service of process procedures of § 1608 within ten days of the date on which that party determined the existence of the foreign state's interest. *See also* note 17 *supra*.

A recent judicial opinion suggests that the scope of the exception for the party who was unaware of foreign states involvement is narrow. On the basis of the legislative history of the Act, Judge Young in *Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165 (D.Md. 1978), found that the exception is restricted to "rare cases" in which the party attaching the ship *could not reasonably have known* that the ship's owner was a foreign sovereign. Judge Young rejected the plaintiff's argument that because it did not in fact know of the foreign state's interest, the attachment was valid. The plaintiff, the court found, could have discovered the foreign state ownership, since several publications were readily available that would have shown such ownership. The judge held that the plaintiff had forfeited its in personam remedy for all time, as required under § 1605(b)(1). 462 F. Supp. at 1178.

²⁷ HOUSE REPORT, *supra* note 2, at 26.

In *Weilamann v. Chase Manhattan Bank*, 21 Misc.2d. 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959), the United States Attorney General submitted a letter from the Legal Adviser of the Department of State setting forth the official position as follows:

The Department always recognized the distinction between "immunity from jurisdiction" and "immunity from execution". The Department has maintained the view that under international law, property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit. . . .

The Department is of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment ensuing from the suit because, in the Department's view, under international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit.

Myers, *Contemporary Practice of the United States Relating to International Law*, 54 AM. J. INT'L L. 632, 643 (1960).

²⁸ *See* 1976 Hearings, *supra* note 4, at 31 (statement of Bruno A. Ristau).

attachments are no longer permitted, but a successful litigant under certain circumstances may execute against foreign state property.²⁹ The Act, however, does not substantially alter the rule of immunity with respect to pre-judgment attachments for security purposes.³⁰

The general principle of immunity from attachment, as provided in section 1609, has been interpreted to apply to pre-judgment attachment for purposes of securing payment of a judgment that may later be entered against a foreign sovereign.³¹ The only exception to this rule of immunity from protective attachments is embodied in section 1610(d), which provides that property of a foreign state used for a commercial activity³² in the United States shall not be immune from attachment prior to entry of judgment under two conditions.³³ First, the foreign state must have *explicitly* waived its immunity from pre-judgment attachment, notwithstanding any purported withdrawal of the waiver, except in accordance with the terms of the waiver.³⁴ Second, the purpose of the attachment must be to secure satisfaction of a judgment that may ultimately be entered against the foreign state, rather than to obtain jurisdiction.³⁵ The legislative history of the Act suggests that a waiver may be accomplished by the provisions of a treaty, a contract, or an official statement.³⁶

Post-Judgment Attachment for Purposes of Execution

In place of the former rule of absolute immunity from execution,

²⁹ See text accompanying notes 38-50 *infra*.

³⁰ See 28 U.S.C. § 1610 (Supp. I 1976).

³¹ *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 391 (D.N.J. 1979); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979).

³² 28 U.S.C. § 1603(d) (1976) provides the definition of "commercial activity":

A "commercial activity" means 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.

³³ *Id.* § 1610(d).

³⁴ *Id.* § 1610(d)(1).

³⁵ *Id.* § 1610(d)(2).

³⁶ HOUSE REPORT, *supra* note 2, at 28. The report's analysis of § 1610(a)(1), which permits execution against property of a foreign state upon explicit or implied waiver of immunity, states: "A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution."

Although the Committee's discussion of the various means of providing waiver apply to post-judgment attachment, immunity from pre-judgment attachment presumably could be waived by these methods as well, so long as the waiver is explicit, as required under § 1610(d). A treaty, contract or official statement might provide the basis for an explicit waiver. The fourth means of creating a waiver—"steps taken by the foreign state in the proceeding"—appears, however, more likely to be a source of implied waiver than of explicit waiver.

the Act restricts executorial immunity by providing exceptions to immunity in section 1610.³⁷ Section 1610(a) enumerates the conditions under which property in the United States of a foreign state may be subject to attachment in aid of execution or to execution once a judgment has been entered.³⁸ Execution is permitted only if the property of the foreign state is used for a commercial activity in the United States.³⁹ Such property is subject to execution if either: (1) the foreign state has waived its immunity from execution either explicitly or implicitly;⁴⁰ (2) the property is or was used for the commercial activity upon which the claim is based;⁴¹ (3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law;⁴² (4) the execution relates to a judgment establishing rights in property which is acquired by succession or gift, or which is immovable and situated in the United States, provided that the prop-

³⁷ 28 U.S.C. § 1610 (1976). The trend in international law is toward applying the restrictive theory of immunity to execution as well as jurisdiction. HOUSE REPORT, *supra* note 2, at 27. One commentator stated before the FSIA's enactment:

Recent research in the field shows only the United States and the United Kingdom as actively supporting the doctrine of absolute sovereign immunity from execution, whereas Belgium, France, Italy, Netherlands, Egypt, Czechoslovakia, Greece, Switzerland, and the U.S.S.R. seem to support the amenability of government property to attachment in aid of a judgment.

Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 120 (1961).

Another study, however, found that some nations that give their courts authority to execute place various restrictions on this power, such as requiring authorization by another branch of government. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 241-42 (1951).

