**Berkeley Journal of International Law**

Volume 22 | Issue 3 Article 7

2004

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Jeremy Ostrander

Recommended Citation

Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgements*, 22 Berkeley J. Int'l Law. 541 (2004).
Available at: http://scholarship.law.berkeley.edu/bjil/vol22/iss3/7

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# The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments

By
Jeremy Ostrander*

## INTRODUCTION

The twentieth century has brought significant progress for plaintiffs seeking to recover against state defendants in U.S. courts. Indeed, given the development of the restrictive theory of sovereign immunity in the middle of the twentieth century,[1] one would expect a growing number of effective adjudications and subsequent executions of judgments against foreign states. Although there has been an increase in such suits against foreign states, particularly in the area of terrorist related tort actions in the United States,[2] successful claimants

* J.D., 2004, University of California, Berkeley (Boalt Hall). The author would like to thank Professor Richard Buxman for guiding the seminar that resulted in this work and articles editor Meridith Bentley for her excellent contributions.

1. The restrictive theory of sovereign immunity refers to the idea that foreign governments should not be able to claim a defense of sovereign immunity when a claim against them is based on private acts (*jure gestionis*) of the state. Up until the mid 1950s, the United States adhered to the absolute theory of sovereign immunity, which immunized almost all actions of foreign states from U.S. judicial scrutiny. *See* Schooner Exchange v. McFaddon, 7 Cranch 116 (1812). This immunity was extended to the property of a foreign government engaged in a commercial enterprise. Berizzi Bros. Co. v. Pesaro, 271 U.S. 562 (1926). Gradually, the Court relied more on the policy and practices of the State Department to determine whether immunity was appropriate. *See, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945) (finding no sovereign immunity where the state department failed to recognize such a claim). However, given the increasing involvement of government actors in commercial undertakings, the State Department in 1952 officially adopted the restrictive theory of immunity, bringing its practice into line with the majority of jurisdictions. *See* Letter from Jack Tate, Legal Advisor of U.S. Department of State to the Office of the Attorney General, 24 DEP'T OF STATE BULL. (1952). After the adoption of the restrictive theory, U.S. courts struggled to discern between the public and private acts of foreign states. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT'L L. 159, 165 (1996). This difficulty engendered the drafting and passage of the Foreign Sovereign Immunities Act.

2. Most readers will be familiar with the additions made to the foreign sovereign immunities regime by the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (codified at 28 U.S.C. § 1605(a)(7)). As a brief summary, the new exceptions allow for suit where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." The section allows for these type of actions only against states that are listed on the State Department's list of state sponsor's of terror-



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must eventually confront the rules of immunity from execution of judgments enshrined in the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] This article considers particular aspects of the immunity from execution enshrined in the FSIA, which either diverge from the common practice of states, or create unnecessarily restrictive barriers on execution. By reference to the treatment of these same problems in foreign jurisdictions, and under regimes created by international bodies such as the International Law Commission, the article identifies specific areas where improvement is necessary to construct a coherent regime of immunity from execution.

Before turning to a comparative review, one must turn to the structure of the FSIA itself. The statutory scheme set up by the FSIA essentially presents two barriers to successful litigation: the first, more often discussed and assailed in recent years, relates to the necessity of obtaining proper jurisdiction over a foreign state; the second, a stringent limitation on the property of foreign states that will be available for execution. These two barriers are constructed by the interplay of several sections of the FSIA, found in Title 28 of the United States Code, sections 1605-1611. The adjudicatory barrier can be found in sections 1605-1608, which establish a general rule of immunity and enumerated exceptions, the most important being the commercial activity exception of the restrictive theory.[4] The execution barrier is enumerated in sections 1609-1611.[5] This

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ism. § 1605(a)(7)(A). The list currently includes Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. *See* United States Department of State, Patterns of Global Terrorism: Overview of State Sponsored Terrorism, (Apr. 30, 2003), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19988.htm.

3. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (2000)) [hereinafter FSIA].

4. *See* FSIA, §§ 1604 (declaring the general rule of immunity from jurisdiction); 1605 (establishing general exceptions to immunity from adjudicative jurisdiction); 1606 (prohibiting punitive damages); 1607 (allowing for counterclaim jurisdiction over a foreign state); 1608 (establishing provisions for service and default judgments).

5. *See* FSIA, §§ 1609 (establishing the traditional rule of immunity from execution of judgments); 1610 (establishing general exceptions to immunity from execution); 1611 (excepting specific types of property from execution). Since these provisions will be referred to continuously, the full text of the relevant portions is as follows:

> § 1609. Immunity from attachment and execution of property of a foreign state
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] 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.
> § 1610. Exceptions to the immunity from attachment or execution.
> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or
> (2) the property is or was used for the commercial activity upon which the claim is based, or
> . . .

article undertakes an analysis of how the application and interpretation of the latter sections results in, as one circuit court has acknowledged, an adjudicated "right without a remedy."[6]

In the United States, this set up has resulted in tortuous journeys for successful claimants against foreign states, the most famous being that of Stephen Flatow versus the Republic of Iran. Flatow's claim arose out of the death of his daughter in a terrorist bombing while she was visiting Israel.[7] Flatow alleged that the Government of Iran sponsored the bombing and, consequently, he brought suit in the District Court for the District of Columbia under section 1605(a)(7) of the FSIA. The court granted Flatow a default judgment against Iran in 1998 for $225 million.[8] This judgment consisted of approximately $25 million in compensatory damages and the balance in punitive damages.[9] Flatow subsequently attempted to execute this judgment against numerous properties of

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(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or
(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or
(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.
(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—
(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or
(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.
. . .
§ 1611. Certain types of property immune from execution
. . .
(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or
(2) the property is, or is intended to be, used in connection with a military activity and
(A) is of a military character, or
(B) is under the control of a military authority or defense agency.

6. Letelier v. Republic Of Chile, 748 F.2d 790, 798 (2d Cir. 1984).
7. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7-9 (D.D.C. 1998).
8. *Id.* at 34.
9. The punitive damages portion, which would normally be disallowed under FSIA § 1607, was specifically allowed for by Congress in actions brought under § 1605(a)(7). *See* 28 U.S.C. § 1605, statutory note. This note is commonly referred to as the "Flatow Amendment."

Iran, including an expired arbitration award,[10] the former embassy property of Iran in the United States,[11] and U.S. Treasury funds owed to Iran.[12] In October 2000, after all of these attempts failed, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA),[13] which afforded certain victims of terrorist attacks an opportunity to recover funds from the U.S. Government in lieu of execution against the property of the foreign state. The Act allowed for recovery of one hundred percent of compensatory damages, in exchange for relinquishment of all claims to punitive damages.[14] Even after taking advantage of this extraordinary action by the Congress, Flatow continued his attempts to execute the punitive damage portions of the judgment, without any success.[15]

In response to cases arising after Flatow's,[16] which are not explicitly covered by the backward-looking VTVPA, Congress has continued to make *ad hoc* alterations to the FSIA, section 1610 enforcement regime. In the case of *Roeder v. Islamic Republic of Iran*,[17] Congress attempted to allow execution of a judgment against the frozen assets of the Iranian government for actions arising out of the Iranian embassy hostage-taking from 1979 to 1981, even though Iran was not deemed a terrorist state under 1605(a)(7) when the acts took place.[18] Regardless of this attempt by Congress, the Roeders were denied a remedy under the general provisions of the Algiers Accords, which absolved all claims on the part of both the United States and Iran.[19]

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10. Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 28, 29 (D.D.C. 1999).

11. Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

12. Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999).

13. Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter VTVPA]. It should be noted that while Flatow did not receive any of his punitive damages claims under the VTVPA, at least one other frustrated plaintiff received an amount covering the entire compensatory award and some of the punitive award. *See* Christopher Marquis, *Families Win Cuban Money in Pilot's Case*, N.Y. TIMES, Feb. 14, 2001, at A1.

14. *See* VTVPA, § 2002(a).

15. *See* Flatow v. Islamic Republic of Iran, 305 F.3d 1249 (D.C. Cir. 2002) (refusing a claim to post-judgment interest on the punitive damages claim); Flatow v. Islamic Republic of Iran, 308 F.3d 1065 (9th Cir. 2001) (refusing execution against real estate owned by Iranian instrumentality).

16. A case of particular interest has been that relating to the death of Charles Hegna. *See* Sean Murphy, *Contemporary Practice of the United States Relating to International Law: 2002 Victims of Terrorism Law*, 97 A.J.I.L. 187 (2003). The Hegnas had presented an argument to the district court that the VTVPA, by distinguishing between two types of plaintiffs, those who had a final judgment as of July 20, 2000, and those who had not, violated the equal protection element of the Fifth Amendment. After upholding the government's arguments against this argument, Judge Henry Kennedy Jr. wrote a letter to Senate Majority Leader Tom Daschle, urging Congressional action that would allow Mrs. Hegna to recover on the $375 million judgment for the murder of her husband at the hands of Hezbollah terrorists during a hijacking. *Id.*

17. 195 F. Supp. 2d 140 (D.D.C. 2002).