³⁸ 28 U.S.C. § 1610(a) (1976). The FSIA itself does not specify procedures for execution of a judgment. The House Report analyzing the bill cites Rule 69 of the Federal Rules of Civil Procedure as the controlling authority. HOUSE REPORT, *supra* note 2, at 28.

Rule 69 provides in part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

FED. R. CIV. P. 69.

Rule 69 brings about the application of state execution laws. The applicability of varying state procedures for judgment enforcement arguably conflicts with the general goal of the Act—uniform treatment of foreign sovereigns. See Note, *The Problem of Execution Uniformity Under the Foreign Sovereign Immunities Act of 1976 and Federal Rule of Civil Procedure 69*, 12 VAL. U.L. REV. 569, 598-99 (1978).

³⁹ For the definition of "commercial activity", see note 32 *supra*.

⁴⁰ 28 U.S.C. § 1610(a)(1) (1976).

⁴¹ *Id.* § 1610(a)(2).

⁴² *Id.* § 1610(a)(3).

erty is not used for diplomatic purposes;⁴³ or (5) the property consists of any contractual obligation or proceeds from such contractual obligation to indemnify the foreign state under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.⁴⁴

For purposes of the exceptions to immunity from execution, the Act differentiates between property of a foreign state and property of an agency or instrumentality of a foreign state.⁴⁵ Section 1610(b) provides for a lower barrier of immunity in the case of an agency or instrumentality engaged in a commercial activity in the United States than in the case of a foreign state.⁴⁶ The major difference in the treatment of these two classes is that execution against foreign state assets is valid only if the property is used for a commercial activity, whereas a levy upon property of an agency or instrumentality is allowed regardless of whether the property is commercial in nature.⁴⁷ The section 1610(a) exceptions to executional immunity listed above apply to agencies or instrumentalities of a foreign state as well as to the foreign state itself.⁴⁸ In addition, execution is permitted if the agency or instrumentality of the foreign state has explicitly or implicitly waived its immunity or if the judgment relates to a claim for which the agency or instrumentality is not immune under the Act.⁴⁹ The property is subject to execution regardless of whether the property was used for the activity upon which the claim giving rise to the judgment was based.⁵⁰

Before ordering execution, a court⁵¹ is required under section 1610(c) to determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, follow-

⁴³ *Id.* § 1610(a)(4).

⁴⁴ *Id.* § 1610(a)(5).

⁴⁵ For definitions of "foreign state" and of "agency or instrumentality of foreign state," see note 3 *supra*.

⁴⁶ The FSIA's establishment of different standards for purposes of execution as between foreign states on the one hand and their agencies or instrumentalities on the other hand is artificial. One commentator pointed out that the state itself determines whether a task is to be performed by an "independent" agency or by a department of the government. See Note, *Immunity of Foreign Sovereigns*, 6 N.Y.U. J. INT'L L. & POL. 473, 493 (1973).

⁴⁷ HOUSE REPORT, *supra* note 2, at 29.

⁴⁸ 28 U.S.C. § 1610(a) (1976).

⁴⁹ *Id.* § 1610(b).

⁵⁰ *Id.* § 1610(b)(2).

⁵¹ The HOUSE REPORT, *supra* note 2, at 30, states that the statute allows only a court to issue an order for attachment of foreign sovereign property. The report notes that some jurisdictions permit attachment to be accomplished simply by applying to a clerk or sheriff. Such a procedure would not afford sufficient protection to a foreign state, the report states.

ing notice of the judgment to the foreign state.⁵² The House Report notes that this subsection contemplates that the courts will exercise discretion in permitting execution. The report states:

In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representation by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.⁵³

Under section 1610(d), a court may order attachment of foreign state assets prior to the lapse of the "reasonable period of time," required under section 1610(c), only upon the explicit waiver of immunity on the part of the foreign state.⁵⁴

EFFECTS AND IMPLICATIONS OF ATTACHMENT PROVISIONS

Foreign Relations

One of the major policies underlying the FSIA is that of deference to foreign states. This policy is based on a desire to prevent, as a side effect of bringing the foreign sovereign under the personal jurisdiction of a United States court, strained relations between the United States and the defendant foreign state.⁵⁵ The policy of deference is also based on an expectation that a foreign state will reciprocate if the United States is brought within its jurisdiction.⁵⁶ These foreign policy goals are reflected in the prohibition of pre-judgment attachment for purposes of jurisdiction and security, except, in the latter case, upon the explicit waiver of the foreign state.⁵⁷

There are a number of reasons for the Act's strict limitations on the use of pre-judgment attachment. The House Committee Report

⁵² Section 1610(c) reads:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of the chapter.

⁵³ HOUSE REPORT, *supra* note 2, at 30.

⁵⁴ 28 U.S.C. § 1610(d) (1976).

⁵⁵ See HOUSE REPORT, *supra* note 2, at 27. The potential for strained relations was particularly acute in cases of attachment. In addition to the irritation created, jurisdictional attachments were a source of embarrassment to the State Department. The department was placed in the sensitive position of considering requests for immunity on the part of foreign states protesting the attachment. Kahale, *supra* note 14, at 215.

⁵⁶ See 1976 Hearings, *supra* note 4, at 62 (statement of Michael H. Cardozo), 97 (statement of Michael M. Cohen).

⁵⁷ See text accompanying notes 17-36 *supra*.

characterized attachment for jurisdictional purposes as a "shotgun approach" that irritated many foreign governments.⁵⁸ Jurisdictional attachment may immobilize foreign sovereign assets located in the United States from the time at which the suit is initiated until the time any judgment the court renders is satisfied.⁵⁹ In some cases, foreign governments have been faced with attachments of a number of different assets in various parts of the United States.⁶⁰ Having property tied up for an indefinite period of time may interfere with the orderly functioning of foreign offices of the government and with the payment of debts.⁶¹ These potential hardships may provide the foreign state with an incentive to place its monetary reserves in a country that does not permit attachment, a move that would hinder United States domestic business as well as international trade.⁶²

Judgment Satisfaction

The extent to which the Act protects sensitive international relationships is limited by the competing statutory objective of ensuring satisfaction of judgments obtained by private litigants. The FSIA's grant of power to the judiciary to enforce execution represents a major benefit to parties who have successfully litigated the merits of a claim against a foreign state. The private sector lobbied strongly in favor of the section 1610 provisions restricting immunity from execution.⁶³ American business interests were concerned about hardships potentially facing private litigants seeking to collect judgments from recalcitrant foreign states.⁶⁴ Under pre-FSIA law, a private party could obtain jurisdiction over a foreign state and overcome a defense of sovereign immunity in a commercial action and yet have no means to sat-

⁵⁸ HOUSE REPORT, *supra* note 2, at 27.

⁵⁹ Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 443 (1977).

⁶⁰ HOUSE REPORT, *supra* note 2, at 27.

⁶¹ Note, *Immunity of Foreign Sovereigns*, 6 N.Y.U.J. INT'L L. & POL. 473, 496 (1973).

⁶² *Id.*

⁶³ 1976 *Hearings*, *supra* note 4, at 58-59 (statement of Peter M. Trooboff), 68 (statement of International Law and Transactions Division of the District of Columbia Bar), 73 (written testimony of Committee on International Law of the Association of the Bar of the City of New York), 85 (statement of Cecil J. Olmstead). The House subcommittee heard favorable testimony concerning the provisions for enforceable execution from representatives of such groups as the American Bar Association, the District of Columbia Bar, the Association of the Bar of the City of New York, and the Rule of Law Committee. The latter is an organization comprised of attorneys and other representatives of American companies engaged in foreign commerce and investment. *Id.* at 79 (statement of Cecil J. Olmstead).

⁶⁴ *Id.* at 81 (statement of Cecil J. Olmstead).

isfy its judgment, unless the foreign state voluntarily paid.⁶⁵

Some commentators have suggested that the value of the provision permitting compulsory executions is diminished in light of the absence of any mechanism for protective attachment of assets without the explicit waiver of the foreign state.⁶⁶ Despite the congressional goal of judgment satisfaction, as represented by section 1610, the Act allows the foreign sovereign to dissipate or to remove its property from the jurisdiction of the court in order to avoid payment of a judgment that may later be entered.⁶⁷

The flight of foreign state assets during litigation was not a risk prior to the enactment of the FSIA for two reasons.⁶⁸ First, since property of the state was generally attached in order to obtain jurisdiction, such property could not be removed pending litigation.⁶⁹ Second, even if property was not attached for jurisdictional purposes, a foreign state would have no reason to remove its assets, since the principle of executorial immunity allowed a foreign government to avoid a judgment simply by refusing to pay.⁷⁰

The FSIA's barriers to attachment for jurisdictional and security purposes were criticized by several private bar groups at the time the legislation was under consideration in Congress.⁷¹ One group testifying before the House subcommittee considering the bill noted that a foreign state as a plaintiff could, under general procedural rules, secure pre-judgment attachment for security purposes against a private de-

⁶⁵ See note 27 *supra*.

⁶⁶ Atkeson, Perkins, & Wyath, *H.R. 11315—The Revised State-Justice Bill of Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 298, 308 (1976).

⁶⁷ *Id.*

⁶⁸ 1976 Hearings, *supra* note 4, at 84 (statement of Cecil J. Olmstead).

⁶⁹ *Id.*

⁷⁰ See note 27 *supra*.

⁷¹ The Committee on International Law of the Association of the Bar of the City of New York stated in written testimony to the House subcommittee that it was "uncomfortable" with the elimination of provisional remedies, even though it supported the bill as a whole. The Committee suggested that the statute be amended if experience indicates that removal of assets to frustrate judgments is a problem. 1976 Hearings, *supra* note 4, at 76 (written testimony of Committee on International Law of the Association of the Bar of the City of New York). The Rule of Law Committee also expressed the opinion that a future amendment may be necessary. *Id.*