18. In order to allow for jurisdiction over Iran in the *Roeder* case, Congress acted by making a specific fact based amendment section 1605(a)(7) allowing for jurisdiction over acts "related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia." Pub. L. 107-77, Title VI, § 626(c), 115 Stat. 803 (2001). Congress later amended the section again to correct a typo in the case number. Pub. L. 107-117, Div B, Ch. 2, § 208, 115 Stat. 2299 (2002).

19. *Roeder*, 195 F. Supp. at 184-85. For the Algiers Accords, see Declaration of the Government of the Democratic Republic of Algeria, 1 IRAN-U.S. CL. TRIB. REP. 3 (1981); Declaration of the Government of the Democratic Republic of Algeria Concerning the Settlement of Claims by the

Congress went one step further with the Terrorism Risk Insurance Act of 2002.[20] Under the provisions of that Act, successful plaintiffs may now execute judgments against frozen assets of terrorist states to the extent of compensatory damages, "[n]otwithstanding any other provision of law."[21] The President may still prevent the attachment of, or execution against, state property that is protected under an international treaty.[22]

The chronicle of Stephen Flatow, and the *ad hoc* Congressional splintering of immunity, reflects the hazards that execution of a judgment against a foreign sovereign can present and raises the question whether the structure of the FSIA as constituted should persist under the avalanche of terrorism related claims arising in U.S. courts. Indeed, there has been considerable discussion of altering the balance of deference to state property in recent years. The American Bar Association (ABA), in a broad discussion of amending the FSIA, was particularly acute in its criticisms of the execution portions of the Act,[23] finding them to be "among the most confusing and ineffectual in the statute."[24] Yet, the idea of a separate immunity from execution against sovereign assets has been long entrenched in international law.[25] Although the restrictive theory of sovereign immunity has expanded the reach of adjudicative jurisdiction quite liberally over time by allowing for claims against a state arising from commercial activities, *acta jure gestionis*, as opposed to sovereign activities, *acta jure imperii*, the principles of immunity from execution have been comparatively slow to evolve. Indeed, the International Law Commission (ILC), in promulgating its 1991 Draft Articles on the Jurisdictional Immunities of States and Their Property,[26] noted that the question of execution of judgments, because it arises only after successful litigation against a state party, presents the "last bastion of state immunity."[27] Yet, as with the national statutory regimes considered herein, the ILC's definition of execution immunity is quite broad, so much so that a judgment creditor will have "little hope . . . unless the state willingly consents."[28] Furthermore, the ILC has faced some criticism for the limited scope of its consider-

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Government of the United States and the government of the Islamic Republic of Iran, 1 IRAN-U.S. CL. TRIB. 9 (1981).

20. *See* Pub. L. No. 107-297, Title II, 116 Stat. 2322, 2337-40 (2002).

21. *Id.* § 201.

22. *Id.*

23. American Bar Association Working Group, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COL. J. TRANSNAT'L L. 489, 581-594 (2002) [hereinafter ABA Report].

24. *Id.* at 581.

25. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 346-47 (5th ed. 1998).

26. The Aricles themselves are contained in *Report on the Draft Articles on the Jurisdictional Immunities of States and Their Property*, U.N. Doc. A/46/10, *reprinted in* [1991] Y.B. INT'L L. COMM., Vol. II (2), at 17 [hereinafter ILC Draft Report]. They are also generally available on the ILC website. *See* The Draft Articles on Jurisdictional Immunities of States and Their Property (1991), *available at* http://www.un.org/law/ilc/texts/jimm.htm [hereinafter ILC Draft Articles].

27. *Id.* at 56.

28. M.P.A. Kindall, *Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission's Draft*, 75 CAL. L. REV. 1849, 1863 (1987) (noting the breadth of execution immunity in a draft of the Articles).

ation,[29] having left out some of the most difficult problems of immunity from execution. Over time, the ILC's course in considering the issue of execution immunity has become increasingly more fractured. Indeed, a recent proposal to rely on the "development of voluntary compliance regimes," which were to include mandatory grace periods for a state,[30] seems to avoid the more complex issues put before the ILC, including pre-judgment attachment and the nature of commercial property for the purposes of execution.

There are, of course, tenable arguments for maintaining the strong structure of execution immunity when confronted with the restrictive theory of adjudicative immunity. First, the very nature of a state debtor (or tortfeasor) transcends normal concerns of restitution, compensation, or contractual expectations; indeed, the funds of a foreign state are subject to an individual political mechanism to which other foreign states—out of a sense of comity and a prediction of reciprocity—should give great deference. Second, while the announcement of a judgment against a foreign sovereign implicates a fair measure of that state's dignity, the arrest of and execution against a foreign state's assets have much stronger potential to upset diplomatic relations. It should be noted that many of the disputes arising between a private party and a foreign state involve concerns arising from distinctly political disputes—the Iranian and Cuban expropriations after their respective revolutions, for instance—that necessitate the allowance of some claim for immunity and thereby remove conflict with foreign states from the judicial forum.

These issues will be returned to later in this note. The core, however, will consider the manifestation of immunity from execution of judgments within the provisions of the FSIA in light of the treatment of execution against sovereign states in foreign jurisdictions. As depicted in *Flatow* above, the U.S. enforcement regime is quite permissive in some cases of tort claims, but also can be quite restrictive as regards the classification of a foreign states commercial property. Common law jurisdictions, particularly the United Kingdom, offer an interesting view into the parallel development of the law of sovereign immunity since the passage of the FSIA twenty-seven years ago. The United Kingdom's State Immunity Act,[31] passed only two years after the FSIA, is substantially simpler as a textual matter than the American statute, but offers a developed framework and jurisprudence on principles of immunity from execution.

29. *See, e.g,* HAZEL FOX, THE LAW OF STATE IMMUNITY 244-250 (2002). *See generally* Kindall, *supra* note 28, at 1863-1872 (commenting on an early version of the Draft Articles). The draft code does not address many of the more troubling issues in the area of execution of judgment of sovereign states. In particular, it does not contain express provisions regarding pre-judgment attachment, although this is the center of the 2002 reconsideration of the draft code by an Ad Hoc Committee. *See Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, U.N. GAOR, 57th Sess., Supp. No. 22, Art. XY, at 10, U.N. Doc. A/57/22 [hereinafter ILC Ad Hoc Report].

30. *Report of the Working Group On Jurisdictional Immunities Of States And Their Property*, ILC Report, A/54/10, 1999, U.N. Doc. A/CN.4/L.576 [hereinafter ILC 1999 Report].

31. State Immunity Act, 1978 c. 33 (Butterworth's 2003) [hereinafter UKSIA].

Quander: The Last Bastion of Sovereign Immunity: A Comparative Look at Jurisdictional

Two relatively more recent immunity statues, the Canadian State Immunity Act[32] and the Australian Foreign Sovereign Immunities Act,[33] offer through their preparatory works an interesting theoretical development of the issue of immunity from execution. Given the relative size of the jurisdictions, there is not the magnitude of common law interpretation of these statutes as there is in the United States; however, they still offer an interesting counterpoint to what is essentially a restrictive U.S. regime. These statutory enactments, taken in conjunction with the publications of the ILC and principal cases taken from some civil law jurisdictions, particularly France and Germany, can be used to construct improvements to the FSIA. As a comparative analysis, this paper will lay out the statutory and judicial frameworks concerning execution of judgments from each jurisdiction. Each section will present how the FSIA deals with a set of issues and then comment on the treatment of those same issues in the foreign jurisdictions mentioned above.

Along these lines, part I addresses specific procedural concerns of immunity from execution, the nature of appropriate waivers of execution immunity, an issue of great import for tort plaintiffs, and the propriety of pre-judgment attachment. Part II addresses the substantive scope of execution immunity, with special reference to the nexus requirement and the treatment of tort and terrorism-based claims. Part III considers the scope of specific state property that will be available for execution by a successful plaintiff party, including issues of distinctly sovereign property, such as central bank assets, military property, and most controversially, the accounts and properties of diplomatic entities.

Finally, part IV takes all of these comparative considerations in hand to discuss the reform of the execution provisions of the FSIA with reference to the policy underlying the act and the growing pressure of litigation involving the FSIA. A number of possible solutions, some of which have been proposed in the ABA Report mentioned above, can be developed, or should be adopted from the practice of other states for the foreign sovereign immunity regime to function more effectively in the United States. This final section takes note of all of the possibilities and considers the impacts each would have on the plight of plaintiffs and defendant states in U.S. courts.