A representative of the Maritime Law Association, an organization of admiralty lawyers, told the House subcommittee that the elimination of pre-judgment attachment and arrest remedies was the only material disadvantage of the bill. *Id.* at 97 (statement of Michael M. Cohen). In part, the Association's objections were based on a perception that there were no effective means for making service of process upon a foreign state. *Id.* at 96. A minority of the maritime bar group also criticized the bill on the ground that pre-judgment attachment is sometimes necessary as a method of assuring satisfaction of a judgment. *Id.* at 98. Although the group as a whole endorsed the legislation, the minority of members who favored protective attachments withheld their support of the bill, since they wanted further time to study it. *Id.*

fendant, even though a private plaintiff could not obtain this remedy against a foreign state.⁷² A spokesman for the Maritime Law Association testified that a minority of its members felt that the risk of flight of assets would be particularly serious in cases where a foreign state has property in the United States only infrequently.⁷³ This minority contended that by defaulting in litigation and leaving no property against which a judgment could be executed, such countries could conduct business in the United States without the fear of having their property immobilized.⁷⁴

Although the elimination of pre-judgment attachment has been criticized, cases involving intentional removal of assets prior to a judgment ordinarily do not arise because of several pragmatic factors. The state may have a variety of assets located in the United States, some of them difficult to liquidate or remove.⁷⁵ Because the United States is an international commercial center, instances in which a foreign state has no property in the United States would be rare.⁷⁶ Moreover, states often find that the benefits of good commercial and diplomatic relations with the United States provide a sufficient incentive to satisfy a valid judgment, so long as the state has had a fair opportunity to litigate the merits.⁷⁷

⁷² *Id.* at 81 (statement of Cecil J. Olmstead).

⁷³ *Id.* at 98 (statement of Michael M. Cohen).

⁷⁴ *Id.*

⁷⁵ For the comments of Judge Duffy in *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979), about the risk of flight of Iranian assets from the United States, see text accompanying notes 114-16 *infra*. It should be noted that Judge Duffy's opinion was handed down September 27, 1979, prior to the seizure of American hostages in Iran and President Carter's Executive Order 12170, freezing Iranian assets in the United States. N.Y. Times, Nov. 15, 1979, § 1, at 1, col. 3.

⁷⁶ Michael Cohen, chairman of the Committee on Maritime Legislation of the Maritime Law Association, said in House testimony that cases in which a foreign state has no property in the United States are probably rare. He also noted that even though foreign states in some cases have defaulted, *Kane v. Union of Soviet Socialist Republics*, 267 F. Supp. 709, 712 (E.D. Pa. 1967), or have run away from judgments, *Rich v. Naviera Vacuba S.A.*, 295 F.2d. 24, 25 (4th Cir. 1961), such instances are also rare. 1976 *Hearings, supra* note 4, at 99 (statement of Michael M. Cohen).

In *Kane*, the Soviet Union and a Soviet shipping company defaulted in a personal injury case and resisted efforts by the plaintiff to collect the judgment. 267 F. Supp. at 712. The defendants failed to respond to requests for payment on the part of the State Department as well. *Id.* In *Rich*, the Republic of Cuba revoked its previous waiver of immunity and refused to pay a consent judgment recovered by two longshoremen. 295 F.2d. at 25. The State Department accepted Cuba's assertion of sovereign immunity, and the court held that it was bound to defer to the State Department's determination. *Id.*

⁷⁷ With respect to the problem of failure to pay judgments against a foreign state, one commentator notes:

Foreign governments engaged in borrowing, purchasing, chartering ships and trading can and often do resist litigation arising out of these activities. But once a judgment is obtained. . . it seems likely that the governments will pay, rather than default on a final judg-

Although these factors may deter most foreign governments from avoiding judgments through the removal of assets, such actions may occur in exceptional circumstances, particularly where political tensions exist between the United States and a foreign nation. In the midst of the 1979 hostage crisis at the United States Embassy in Iran, Iran reportedly planned to transfer its funds that were deposited in American banks to other countries.⁷⁸ In response, President Carter ordered a freeze on official Iranian assets located in the United States⁷⁹ to ensure that financial claims against Iran could be satisfied.⁸⁰

As the Iranian matter illustrates, the disruption of sensitive political relations may precipitate a large-scale withdrawal of assets with the intent, or at least the effect, of frustrating claims against the foreign nation. Even though such cases are rare, the potential harm to private claimants is substantial.⁸¹ By failing to provide for pre-judgment attachment, except in cases of explicit waiver, the Foreign Sovereign Immunities Act inadequately protects against the flight of assets in such circumstances.

One commentator has suggested that courts may have discretion under the FSIA to determine whether a sovereign has waived its immu-

ment. A combination of commercial and diplomatic pressure would probably induce governments that have an interest in maintaining good commercial reputations in the United States and good diplomatic relations with this country to pay judgments that have become final after due notice and full opportunity to contest on the merits. Those countries that do not care about their commercial reputation in the United States and have no diplomatic goodwill to protect—e.g. the Castro government in Cuba—are not likely to be caught by an attachment of property either, except on a highly sporadic basis.

Lowenfeld, *Claims Against Foreign States—A Proposal for Reforms of United States Law*, 44 N.Y.U. L. REV. 901, 928-29 (1969).

⁷⁸ N.Y. Times, Nov. 15, 1979, § 1, at 1, col. 3.

⁷⁹ *Id.* The freeze order, Executive Order 12170, 44 Fed. Reg. 65,729 (1979), and the Iranian Assets Control Regulations, 44 Fed. Reg. 65956, 65988, 66832, 67617 (1979) (amending 31 C.F.R. § 5 (1978)), block assets of entities owned or controlled by the government of Iran, such as nationalized businesses, as well as purely governmental assets.