## I.
## PROCEDURAL CONCERNS OF THE FSIA

Under traditional regimes of sovereign immunity, a state can be found to have waived its right to immunity in foreign courts.[34] Under the FSIA, a state can waive its adjudicative immunity under section 1605. However, this waiver is not considered consent to execution against the sovereign state's property; it

32. State Immunity Act, R.S.C. 1985, ch. S-18, §§ 1-16 (Lexis 2003) [hereinafter CSIA].

33. Foreign Sovereign Immunities Act of 1985 (AUS), *reprinted in* 25 I.L.M. 715 (1986) [hereinafter ASIA].

34. *See* BROWNLIE, *supra* note 25, at 343. A similar principle holds within the federal system of the United States. *See, e.g.*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (finding that a state may waive its sovereign immunity in federal court).

only suffices to draw the foreign state into court. The FSIA requires an entirely separate waiver of execution immunity, a requirement that places unknowing plaintiffs in danger of pursuing a successful case and finding no assets against which to execute the judgment.

This first section deals with two specialized issues of waivers of immunity from execution on a comparative level. On one hand, it presents the form that a waiver must take, that is, whether it must be explicit (rather than implicit) and whether a state may broadly waive its execution immunity through an international treaty instrument. This section will also deal with a corollary issue to waiver, that of pre-judgment attachment.[35] All formulations of sovereign immunity preclude this manner of attachment, absent a waiver, and this section will explore the manifestation of this in different jurisdictions, along with its theoretical justification in a modern immunity regime.

### *a. Waiver of Immunity from Execution*

#### *i. United States Practice*

Separate waivers are required to submit a state to the adjudicative jurisdiction of U.S. courts and to pursue the execution of a judgment against that state. In other words, even an explicit waiver of immunity from adjudicative jurisdiction will not necessarily allow for execution against sovereign property that would otherwise be immune—assuming the waiver is the only grounds relied upon in pursuing execution. Note that, as with any waiver of rights belonging to an organization or state, there may still be issues of competency to waive that are particularly important given the numerous instrumentalities and agents of a foreign state, and issues related to the drafting of an express consent to jurisdiction.[36]

Despite the requirement of a separate waiver, which limits the recovery prospects of all but the most conscientious commercial actors, the FSIA has a somewhat broad means of establishing waiver. For instance, it is the settled practice of the Untied States that waiver of execution immunity may be established either explicitly or implicitly.[37] One of the most common roads to establish explicit waiver is through international agreement or convention.[38] Under the FSIA, an international agreement entered into after the passage of the Act

35. Pre-judgment attachment is dealt with specifically in § 1610(d). *See* discussion *infra* part I.b.i. Note that pre-judgment attachment solely for the purpose of acquiring jurisdiction is forbidden under the regime of *Shaffer v. Heitner*, 433 U.S. 186 (1977). However, attachment for other purposes, for example, in aid of execution, is possible.

36. *See* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257 (1994).

37. FSIA, § 1610(a)(2). As noted above, to obtain pre-judgment attachment against a foreign sovereign requires an explicit waiver of rights. *Id.* § 1610(d)(2).

38. *See, e.g.*, Int'l Ins. Co. v Caja Nacional De Ahorro Y Seguro, 293 F.3d 392 (7th Cir. 2000) (relying, in part, on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to establish waiver); *Gadsby & Hannah v. Socialist Republic of Romania*, 698 F. Supp. 483 (1988) (relying on U.S.-Romanian trade treaty to establish waiver).

likely can constitute an explicit, or implicit, waiver under section 1610(a)(2),[39] and there is an explicit allowance preventing the application of any of the FSIA's provisions in situations governed by international agreements signed before the passage of the Act.[40] Other implicit waivers have been provided for under the provisions of section 1610(f), particularly in cases when a foreign state agrees to arbitrate in a foreign country, agrees to a contract governed by the laws of a particular country, or if the state files a responsive pleading without raising the immunity defense.[41]

*ii. Comparative Analysis*

Section 13(3) of the UKSIA requires an express written waiver by a foreign state as to execution immunity.[42] The written consent may be contained in a treaty between the nations, or in any prior written agreement with the non-state party.[43] Furthermore, the head of a foreign state's diplomatic mission is assumed to have the power to consent to execution of that state's assets.[44]

Normally, the waiver of execution immunity will be construed to apply to both pre-judgment and post-judgment enforcement measures, including the use of a *Mareva* injunction against the state.[45] In one case, an English court allowed a waiver of execution to arise from a written waiver by a state of "whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)."[46] The court there found that while the statement was undoubtedly a reference to a waiver of adjudicative jurisdiction, the reference to

39. *See, e.g.*, Ferrostaal Metals Corp. v. S.S. Lash Pacifico, 652 F. Supp. 420 (S.D.N.Y. 1987) (holding that a trade agreement between the United States and Romania waived any claim to sovereign immunity by a state agency sued in the United States).

40. *See, e.g., Caja Nacional*, 293 F.3d at 399-400 (allowing pre-judgment security posting against an Argentine insurance company because the State of Argentina had signed both the New York and Panama Conventions).

41. *See* Enron Equip. Procurement Co. v. M/V Titan 2, 82 F. Supp. 2d 602, 611-12 (W.D. La. 1999); Coastal Cargo Co, Inv. v. M/V Gustav Sule, 942 F. Supp. 1082, 1087 (E.D. La. 1996). The language quoted in those cases concerning the nature of an implied waiver arising from arbitration agreements, choice of law clauses, and responsive pleadings comes from the House Report accompanying the passage of the FSIA. H.R. Rep. No. 1487, 94th Congress, 2d. Sess. 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. While the language on its terms referred to the waiver provisions of § 1605 relating to waiver of jurisdictional immunity, the fact that the FSIA requires a separate waiver for execution immunity does not require that the *types* of waivers allowed should be construed differently given the identical language regarding waivers found in sections 1605 and 1610.

42. UKSIA, § 13(3).

43. *Id.* § 13(5).

44. *Id.*

45. A *Mareva* injunction is a pre-judgment remedy intended to prevent a defendant's removal of specific assets, often those related to the underlying claim, from the jurisdiction. For a more thorough discussion, see *infra* part I.b.ii. Note that this does not apply to the provisions of § 13(4), where if the exception to execution is based on the commercial nature of the property, no pre-judgment attachment will be allowed. *See* Fox, *supra* note 29, at 379. *But see* Hispano Mercantil SA v. Central Bank of Nigeria [1979] 2 Lloyd's Rep. 277.

46. A Company v. Republic of X (1990) 2 Lloyd's Rep. 520, 523. Note that under the UKSIA, the *only* available method of obtaining execution against a foreign mission, state central bank, and probably against foreign military property is through express consent. *See* UKSIA, §§ 14(5) (central bank or other monetary authority property); 16(1)(b) (property of foreign mission); 16(2) (property of foreign soldiers in UK).

"property" was specific enough to constitute a waiver of execution immunity for the purposes of section 13.

As a corollary to this holding, the UKSIA does not allow implicit waivers of immunity from execution, particularly not in the case where the foreign state has consented only to adjudicative jurisdiction.[47]

The CSIA allows for both explicit and implicit waiver of immunity from execution. [48] Since the CSIA was modeled on the American FSIA,[49] this allowance is not particularly surprising. Unfortunately, there have been no reported cases exploring the possible breadth of an implicit waiver of immunity from execution. In the context of adjudication, states may waive their immunity in a variety of manners by submitting themselves to the jurisdiction of Canadian courts,[50] but these express provisions of implied waiver do not exist in the section dealing with execution immunity. In general, the Canadian courts borrow heavily from the rationale of more active U.S. commercial courts.[51]

Under the Australian State Immunity Act (ASIA), an exception from the general rule of immunity from execution may be had only by "agreement," although a written agreement is not specifically required.[52] It will be interesting to see, when the issue arises in a litigation context, what manner of actions constitutes an "agreement" for purposes of finding a waiver of immunity. As to issues of competence, the head of the Australian mission of the foreign state is assumed to have the power to waive immunity, but the Summary Recommendations relating to the ASIA specifically prohibit waiver by a party, such as an instrumentality, contracting on the part of the state.[53] Further, implied waiver of immunity is not allowed.[54]

Turning from the common law jurisdictions, one must consider first the ILC Draft Articles. Per Article 18, the Draft Articles establish a fairly basic

47. *See* A Company v. Republic of X, 2 Lloyd's Rep. at 522 (Saville, J.) (holding waiver by arbitration agreement sufficient because waiver clause separately discussed jurisdictional and execution immunity).