⁸⁰ N.Y. Times, Nov. 15, 1979 § 1, at 1, col. 3.

⁸¹ Despite the existence of the freeze order, the concern among private claimants that Iran may remove its assets from the United States in the future remains. An estimated 200 claims against Iran are currently pending in the United States district courts. 305 U.S. EXPORTS WEEKLY (BNA), at C-1 (April 29, 1980). The types of cases include bank loan defaults, trade creditor matters, and expropriation of property. 302 U.S. EXPORTS WEEKLY (BNA), at C-1 (April 8, 1980). The claimants fear that the United States government may rescind the freeze order as part of an agreement to secure the release of the American hostages or to improve relations with Iran. Legal Times of Washington, Feb. 25, 1980, at 10. Because Iran would be free to remove its funds if the freeze order is lifted, the need for pre-judgment attachment for security purposes might arise. Consequently, a central issue in the pending cases against Iran is expected to be the validity of pre-judgment attachment under the Immunities Act. 302 U. S. EXPORTS WEEKLY (BNA), at C-1 (April 8, 1980).

nity from pre-judgment attachment.⁸² He predicted that where the risk of frustration of judgment appeared particularly great, a court may be more willing to find a waiver of immunity in order to prevent the removal of property which would otherwise be subject to execution.⁸³ As will be subsequently demonstrated, however, the suggestion that courts may have the authority to use an implied waiver of immunity from protective attachment as a vehicle for reducing the risk of the flight of assets is of dubious validity under the letter as well as the policy of the Act.

IMPLIED WAIVER OF PRE-JUDGMENT ATTACHMENT IMMUNITY BY INTERNATIONAL AGREEMENT

The FSIA provides different standards for determining the validity of waivers for pre-judgment attachment and for post-judgment attachment in aid of execution. While a waiver of immunity from pre-judgment attachment must be explicit under section 1610(d),⁸⁴ a waiver of immunity from execution may be either explicit or implicit under section 1610(a).⁸⁵ This difference in the waiver standard suggests that Congress viewed pre-judgment levies as unduly burdensome to foreign states when compared with post-judgment attachments.⁸⁶

The statute provides two routes through which a foreign state may waive its immunity from pre-judgment attachment. First, the state may explicitly waive immunity under section 1610(d). Second, section 1609 specifies that the provisions of the Act relating to attachment and execution are subject to modification by international agreements entered into prior to the passage of the Act.⁸⁷ Many treaties of friendship, commerce and navigation to which the United States is a party provide for waiver of immunity from the jurisdiction of the courts of party states and from execution of judgment.⁸⁸ Thus, a waiver of immunity from pre-judgment attachment provided by a treaty would constitute an in-

⁸² Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 450-51 (1977).

⁸³ *Id.*

⁸⁴ 28 U.S.C. § 1610(d)(1) (1976).

⁸⁵ *Id.* § 1610(a)(1).

⁸⁶ *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979).

⁸⁷ 28 U.S.C. § 1609(1976) states that the general principle of immunity from attachment of the property of foreign states and the exceptions provided in §§ 1610 and 1611 are subject to existing international agreements to which the United States is a party.

⁸⁸ *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. XVIII, para. 3, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan art. XVIII, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863.

dependent basis upon which a court could order attachment of foreign sovereign assets prior to entry of judgment.⁸⁹

The savings clause in section 1609 and the explicit waiver provision of 1610(d), when taken together, however, create a serious ambiguity within the statute. The Act is silent as to whether an implied waiver contained in a treaty would be sufficient under section 1609 to subject the foreign state's property to pre-judgment attachment, even though an implied waiver is not sufficient under section 1610(d).

Two recent federal district court decisions illustrate the tension resulting from the statute's silence on the issue of implied waiver created by treaty. In *Behring International, Inc. v. Imperial Iranian Air Force*,⁹⁰ Federal District Court Judge Fisher interpreted section 1609 as permitting pre-judgment attachment on the basis of an implied waiver contained in an international agreement notwithstanding the requirement of section 1610(d) that a waiver of immunity from pre-judgment attachment be explicit.

In *Behring*, the plaintiff petitioned the district court for a writ of attachment of property of the Islamic Republic Iranian Air Force (IRIAF) to secure the plaintiff's claim.⁹¹ IRIAF, an agency of the Iranian government within the meaning of the Act,⁹² argued that its property was immune from attachment prior to judgment under section 1610(d).⁹³ The *Behring* case was complicated by the existence of the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran (Treaty of Amity), an agreement entered into in 1955.⁹⁴ The treaty provides:

⁸⁹ *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 394 (D.N.J. 1979); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724, 728 (S.D.N.Y. 1979). The importance of the questions of treaty and statutory construction raised in these decisions was pointed out by Georges R. Delaume in *United States Foreign Sovereign Immunities Act and Prejudgment Attachment*, 18 INT'L LEGAL MAT'LS 1369 (1979), in which both the *Behring* and *Reading* opinions were reprinted.

⁹⁰ 475 F. Supp. 383 (D.N.J. 1979).