48. CSIA, § 12(1)(a).

49. Note, however, that the definition of commercial activity under the CSIA is not as narrowly construed as that under the FSIA. The U.S. Supreme Court decision in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), relied partially on the text of the FSIA, which prohibits consideration of the purpose of a state act. *See* FSIA, § 1603. The Canadian act, however, contains no such prohibition, and Canadian courts have been willing to look to the purported purpose of a state act in determining whether it was commercial. *See United States v. The Public Service Alliance of Canada* [1992] 2 S.C.R. 50, *reprinted in* 32 I.L.M. 1 (1993).

50. *See* CSIA, § 4. There has been at least one case in Canada interpreting the meaning of the implied litigation waiver under the CSIA. *See* Schreiber v. Federal Republic of Germany [2002] S.C.C.D.J. 1816 (holding that request for extradition by foreign state does not constitute "initiation" of proceedings under § 4(4) sufficient to waive immunity from adjudicative proceedings).

51. *See, e.g.*, Re: Canadian Labor Code, [1992] 2 S.C.R. 50, 1992 S.C.R. Lexis 49 (relying on U.S. case law, in part, in disallowing a claim of immunity by the U.S. government).

52. ASIA, § 31(1). The ASIA provides further that the waiver may be subject to specific limitations, § 31(2), does not apply to diplomatic or military property absent a specific designation, § 31(4), and that the head of the diplomatic mission of the foreign State in Australia is assumed to have authority to waive execution immunity, § 31(5).

53. Summary of Recommendations and Draft Legislation on Foreign State Immunity, § 33, *reprinted in* 23 I.L.M. 1398 (1984) [hereinafter ASIA Commentary].

54. *Id.*

pattern of enforcement,[55] which is quite deferential to state defendants. As a preliminary, the Draft Articles state quite clearly that the waiver of execution immunity must be distinct from any waiver of jurisdictional immunity.[56] Although the ILC Commentary acknowledged that there is differing opinion and inconsistent case law on this issue,[57] it adopted the structure most deferential to the sovereign interests of the state.

Regarding the form of waiver, the Draft Articles expressly require explicit written consent to construct a waiver of execution immunity.[58] Written consent may be manifested in an international agreement, an arbitration agreement or written contract, or through a court declaration after the dispute has arisen between the parties.[59] Although the definition of waiver under the Draft Articles is rather narrow, once the waiver is given, it can only be withdrawn under the terms of the treaty or contract itself.[60]

In comparing the civil law tradition on these issues, one must realize that the nature of state immunity on the European continent is different than the statutory frameworks that have developed in most common law jurisdictions. First, the law of foreign sovereign immunity is primarily a concept of public international law, rather than a state based development.[61] Second, states import general principles of international law, including those of foreign sovereign immunity, into their domestic legal systems as necessary. Thus, almost all of the developments in the law of sovereign immunity, particularly in France and Germany, are based on case law. Although this makes for a less comprehensive set of rules due to the fact-based nature of such decisions, it allows for clear articulation of *how* to make a sovereign immunity decision, which complex statutory schemes sometimes avoid. As a starting point, both France and Germany have engaged the restrictive theory of sovereign immunity through their case

55. ILC Draft Articles, *supra* note 26, art. 18. Article 18 reads as follows:

Article 18: State Immunity from Measures of Constraint

> 1. No Measures of constraint, such as attachment, arrest, execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that
>
> a. The State has expressly consented to the taking of such measures
>
> . . .
>
> b. That State has allocated or earmarked property for the satisfaction of the claim which is the object of the proceeding
>
> c. The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim that is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.
>
> 2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent will be necessary.

56. *Id.*

57. ILC Draft Report, *supra* note 26, at 57, n. 171, 172.

58. *Id.*

59. ILC Draft Articles, *supra* note 26, art. 18(1)(a)(i)-(iii).

60. ILC Draft Report, *supra* note 26, at 58, para. 9.

61. *See generally* BROWNLIE, *supra* note 25, at 332-340.

law.[62] Therefore, the initial inquiry in all cases turns on whether the property to be executed against is, by its nature, public or private. In most cases, the distinction between public—or sovereign—property and private—or commercial—property turns on the nature of the property rather than the object or purpose of the transaction it is engaged in.[63] Thus, execution against public property must be contemplated before even considering an issue of waiver.

The case of *Eurodif v. Islamic Republic of Iran*[64] involved an attempt to attach loan payments owed by the French government and a French corporation to Iran, as potential satisfaction of an arbitral award arising out of Iran's termination of a nuclear power development project with the fall of the Shah.[65] In considering arguments of waiver of execution, the French Court de Cassation held that waivers of execution are generally allowed as long as such waivers are "certain and unequivocal,"[66] and that a separate waiver is required at both the adjudication and execution stages of a proceeding.[67] The Court then went on to hold that a clause consenting to arbitration could not be construed to waive immunity from execution, a result that other French courts have upheld.[68] In a relatively recent case, *Creighton Ltd. v. Qatar*,[69] the Court de Cassation again confronted the issue of an implied waiver in a construction contract dispute between Qatar and an American company. After Creighton attached various assets of the state of Qatar in France, the state objected and was successful in both the trial and appeals courts in overturning the attachment.[70] However, the Court, overturning previous precedent, did find that a waiver formulated under the rules of the International Chamber of Commerce would imply a waiver of execution in order to effectuate any resulting award.[71]

62. Eurodif Corporation v. Islamic republic of Iran, Court de Cassation (France), *reprinted in* 23 I.L.M. 1062 (1984); Philippine Embassy Case, Bundesverfassungsgericht (German Federal Constitutional Court) 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_ law/german-cases/cases_bverg.shtml?13dec1977; *see also* Maurizio Ragazzi, *Italy: Constitutional Court Judgment on Sovereign Immunity with Regard to Measures of Constraint*, 33 I.L.M. 593 (1994) (considering the case of *Condor v. Nigeria*, which ended the de facto absolute immunity regime of Italian statute and ushered in a case by case consideration of the private versus public nature of property).

63. *See, e.g., Philippine Embassy Case*, 46 BverfGE 342.

64. Eurodif Corporation v. Islamic Republic of Iran, Court de Cassation (France), *reprinted in* 23 I.L.M. 1062 (1984) *rev'g* Court of Appeal (Paris), 1983 R.C.D.I.P. 101 (holding that an arbitration clause cannot itself imply a waiver of immunity from execution).

65. *Eurodif*, 23 I.L.M. at 1062.

66. *Id.* at 1068.

67. *Id.*

68. *Id.* at 1069; *see also* Soabi (Seutin) v. Senegal, Court de Cassation, *reprinted in* 30 I.L.M. 1167 (1991) (holding that recognition must be given to any award satisfying the requirements of ICSID, but such recognition does not necessarily imply execution, which is itself a separate issue under French law).

69. 2000 Journal du Droit Internationale, 1054 (6 Jul. 2000). Much of the discussion of *Creighton* here is derived from Nathalie Meyer-Fabre, *Enforcement of Arbitral Awards against Sovereign States, a New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in Creighton v. Qatar, July 6, 2000*, 15-9 MEALEY'S INTL. ARB. REP. 13 (2000).

70. Meyer-Fabre, *supra* note 69.

71. *Id.*

*b. Pre-judgment Measures of Constraint*

Pre-judgment measures of constraint, whether to establish jurisdiction or to secure assets for post-judgment execution, have been a persistent difficulty in the law of foreign sovereign immunity.[72] The very nature of such a remedy, by sequestering the assets of a party before a decision on the merits, has great potential to infringe the traditional immunities of a sovereign state. Indeed, due to this conflict with the traditional notion of immunity from execution, all of the jurisdictions considered here place significant limitations on the use of pre-judgment measures of constraint. It is one of the primary motivations of the discussion in part IV that the strict limitations on pre-judgment measures of constraint cannot be sustained.

*i. United States Practice*

The use of attachment jurisdiction as the sole basis for the assertion of jurisdiction over a foreign defendant ended with the Supreme Court's decision in *Shaffer v. Heitner*[73] just over twenty-five years ago.[74] Of course, the holding in *Shaffer* precluded attachment of a defendant's assets for the sole reason of establishing quasi in rem jurisdiction in a situation otherwise failing the minimum contacts analysis of constitutional due process.[75] As applied to foreign states, the FSIA also specifically prohibits the attachment of state assets solely as a means to obtain jurisdiction,[76] but given the constitutional holding of *Shaffer* and the explicit provisions of 28 U.S.C. §1330, included as part of the FSIA, this provision seems superfluous.

However, there are other legitimate reasons to seek a pre-judgment measure of constraint against an adversary, including attachment for security of judgment. This issue of pre-judgment measure of constraint is dealt with in the FSIA in a section separate from the one establishing post-judgment remedies. That section, 1610(d), allows attachment only if:

> (i) the foreign state has explicitly waived its immunity from attachment prior to judgment; and
> (ii) the purpose of the attachment is to secure satisfaction of a judgment against the foreign state and not to obtain jurisdiction.[77]

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72. Indeed, the members of the ILC found it so contentious that they did not confront the issue at all in the original Draft Articles. It was not until 1998 that they did so. *See* ILC Ad Hoc Report, *supra* note 29.

73. 433 U.S. 186 (1977).

74. The FSIA itself provided explicitly for personal jurisdiction over claims brought under the act. To this end, the language of 28 U.S.C. § 1330 provides that

> (a) The district courts shall have original jurisdiction . . . against a foreign state . . . as to any claim for relief in personam with respect to the foreign state is not entitled to immunity. . . .
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the courts have jurisdiction under subsection (a) where service has been made under section 1608. . . .

75. *Shaffer*, 433 U.S. at 207.

76. FSIA, § 1610(d).

77. *Id.*

Here we see a similar redundancy problem as with the *Shaffer* issue, but we are concerned more with the difficulty of obtaining a waiver of this specific form of immunity. Note that, unlike the general waiver provisions of 1610(a), this provision requires explicit waiver by the foreign state, and once again, the waiver of immunity from attachment must be given separately from the waiver of jurisdiction.[78] However, there are similarities to the general waiver provisions. In particular, once given, the waiver is irrevocable[79] and explicit waiver can be given by treaty.[80] If these sections are not satisfied, the FSIA precludes pre-judgment attachment under all circumstances.

*ii. Comparative Analysis*

In order to prevent the flight of a defendant's assets from the jurisdiction, U.K. courts issue a form of injunctive relief known as a *Mareva* injunction. The English common law had not allowed the use of pre-judgment security measures in private law actions. It was not until the 1975 case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*[81] that English courts allowed any form of pre-judgment security relief. From this relatively late development in private law, some English courts jumped to allowing *Mareva* injunctions against state assets used for a commercial purpose.[82] In those early cases allowing *Mareva* relief against state assets, the English courts considered that there was no international law prohibiting pre-judgment attachment against a foreign state, and thus there was no reason to prevent it.

The UKSIA, which was being drafted and promulgated simultaneously with the advent of the *Mareva* injunction and its nascent application to sovereign states, contains language that would seem to prevent pre-judgment measures of constraint in most situations. The decision to limit remedies against foreign states was, of course, in line with the general view of international law at the time. The specific portion of the UKSIA that impacts measures such as the *Mareva* injunction is section 13(2). That section provides that:

> (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

78. Courts have had little trouble applying the clear statement of § 1610(d). *See* Venus Lines Agency v. CVG Industria Venezolana de Aluminio, 210 F.3d 1309 (11th Cir. 2000).

79. For an interesting issue concerning the breadth of the waivers of pre-judgment attachment when it concerns central bank property, see *infra* part III.b.

80. Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.C. NJ 1979) (finding no waiver under the 1979 Treaty of Amity between the United States and Iran); O'Connell Machinery Co. v. M.V. Americana, 566 F. Supp. 1381 (S.D.N.Y. 1983) (finding no waiver from treaty provision waiving immunity "from any other liability").

81. [1975] 2 Lloyd's Rep. 509.

82. *See, e.g.*, Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] Q.B. 529, *aff'd* [1977] 2 W.L.R. 356; Hispano American Mercantil S.A. v. Central Bank of Nigeria [1979], 2 Lloyd's L.R. 277.

As is to be expected, the Act provides two specific exceptions to this general prohibition:

> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process *with the written consent of the State concerned* . . . a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
> (4) Subsection 2(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.[83]

Under the construction given in these sections, the second omits the "giving of relief" language of the first. The effect of this construction is that pre-judgment attachment will be allowed where the state has given prior written consent, but not where attachment would be based on the commercial purposes exception of section 13(4). No English court has taken up this interpretation of these provisions but, as a textual matter, it appears to be required.

The construction found in the CSIA is a blend of the FSIA and UKSIA. Canadian courts have generally accepted the notion of the *Mareva* injunction, allowing it in cases where there is a "genuine risk of disappearance of assets" for the sole purpose of avoiding judgment.[84] However, the CSIA contains a general prohibition against the issuance of injunctions or orders of specific performance against a foreign state.[85] Further, a state may only consent to the issuance of injunctive relief of any kind, including pre-judgment remedies, in writing.[86] The CSIA also explicitly requires a separate written waiver pertaining to any form of injunctive relief, so even voluntary submission to the adjudicative jurisdiction of Canadian courts will not manifest consent to injunctive remedies.[87]

The ASIA is constructed similarly to the UKSIA. It is probably the most developed of the immunity acts, having been written nearly a decade after the English and American acts, but it has lacked proper interpretation by Australian courts. The rule of general immunity applies to both "interim or final" orders by Australian courts, so assumedly the drafters intended the same provisions to apply both pre and post-judgment.[88] As noted, waiver of such immunity by international agreement is possible. The ASIA also allows for the removal of execution immunity as to any commercial property, [89] which is defined as "property, other than diplomatic property or military property that is in use by the foreign state concerned substantially for commercial purposes."[90] However,

83. For the definition of commercial purposes, see UKSIA §§ 17, 3(3), excerpted in part below in part II.a.ii. For an example of a decision on an alternative issue, but containing an explicit written waiver, see Sabah Shipyard Ltd. v. Islamic Republic of Pakistan [2002] 2 Lloyd's Rep. 571.

84. Aetna Financial Services v. Feigelman, [1985] S.C.R. 2 (Can.).

85. CSIA, § 11.

86. *Id.*

87. *Id.* § 11(2).

88. *See* ASIA, § 30.

89. *Id.* § 32(1).

90. *Id.* § 32(3)(a). The term "commercial purposes" is not defined elsewhere within the act, and no case has yet taken it up. One possible definition might be had by reference to the ASIA adjudicative immunity provisions, which strip adjudicative immunity from claims concerning "commercial, trading, business, professional or industrial or like transaction" and specifically includes

if a foreign state had voluntarily submitted to the jurisdiction of Australian courts, it can limit the execution remedies allowed against it.[91]

It is slightly puzzling as to why the original ILC Draft itself contained no consideration of the issue of pre-judgment attachment, as the issue was surely in contention at the time. The only mention of the issue of pre-judgment attachment found in the ILC Draft Report[92] simply treats a pre-judgment measure as any other execution measure, requiring satisfaction of the terms of Article 19. The ILC has since considered the issue of pre-judgment attachment[93] and issued a proposed new article to deal with the issue.[94] However, the new article avoids the more difficult question of pre-judgment attachment against commercial property, allowing such attachment only in the case of a waiver identical to that required under Article 19, or against property that has been earmarked for satisfaction of the claim.[95] The first is the only exception of any practical significance; a cooperative state that has earmarked certain funds to satisfy a claim, assuming the funds are sufficient, will likely not be subject to such pre-judgment measures in any case. Thus, despite continuing difficulty with this topic, the ILC's additions to the debate seem to add little of value.

The French courts confronted the issue of pre-judgment measures of constraint directly in *Eurodif Corporation v. Islamic Republic of Iran*.[96] There, the Court granted the pre-judgment attachments Eurodif had sought, and Eurodif received a provisional measure attaching the assets of a corporation owned by Iran.[97] Although the Court went on to hold that there was no waiver of execution immunity as to the attached assets as part of its broader holding adopting a restrictive view of sovereign immunity,[98] in so doing the Court treated the pre-

"(a) a contract for the supply of goods and services; (b) an agreement for a loan or some other transaction for or in respect of the provisions of finance; and (c) a guarantee or indemnity in respect of a financial obligation." *Id.* § 11(3). Whether property used "substantially for a commercial purpose" would be the subject matter of these types of transactions (that is, the goods contracted for, the loan proceeds) or the instrumentalities of such transactions (such as all the property of the state trading company) is open to interpretation.

91. *See* ASIA, §§ 32(1), 10.
92. ILC Draft Report, *supra* note 26, at 56.
93. *See* ILC 1999 Report, *supra* note 30, para. 118-124.
94. *See* ILC Ad Hoc Report, *supra* note 29, at 1. The article reads:

> Article XY
> State Immunity from pre-judgment measures of constraint
> No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
> (a) The State has expressly consented to the taking of such measures as indicated
> i. By international agreement
> ii. By an arbitration agreement or in a written contract; or
> iii. By a declaration before the court or by a written communication after a dispute between the parties has arisen; or
> (b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

95. *Id.*
96. 23 I.L.M. 1062 (1984).
97. *Id.* at 1070.
98. *Id.* at 1068.

Quander: The Last Bastion of Sovereign Immunity: A Comparative Look at Execution

judgment measure as any other execution measure would be treated. Therefore, the "analysis of the overall activity on which the claim is based" will be used to determine "the characterization of the public or private nature of the transaction involved," and thus determine whether the assets can be attached.[99] One would assume that the discussion of waiver would be identical as well.