In *Behring*, the plaintiff, Behring International Inc., had entered into a contract with the Imperial Iranian Air Force (IAF) in 1975 under which Behring agreed to perform freight forwarding services in regard to IAF goods being shipped to Iran. In January 1979, at the height of the political turmoil leading to the revolution in Iran, business between the two parties was terminated. Behring sought payment for freight services rendered under the contract amounting to \$390,494 but the IAF, and later its successor, the Islamic Republic Iranian Air Force, refused to comply.

⁹¹ *Id.* at 387.

⁹² For the statutory definition of "agency", see note 3 *supra*.

⁹³ 475 F. Supp. 383, 388 (D.N.J. 1979).

⁹⁴ Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter cited as Treaty of Amity]. The court assumed that the Treaty remained valid despite the Iranian revolution. 475 F. Supp. at 390 n.19.

No enterprise of either High Contracting Party, including . . . government agencies and instrumentalities . . . 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.⁹⁵

While this treaty provides a waiver of immunity from suit and from execution of judgment, it does not by its terms deal with immunity from pre-judgment attachment. Consequently, Judge Fisher ruled that this provision of the Treaty of Amity did not constitute an explicit waiver of immunity from pre-judgment attachment, as required by section 1610(d).⁹⁶ Judge Fisher concluded, however, that this treaty clause constitutes an implied waiver of pre-judgment attachment immunity.⁹⁷ Applying "ordinary principles of construction," he found that the language "other liability to which privately owned and controlled enterprises are subject therein" indicates that the preceding language, citing specific forms of liability, was used for the purpose of illustration rather than limitation.⁹⁸ Moreover, he noted that the treaty shows an intent to place the sovereign parties on the same footing as private parties in the other country's courts.⁹⁹ As the court pointed out, pre-judgment attachment may be used as a remedy in cases involving private parties.¹⁰⁰

In light of this construction of the Treaty of Amity, Judge Fisher found it necessary to examine the effect of the FSIA on the terms of the treaty. He rejected the Iranian Air Force's argument that the FSIA's prohibition of protective attachment absent explicit waiver precluded judicial recognition of any implied waiver contained in a treaty prior to passage of the Foreign Sovereign Immunities Act.¹⁰¹ Judge Fisher determined that the section 1610(d) requirement of an explicit waiver

⁹⁵ Treaty of Amity, *supra* note 94, art. XI, para. 4 (emphasis added).

⁹⁶ 475 F. Supp. 383, 393 (D.N.J. 1979). In a subsequent case also involving the Treaty of Amity, a court found that the treaty provides an explicit waiver of immunity from jurisdiction of United States courts within the meaning of § 1605(a)(1). *Electronic Data Sys. Corp. v. Social Security Organization of Iran*, No. CA3-79-218-F (N.D. Tex. June 21, 1979) (memorandum opinion granting preliminary injunction). This opinion is not inconsistent with *Behring's* interpretation of the treaty. The issue in *Electronic Data* was waiver of immunity from suit, which is specifically provided in the treaty as a form of immunity that is waived. The treaty does not, however, specifically state that pre-judgment attachment immunity is waived. For this reason, Judge Fisher in *Behring* found no explicit waiver of pre-judgment attachment immunity within the meaning of § 1610(d). 475 F. Supp. at 393.

⁹⁷ 475 F. Supp. at 393.

⁹⁸ *Id.* at 395.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

does not in any way limit the savings clause in section 1609, which preserves the terms of the Treaty of Amity.¹⁰² Moreover, he found that the Act should not control the construction of prior treaties.¹⁰³

The FSIA, he reasoned, represents a source of substantive law and not of treaty construction principles.¹⁰⁴ He stated that the Act does not "require the drafter of a 1955 treaty to anticipate the requirements of a law that will be passed twenty-one years later."¹⁰⁵ Because the court found the Treaty of Amity to be in full force and effect and because it discovered an implied waiver of immunity therein, the property of the Iranian Air Force was subjected to attachment prior to judgment.¹⁰⁶

In *Reading & Bates Corp. v. National Iranian Oil Co.*,¹⁰⁷ Judge Duffy took issue with Judge Fisher's view of the relationship between the Treaty of Amity and the FSIA.¹⁰⁸ In *Reading*, the court had granted an ex parte order of attachment, and the plaintiffs made a motion to confirm the attachment, as required under New York law.¹⁰⁹ The purpose of the attachment was to secure any judgment that might be rendered after consideration on the merits.¹¹⁰

The court held that the plaintiffs failed to meet their burden under a state statute of establishing the grounds for attachment, the need for a continuing levy, and the probability of success on the merits.¹¹¹ The plaintiffs contended that attachment was necessary to insure against the risk that Iran may cut off oil sales to the United States or require that its customers' payments be made outside the United States.¹¹² Such

¹⁰² *Id.* at 394.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Judge Fisher noted that his decision would be different if the waiver were contained in an ordinary commercial agreement, in which case the saving clause would not apply. Congress, he noted, chose to treat international agreements differently from commercial agreements. *Id.*

¹⁰⁷ 478 F. Supp. 724 (S.D.N.Y. 1979).

¹⁰⁸ In *Reading*, plaintiffs *Reading & Bates Corp.* and *Reading and Bates Exploration Co.* brought a motion to confirm the court's order of attachment of approximately \$26 million which the defendant, *National Iranian Oil Co. (NIOC)*, had deposited in New York banks.