These concerns of pre-judgment attachment are of special concern to plaintiffs pursuing claims that are uniquely political in nature. Such a plaintiff may have no problem establishing the need for pre-judgment measures of constraint on the assets of a typical, non-state, defendant, but may face additional obstacles in doing so for a state defendant. Indeed, the existence (or lack thereof) of a proper waiver, as to both pre- and post-judgment remedies, may close the door to recovery entirely. In this way, procedural concerns can blend into considerations of substance, and the import of recovery weighed against the sovereign rights of a foreign state, for an unwary party. Granted, most parties contracting with states are far from unwary and will suffer from these limitations less often, but there are substantive barriers (the most important being that commercial property to be executed against be related in fact to the claim itself), which apply to contractual and tort claimants equally. The next section addresses these concerns.

## II.
## SUBSTANTIVE SCOPE OF EXECUTION IMMUNITY

Perhaps the most controversial provision of the FSIA's execution provisions is the required "nexus" between any commercial property against which a judgment may be executed, and the underlying claim upon which the judgment to be executed is based. This burden of the nexus requirement falls harshly on plaintiffs because it forces them to rely on the fortuitous presence in the jurisdiction of some property related to the subject matter of their claim. While this may be reasonable for claims sounding in contract law, the nature of tort claims, being random occurrences of negligence, often without involving any tangible property, makes the establishment of a nexus in such cases unlikely.

The United States remains one of the few jurisdictions to apply the nexus requirement as part of its foreign sovereign immunity law. The differences between that regime and the others considered here, none of which apply the nexus requirement, are laid out in part (a) of this section. Part (b) will elaborate on this concept by looking directly at the treatment of tortious acts of foreign states under the various sovereign immunity regimes. Combined with the nexus requirement, the tort exception of the FSIA creates a *de facto* prohibition on recovery in the United States. Outside of the *ad hoc* additions of the terrorism amendments to the FSIA,[100] little has been done to address this issue. The parameters of this restrictive regime, present in the United States and the ILC Draft Articles and to an extent under French law, are compared below.

99. *Id.*
100. *See supra* Introduction.

*a. The Nexus Requirement*

*i. United States Practice*

The provisions of the FSIA relating to immunity against the execution of judgments are constructed parallel to the sections abrogating immunity for adjudication. While there are various means of overcoming execution immunity,[101] this section will focus on section 1610(a)(2), which provides an exception that excludes from immunity all property that is or was in use for the commercial activity[102] upon which the claim was based and is present within the territory of the United States.[103] This last exception, with an explicit qualification of a claim to the property nexus and requirement of physical presence within the United States, significantly narrows the enforcement possibilities for a successful plaintiff.[104]

This "nexus" requirement serves to (1) assure that an antecedent basis for adjudicative jurisdiction exists; and (2) limit the property at issue to satisfy the judgment to resources that had already been allocated to a commercial transaction. Of course this second justification has only limited application to claims of a tortious nature. For instance, in *Letelier v. Republic of Chile*,[105] the plaintiffs were unsuccessful in attaching the aircraft of the Chilean airline, LAN, to satisfy the wrongful death judgment resulting from the assassination of Letelier, the former Chilean ambassador to the United States.[106] The Court rejected the contention that LAN's activities in transporting the assassin were the relevant commercial activities, because politically motivated assassinations could not be considered commercial activities.[107]

It is important to note that the nexus requirement only applies to suits against the state proper, not against state instrumentalities.[108] Given that the definition of instrumentalities is fairly broad,[109] this exception does mitigate some of the harm done by the nexus requirement. After all, it is often the instru-

101. See the text of 28 U.S.C. § 1610(a), *supra* note 5, for a full listing of the exceptions to execution immunity.

102. The FSIA defines commerical activity in section 1603, which reads, in part:

> (d) 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.

The definition of commercial activity was clarified by the Supreme Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). The Court there looked to the nature of government issued debt instruments—which could be traded on the international market, were negotiable, and could be held by private parties—rather than to the purpose, which could in almost any case of state action be stated as a "sovereign" purpose. *See* FSIA, § 1603(d).

103. FSIA, § 1610(a)(2).

104. Note that the amendments to the FSIA in 1996, and later in 2000, remove the requirement that the property relate to the underlying claim to get attachment in situations of terrorism-related torts. § 1610(f).

105. 748 F.2d 790 (2d Cir. 1984).

106. *Id.* at 791.

107. *Id.* at 795-98.

108. FSIA, § 1610(a)(3).

109. *See* FSIA, § 1603 (defining, in part, an instrumentality 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

mentalities of the state that we find in U.S. courts.[110] In such situations, any property in the United States for a commercial purpose is available for execution.

*ii. Comparative Analysis*

Under the UKSIA, the second exception to the section 13 prohibition against execution, the first being waiver, deals with property "in use or intended for use" for commercial purposes."[111] The term "commercial purpose" is incorporated by reference to sections 17 and 3(3) of the UKSIA itself, where it is defined as anything with the purpose of a commercial transaction.[112] A "commercial transaction" is, in turn, defined as:

> (3) . . .
> (a) any contract for the supply of goods and services
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
> (c) any other transaction or activity (whether of a commercial, financial, professional, or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority[113]

As long as the property is in the United Kingdom for a commercial purpose, execution against that property is possible, because there is no statutory requirement of a nexus to the underlying claim or judgment, unlike the FSIA. However, section 13(4) imports a presumption against defining property as commercial in nature; indeed, if the head of the diplomatic mission of that state in the United Kingdom certifies that particular property is not for commercial use, such a claim amounts to sufficient evidence of non-commercial use.[114] The burden is then on the party claiming against the state to disprove the claim of immunity,[115] a difficult task given that the diplomatic entities making the claim cannot be hailed into court for examination.

Similarly, both the CSIA and ASIA are constructed to allow execution without any requirement of a nexus to the underlying claim.[116] Thus, any property in the forum nation for a commercial purpose can be executed against. The relevant provision of the CSIA is section 5, which allows for execution against property that "is used or is intended for a commercial activity." A "commercial

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subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . .")

110. *See, e.g., Letelier*, 748 F.2d 790 (considering execution against the assets of a national airline).

111. UKSIA, § 13(4).

112. *Id.* § 17.

113. *Id.* § 3(3).

114. *Id.* § 13(5).

115. *Id.*

116. *See* CSIA, § 12(1)(b) (allowing execution against property that "is used or is intended for a commercial activity"). The nexus requirement was explicitly rejected by the framers of the ASIA. *See* ASIA Commentary, *supra* note 53, § 34.

activity" is "any particular transactions, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character."[117]

For the purposes of the ASIA, commercial property is "property substantially in use for commercial purposes."[118] In turn, "[t]he term commercial purposes should be defined independently of the term commercial transactions, and as including a trading, business, professional, or industrial purpose."[119] Additionally, "property that is apparently vacant, or apparently not in use shall be taken to be being used for commercial purposes unless the court" is convinced otherwise.[120] This potentially creates a larger pool of commercial property that litigants may execute against, although, under the ASIA the certificate of a foreign mission will be admissible as evidence of the purpose of certain property,[121] an allowance that may limit any benefit from having a general rule of commercial nature for unused property.

The ILC Draft Articles explicitly adopted the nexus requirement of the FSIA, against the majority of state practice.[122] Also similar to the FSIA, the Draft Articles treat property of the state itself differently from property of a state instrumentality. Thus, execution can be had against an instrumentality as long as the property "has a connection with" the agency or instrumentality.[123]

In France, the *Eurodif* case also tacitly endorsed the requirement for a connection between the property to be attached and the subject matter of the claim.[124] The Court of Appeals, as noted above, vacated the execution authorizing attachment against assets owed to Iran in satisfaction of a judgment for breach of a nuclear power loan and construction agreement, because the funds to be attached were to be returned to Iran as purely public funds.[125] The Court of Cassation, in reversing, held that the loan funds represented the very funds allocated for the power development program, and thus execution would be allowed.[126]

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117. CSIA, § 2. In defining the definition of "commercial character," the Federal Court of Ottawa, Ontario, and Quebec adopted, from British case law, this gloss on the definition:

> The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.

TMR Energy Limite v. State Property Fund of Ukraine [2003] F.C.J. No. 1914; 2004 Fed.C.C. LEXIS 2, 154 (quoting Congresso del Partido, [1983] 1 A.C. 244 [opinion of Lord Wilborforce]).

118. ASIA, § 32(3)(a).

119. ASIA Commentary, *supra* note 53, § 35.

120. ASIA, § 32(3)(b).

121. *Id.* § 41.

122. *See* ILC Draft Articles, *supra* note 26, art. 18(1)(c) (requiring that property have a "connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed").

123. *Id.*

124. *Eurodif*, 23 I.L.M. at 1069.

125. *Id.* at 1065.

126. *Id.* at 1070.