The plaintiffs had entered into a three-year charter agreement with the *Oil Services Company of Iran (OSCO)* for use and operation of the plaintiff corporations' oil drilling rig in Iranian territorial waters. OSCO was concurrently under a service contract with NIOC. Pursuant to this agreement, OSCO was to conduct oil and gas exploration and drilling for NIOC, which was to provide funding for the performance of the service contract. The plaintiffs claimed that payments to it pursuant to the charter were stopped and the NIOC, as the "alter ego" of OSCO, refused to return the rig. The cause of action was based on unlawful taking and conversion. 478 F. Supp. at 725.

¹⁰⁹ N.Y. CIV. PRAC. LAW § 6223(b) (McKinney 1980).

¹¹⁰ 478 F. Supp. at 726.

¹¹¹ *Id.*

¹¹² *Id.* at 727.

events would reduce National Iranian Oil Co. (NIOC) assets in New York, they argued.¹¹³ Judge Duffy, however, discounted the possibility of removal of assets in this case.¹¹⁴ He noted that NIOC had some \$700 million on deposit with New York banking institutions and that the possibility of withdrawal of all these funds was too remote to justify continuing the pre-judgment attachment.¹¹⁵ Judge Duffy found that the plaintiffs had failed to establish sufficient insecurity of enforcement of a potential judgment to justify the harsh remedy of attachment.¹¹⁶

Even though Judge Duffy vacated the levy on grounds of state law, he proceeded to address the issue under the FSIA of the validity of the defendant's claim that it was immune from pre-judgment attachment.¹¹⁷ NIOC was found to be an agency of a foreign state covered under the FSIA.¹¹⁸ As in *Behring*, the plaintiffs' sole basis for claiming that the defendant waived its immunity from pre-judgment attachment was the Treaty of Amity between the United States and Iran.¹¹⁹ Judge Duffy rejected, however, the plaintiffs' contention that an implied waiver by treaty supersedes the section 1610(d) requirement that a waiver be explicit.¹²⁰ He gave weight to the different waiver standards that the Act establishes for pre-judgment attachment and for post-judgment attachment.¹²¹ Judge Duffy inferred that Congress intended that waiver of pre-judgment attachment immunity should not be lightly implied because it considered such attachments as potentially more harassing than post-judgment attachments.¹²²

Judge Duffy acknowledged that the strict rules of construction do not require that the FSIA be binding on the interpretation of the Treaty of Amity.¹²³ Nonetheless, he stated that, in the interest of consistent policy, a waiver of pre-judgment attachment immunity should be explicit, even if it is accomplished by treaty.¹²⁴

Although both the *Behring* and *Reading* courts raise valid arguments in their respective attempts to resolve the ambiguity underlying the statute, the result in *Behring* appears to be inconsistent with con-

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 728.

¹¹⁸ See note 3 *supra*.

¹¹⁹ 478 F. Supp. at 728.

¹²⁰ *Id.*

¹²¹ See text accompanying notes 84-86 *supra*.

¹²² 478 F. Supp. at 728.

¹²³ *Id.* at 729.

¹²⁴ *Id.*

gressional intent. While there is little legislative history interpreting the international agreement savings clause of section 1609, the House Report's analysis of a parallel clause in section 1604 relating to jurisdictional immunity offers some guidance.¹²⁵ The House Report addresses the general question of conflict between treaties and the statute:

In the event an international agreement *expressly* conflicts with this bill, the international agreement would control 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*.¹²⁶

This statement seems to indicate an intent on the part of the House committee to avoid conflicts between a treaty and the statute so long as the treaty can reasonably be interpreted consistently with the Act. Although Congress intended to preserve existing international agreements, it apparently sought to prevent courts from using treaties as a means of overriding the objectives of the statute absent a clear conflict between the two.¹²⁷

As Judge Fisher conceded in *Behring*, the Treaty of Amity does

¹²⁵ The wording of the savings clause of section 1604, which provides for immunity from jurisdiction subject to existing international agreements, is identical to the corresponding clause of section 1609.

¹²⁶ HOUSE REPORT, *supra* note 2, at 17-18.

One commentary has raised the question of whether the FSIA was intended to be interpretive of existing treaty provisions in cases where the treaty arguably is less restrictive of immunity than the Act but where the treaty is subject to differing interpretations. As an example, the writers cite provisions contained in United States treaties with both Japan and Germany stating that the restrictive principle of immunity applies to "corporations, associations, and government agencies and instrumentalities" engaged in commercial activities. The commentators noted that since the clause lacks any reference to governments or political subdivisions engaged in commercial activities, the treaty is subject to the interpretation that such entities are granted immunity, under the principle of *inclusio unius, exclusio alterum* (the expression of one thing excludes another). The commentators found that the statute is unclear as to whether the savings clause of section 1604 would permit this treaty to control over the provision of the Act that denies immunity to a foreign state, or its political subdivision, engaged in a commercial activity—§ 1605(a)(2). Atkeson, *supra* note 66, at 309.

The legislative history cited in the text appears to provide an answer to these commentators' specific illustration. Since that treaty fails to state whether or not the immunity of governments and political subdivisions is restricted, the treaty is silent on this particular question of immunity. The House Report states the Act would control in such cases where there is no manifest conflict between the treaty and the Act. If, however, the treaty expressly provided that the states and their political subdivisions would be granted immunity, the legislative history suggests that the international agreement would control.

¹²⁷ Even though Congress did not intend that the FSIA abrogate existing treaties, Congress has the power to repeal or amend a treaty by statute if it chooses. The Supreme Court in *Chae Chan*

not provide an explicit waiver of immunity from pre-judgment attachment. While Judge Fisher's construction of the treaty is a reasonable one, the words "or other liability" at least leave room for doubt as to their meaning.¹²⁸ Thus, the conflict between the Treaty and the Act is hardly manifest. Even aside from the legislative history, it seems appropriate to construe vague words of a treaty in a way that avoids undermining the congressional policy, based on foreign relations concerns, of limiting resort to use of pre-judgment attachments.

RECOMMENDATION

As the preceding discussion suggests, the notion that waiver of immunity from pre-judgment attachment may be implied by treaty is subject to criticism both on policy and on statutory grounds. The suggestion here is not to ignore the statute's failure to provide protection against the risk that a foreign state will remove its assets from the United States in order to frustrate satisfaction of a judgment. The remedy to this problem, however, should be narrowly drawn so as not to undermine the foreign relations objectives of the Act.

The legislative history of the Act recognizes the risk of the flight of assets. The analysis of section 1610(c), which requires courts to order execution only after a reasonable period of time has elapsed after entry of judgment,¹²⁹ states that courts can exercise their discretion to order post-judgment attachment without delay where there is evidence that the state is about to remove its assets.¹³⁰ Courts, thus, should be able to order pre-judgment attachment, as well as post-judgment attachment, when it is necessary to ensure satisfaction of a judgment that may be

Ping v. United States, 130 U.S. 581 (1889), ruled that where there is a conflict between a treaty and a statute, the last expression of the sovereign controls.

The House Report's suggestion that courts construe treaties in a way that avoids conflicts with the statute is consistent with the policy of the Supreme Court in *Whitney v. Robertson*, 124 U.S. 190 (1888). Since treaties and legislative acts are equal under the Supremacy Clause, the opinion states that: "[T]he courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either. . . ." *Id.* at 194.

¹²⁸ In addition to his dispute with Judge Fisher concerning the relationship between the treaty and the statute, Judge Duffy in *Reading* also reached a contrary finding as to the meaning of the Treaty of Amity. Judge Duffy noted that the primary factor governing the construction of a treaty is the intent of the parties. He reasoned that if the parties had intended to create a waiver of immunity from pre-judgment attachment for security purposes, they would have been suggesting, in effect, that provisional remedies would be necessary in the future to ensure judgment satisfaction. Judge Duffy found it "hard to imagine" that a sovereign nation entering into a treaty to promote commerce would contemplate that it might evade a lawful judgment relating to its commercial activities. 478 F. Supp. at 729.

¹²⁹ 28 U.S.C. § 1610(c) (Supp. I 1979).

¹³⁰ HOUSE REPORT, *supra* note 2, at 30.

entered. Such a remedy would not constitute a return to the "shotgun approach" represented by jurisdictional attachments.¹³¹ Congress apparently intended to eliminate indiscriminate use of attachments that unnecessarily offend and inconvenience foreign states.¹³² The provisional remedy proposed here would be permitted only where evidence indicates an actual risk of flight of assets. In such cases, the interest of the plaintiff in judgment satisfaction would outweigh the interest of the foreign state.

The terms of the Act, however, simply do not provide courts with the power to order pre-judgment attachment, except upon explicit waiver. Given the limitations of the Act, the appropriate solution lies in legislative process. An amendment to the Act could provide the courts with explicit guidelines for determining whether there is sufficient evidence of exigent circumstances justifying pre-judgment attachment for security purposes. Such criteria would limit the discretion of courts in determining whether to order an attachment.

CONCLUSION

Suits against a foreign sovereign engaging in commercial activities generally are not likely to involve a serious risk of flight of assets prior to entry of judgment, since foreign states and their agencies have an incentive to maintain good commercial and diplomatic ties to the United States. The Foreign Sovereign Immunities Act lacks, however, a preventive mechanism to deal with those cases in which a foreign state entity that is less concerned with maintaining friendly relations seeks to evade an anticipated judgment. The FSIA has attempted to balance the somewhat conflicting goals of securing satisfaction of judgments against foreign states and of protecting sovereigns from undue compulsion and harassment. The Act has struck the balance by restricting immunity from post-judgment attachment but by preserving immunity from attachment prior to entry of judgment absent an explicit waiver. A construction of the statute that would allow courts to find an implied waiver contained in a treaty is an inappropriate remedy for the flight of assets problem, since such an interpretation is inconsistent with the policy of the Act. The risk of removal of foreign state assets should be addressed instead by amending the Act to allow courts to order pre-judgment attachment whenever the hazards are sufficiently great. It is unlikely, however, that courts would have to resort to the

¹³¹ *Id.* at 27.

¹³² *Id.*

device frequently. The existence of the power to use such a measure may in itself deter the flight of a foreign sovereign's assets.

Craig J. Hanson