This principle was confirmed in *Sonotarch v. Migeon*,[127] where the Court of Cassation stated that "the assets of a foreign state, which are in principle not subject to garnishment, with exceptions, especially when they are intended for economic or commercial activities of a private nature from which the claim of the creditor arises."[128] The Court did limit its holding somewhat by not extending the nexus requirement to include foreign state instrumentalities, which is similar to the treatment of such entities under the FSIA.[129] Thus, a state enterprise that keeps its own balance sheets and is engaged in private law activity could be subject to attachment even in the absence of a nexus to the claim.[130]

German courts, while not engaging the general requirement of a nexus between the claim and property, have embraced this distinction between property held by a foreign instrumentality and that held by the state itself, even if the property held by the instrumentality is attributable to the state. In the *Iranian Oil Company Case*,[131] the Federal Constitutional Court held that:

> there is no general rule of international law that a foreign state be considered as holder of claims to accounts . . . made out to the name of a legally responsible enterprise of the foreign state. The forum state is not prevented from regarding the enterprise concerned as entitled to claims and from seizing the claims concerned . . . [pursuant to] a writ that had been issued in an interlocutory relief proceeding concerning nonsovereign conduct of the enterprise. This applies independently of the fact whether the credit balances in these accounts are at the free disposal of the enterprise . . . or are earmarked for transfer to an account of the foreign State at the latter's central bank.[132]

These two principles relating to the execution against instrumentalities are, of course, the basis of the principles laid down in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*),[133] discussed *infra* part III.b.2, regarding the presumed separate juridical status of an instrumentality.

The nexus requirement remains one of the greatest restrictions on recovery for plaintiffs under the FSIA regime. Although the nexus requirement does not apply to claims against foreign state instrumentalities, which greatly softens its impact, it is now against the general course of the international law of state immunity and should be reconsidered, particularly considering the *ad hoc* additions to the FSIA that have been necessary to circumvent it in the case of terrorism-related claims.

### *b. Tort Exceptions and Terrorist Activity*

#### *i. Ordinary Tort Actions*

Section 1605(a)(5) of the FSIA allows for jurisdiction over a foreign state when a money damages claim is brought on the basis of wrongful death, prop-

127. Court of Cassation (France), 1 October 1985, 26 I.L.M. 998 (1987).
128. *Id.* at 1003.
129. *Id.*
130. *Id.*
131. Bundesverfassungsgerich (Federal Constitutional Court), 64 BVerfGE 1 (1983), *reprinted in* 22 I.L.M. 1279 (1983).
132. *Id.* at 1292.
133. 462 U.S. 611 (1983) [hereinafter *Bancec*].

erty damage, or injury, subject to a qualified immunity provision.[134] However, unlike all of the other jurisdictional prongs in section 1605, there is no concomitant provision of section 1610(a) that allows for execution of these judgments against the property of the foreign states. Thus, absent some manner of commercial property that satisfies the nexus requirement, a typical tort plaintiff—that is, one without a claim based on a terrorist act—is faced with recovering only under another prong of section 1610, most often related to insurance policy proceeds held by the foreign state.[135]

A similar outcome will result under the ILC Draft Articles. The articles allow for the removal of immunity from adjudicative proceedings for claims of "personal injuries and damage to property."[136] However, the only property that satisfies the nexus requirement, as discussed above, is available as a result of a waiver or "has been earmarked . . . for the satisfaction of the claim that is the object of the proceeding," may be executed against.[137] Taken together, these provisions represent a more parsimonious system for tort plaintiffs than that of the FSIA; if the Draft Articles were applied to such a case, recovery would depend simply on the benevolence of the foreign state.

Under the UKSIA, a state is not immune from proceedings related to "death or personal injury" or "damage to or loss of tangible property," as long as the causative act occurred in the United Kingdom.[138] As with all other suits, execution can be had under section 13 on the basis of waiver or the commercial purposes exception.

Both the CSIA and the ASIA also allow for jurisdiction over a claim involving death or personal injury that occurred in the forum state.[139] As noted above, neither country requires a nexus to the claim, so plaintiffs may recover against any property allowed under the general terms of the acts, either by attaching property which the state has otherwise waived immunity to, or to property that is commercial in nature. In the case of Australia, as mentioned, property available to be executed against may also include any property that has been left idle by the foreign state.

The simplicity of the execution provisions of the UKSIA, ASIA, and CSIA, compared to that of the FSIA, is perhaps best illustrated in considering the nexus requirement above and the considerations of tort litigants here.

### *ii. Terrorism Based Claims*

Given the structure of restricted recovery for tort plaintiffs, U.S. courts routinely have applied principles of immunity from execution of judgments to situations involving terrorism plaintiffs. During the splurge of suits involving the

134. FSIA, § 1605(a)(5)(A)-(B).
135. *Id.* § 1610(a)(5).
136. ILC Draft Articles, *supra* note 26, art. 12.
137. *Id.* art. 18(b).
138. UKSIA, § 5 (a)-(b).
139. *See* CSIA, § 6; ASIA, § 13.

Alien Tort Claims Act[140] in the last decade, Congress began to take notice of these unrequited plaintiffs. As a result, the United States has been persistent in its *ad hoc* statutory approach to terrorist related exceptions to the rule of sovereign immunity.[141] Indeed, none of the other statutory regimes discussed so far make an attempt to deal with such actions by statute, preferring to take a separate route through international law to abrogate the general rule of state execution immunity in such cases. The FSIA, however, has been amended numerous times to deal with this question explicitly. Section 1605(a)(7) of the FSIA allows for jurisdiction over a foreign state for certain terrorist actions.[142] Section 1610(a)(7) provides that:

> The property in the United States of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States . . . [if] the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim was based.

This section dissolves the nexus requirement for actions under section 1605(a)(7), and coupled with the definition of a state found in section 1603,[143] it would seem that a successful plaintiff under the terrorist act exemption would have success in executing a valid judgment. Successful litigants may also have access to the protections of the VTVPA or the Terrorism Risk Insurance Act.[144] However, this seemingly positive outlook is dimmed by the limits of (1) the protections of embassy and military property; (2) the constraints of President Clinton's waiver of possible recovery against frozen foreign assets under section 1610(f), both discussed in part III.a; and (3) by the rule put forth by the Supreme Court in *Bancec*,[145] which established a basic presumption of separate juridical status for instrumentalities of foreign states—this, of course, removes any possibility of agency liability on the part of the foreign state.

*Bancec* involved a suit by an instrumentality of the Cuban government to recover on a letter of credit that had been issued in its favor by defendant Citibank. Citibank counterclaimed for the value of bank branches that had been expropriated by the Cuban Government. In considering whether Citibank could set off the actions of the sovereign government of Cuba against the claims of

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140. 28 U.S.C. § 1350 (2004).

141. Other jurisdictions, which more readily embrace principles of international law into municipal law, have confronted issues of whether some acts, in the nature of jus cogens violations, might abrogate sovereign immunity from execution. *See* Elisabeth Handl, *Introductory Note to the German Supreme Court: Judgment in the Distomo Massacre Case,* 42 I.L.M. 1027 (2003) (discussing the course of a claim before Greek and German courts arising from a WWII era claim against the Nazi government); Greek Citizens v. Federal Republic of Germany, Bundesgrichtshof (Federal Supreme Court), 42 I.L.M. 1030, 1034 (2003) (holding, in accordance with the European Court of Human Rights, that "it has not been proved that it has been accepted in international law that states are not entitled to immunity with regard to damage claims for crimes against humanity. . ."). This topic is too broad to be considered in sufficient detail here.

142. *See* discussion *supra* note 2.

143. FSIA, § 1603(b) (stating that the foreign state for purposes of the act includes "instrumentalities" of that state).

144. For a discussion of the terms of these acts, see *supra* Introduction.

145. 462 U.S. 611 (1983).

one of its instrumentalities, the Court in *Bancec* stated, "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."[146] That original substantive law, according to the Court, established a presumption of separate juridical status for an instrumentality vis-à-vis a foreign state.[147] To overcome this presumption, the plaintiff bears the burden of showing (1) that the separate instrumentality is so extensively controlled by its owner that a principal-agent relationship is created, allowing for the veil of the corporate form to be pierced or (2) that the protection of the corporate form would work fraud or injustice, or defeat overriding public policies.[148] In *Bancec* itself, the Supreme Court found that Citibank had surmounted these requirements, and that to hold otherwise would allow Cuba "to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets."[149] This presumption of separate juridical status has found application in numerous FSIA decisions.[150] Obviously, this judicial construction of the structure of instrumentalities mitigates some of the power granted to plaintiffs under section 1610(a)(7) in particular.

So, although Congress has labored (to an extent) to provide a means for recovery in case of terrorism related tort actions, recovery against certain protected types of property, in particular diplomatic property and the assets of separate juridical entities, is still going to be limited. Coupled with the nexus requirement, which hangs over any claim against property that is "commercial" in nature, the lowering of the front-end barrier of execution immunity is countered by the persistence of requirements that no longer command consensus in the international arena. This trend can be seen further in a consideration of specific sovereign assets, in particular diplomatic and central bank property, which are considered next.

## III.
## Treatment of Specific Sovereign Assets

Parts I and II have dealt with issues of procedure and substance that all claims against foreign sovereign property must overcome. This section deals with specific classifications of property that receive additional protection under most regimes of sovereign immunity. These classifications, including diplomatic and embassy property and central bank property are treated specially because (1) they strongly implicate the distinctly sovereign powers of states, and

146. *Id.* at 620.
147. *Id.* at 629-30.
148. *Id.*
149. *Id.* at 632.
150. *See* Alejandre v. Telefonica Large Distancia de Puerto Rico, Inc., 183 F.3d 1277 (9th Cir. 1999) (applying *Bancec* to an attempted garnishment under § 1610(a)(7)); *Letelier*, 748 F.2d at 793 (applying to an execution of assets of a national airline); *see also* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446 (2d Cir. 1990) (applying *Bancec* principles to issue of immunity from jurisdiction).

(2) they constitute the state property most commonly present in a foreign jurisdiction. Although one might expect these classifications to be amply protected by the commercial property exception, the FSIA has from its inception treated them under a separate section.

### *a. The Special Problem of Embassies and Mixed Accounts*

Under the Vienna Convention on Diplomatic Relations (VCDR), the fixed property of the embassy itself is generally immune from execution, absent a waiver.[151] A more complex question arises when dealing with bank accounts held on the account of diplomatic missions, and particularly when such accounts are used for commercial purposes, such as renting property or purchasing mundane objects like office supplies.

The leading case on the separation of diplomatic bank accounts is the *Philippine Embassy Case*,[152] which came before the German Federal Constitutional Court in 1977. There, a plaintiff landlord had successfully pursued a claim against the Philippine diplomatic mission for unpaid rent and subsequently garnished the embassy's bank account, which was used to pay daily operational expenses, including rent and employee salaries. This dual function of embassy accounts, acting concurrently to satisfy commercial obligations and to fund sovereign diplomatic activities, presents the essence of a "mixed accounts" problem. In refusing to allow garnishment, the Constitutional Court pointed to the preamble and article 3 of the VCDR[153] as precluding the impairment of the exercise of diplomatic duties. The Court had doubts as to whether the forum state could effectively discern which funds in a foreign embassy account were attributable to commercial versus non-commercial purposes, and in any case, such a determination would be contrary to the deference required under international law for the internal decisions of foreign states. The holding of the Court was clearly stated as follows:

> The financial settlement of the expenses and costs of an embassy through a general current account of the diplomatic functions of the sending State, irrespective of the fact that payments made through an account may in relation to the bank or

151. Vienna Convention on Diplomatic Relations, art. 22(3), Apr. 18, 1961, 500 U.N.T.S 85 [hereinafter VCDR].

152. Bundesverfassungsgericht (Federal Constitutional Court) 46 BverfGE 342 (Nov. 1977), available at http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?13dec1977.

153. Article 3 reads:

> 1. The functions of a diplomatic mission consist, inter alia, in:
> (a) representing the sending State in the receiving State;
> (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) negotiating with the Government of the receiving State;
> (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
> 2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

third parties come about within a framework of legal relationships or actions that by their legal nature may be described as *jure gestionis*.[154]

Although this rule has been widely accepted, it has been deviated from in the United States.

*i. U.S. Practice*

The only explicit prohibition in the FSIA that protects diplomatic property is found in section 1610(1)(4)(B), which relates to immovables within the United States. The prohibition protects property "used for purposes of maintaining a diplomatic or consular mission." It is established that under Article 22(3) of the VCDR,[155] and under the FSIA, on the terms of § 1610(1)(4)(B), the fixed property of the embassy itself is immune from attachment and execution. [156] As a final note to the consideration of physical diplomatic property, the TVTPA did ostensibly allow for recovery against the diplomatic properties of state-sponsors of terrorism through the addition of section 1610(f). However, the amendment also allowed for the waiver of such a possibility by the president in "the interest[s] of national security."[157] President Clinton exercised the waiver in October 1999 to address a concern about reciprocal execution against U.S. properties abroad and the threat such actions would pose to the leverage available to the U.S. from foreign properties.[158]

Outside of the physical property of diplomatic missions, U.S. courts have dealt with the question of mixed accounts in radically different ways. First, in *Birch Shipping Corp. v. United Republic of Tanzania*,[159] the court adopted a broad waiver rule for mixed accounts that serve both a commercial and sovereign purpose for an embassy. The court's rationale turned on the possibility that a defendant state might avoid all liability by maintaining nothing but mixed account funds in foreign states.[160] The court reasoned that the solution would be "segregation of public purpose funds from commercial activity funds."[161]

In *Liberian Eastern Timber Corp. v. Republic of Liberia*,[162] which concerned the attachment of bank accounts of the Embassy of Liberia, the court

154. 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_law/ german-cases/cases_bverg.shtml?13dec1977.

155. Article 22(3) states that "the premises of the mission . . . shall be immune from . . . attachment or execution."

156. *See, e.g.*, United States v. County of Arlington, 669 F.2d 925 (4th Cir.1982), *cert. denied and app. dismd*, 459 U.S. 801 (1982) (denying county the power to execute tax lien against apartment complex owned by foreign state and operated to house diplomatic personnel); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16 (D.D.C. 1999); S&S Mach. Co. v. Masinexportimport, 802 F. Supp. 1109 (S.D.N.Y. 1992) (relying on both the VCDR and § 1610(1)(4)(B) to deny execution against a building considered property of the embassy of the Romanian government).

157. FSIA, § 1610(f)(3).

158. *See* Pres. Det. No. 01-03, 65 Fed Reg. 66483 (Oct. 28, 2000) (stating that § 1610 (f) "would impede the ability of the President to conduct foreign policy in the interest of national security").

159. 507 F. Supp. 311, 313 (D.D.C. 1980).

160. *Id.* at 313.

161. *Id.*

162. 659 F. Supp. 606, 610 (D.D.C. 1987).

held that partial commercial use did not invalidate a claim of sovereign immunity.[163] By specific reference to the VCDR, the court found the assets immune from attachment.[164] However, the court went even further and stated that the FSIA should be interpreted in harmony with the VCDR, and should produce the same result.[165] In *Liberian Eastern*, this meant that the commercial activity of the embassy should be interpreted narrowly, so as to not "cause the entire bank account to lose its mantle of sovereign immunity."[166] No U.S. appeals court has authoritatively resolved this issue of mixed accounts.

*ii. Comparative Analysis*

There is a general prohibition against attachment and execution against diplomatic premises and property under the UKSIA.[167] However, as in other jurisdictions, the issue of embassy bank accounts has required judicial resolution. The leading case on the subject of mixed funds in the United Kingdom is *Alcom Ltd. v. Republic of Colombia*.[168] The plaintiff there obtained a default judgment on an unpaid contract for security equipment sold to Colombia. While the trial court denied garnishment of the embassy bank account, an intermediate appellate court held that accounts were attachable as far as the money was to be used for the types of transactions listed in section 3(3).[169] In this situation, this included money set aside for the purchase of goods and services for the embassy offices. Using an analysis similar to the distinction made between nature and purpose in *Weltover* and section 1603(d) of the FSIA, the appellate holding focused on the nature of the transaction to find that the funds were for a commercial purpose.[170] The House of Lords reversed on the grounds that, while the bank account was property under sections 13(2)(b) and 13(4), it could not be bifurcated into commercial and non-commercial—that is, sovereign—purposes.[171] Here, the trial court and the House of Lords gave special notice to the ambassador's note that the account was for the day-to-day activities of the embassy, as provided for in section 13(4), discussed above.[172]

The CSIA does not contain an explicit prohibition on execution against embassy properties. Thus, execution turns on defining the property as "com-

163. *Id.* at 608.

164. *Id.*

165. *Id.*

166. *Id.* at 610.

167. UKSIA, § 16(1). This section is supplemented by the UK's obligations under the VCDR.

168. [1984] 2 All ER 6 HL, *reprinted in* 23 I.L.M. 719 (1984) [hereinafter *Alcom (House of Lords)*].

169. For the covered transactions, see the quoted text accompanying, *supra* note 170.

170. *See* Alcom Ltd. v. Colombia, [1984] 1 All ER 1, [1983] 3 W.L.R. 906, *reprinted in* 22 I.L.M. 1307, 1314 (1983) [hereinafter *Alcom (Court of Appeals)*]

171. *Alcom (House of Lords)*, 23 I.L.M. at 724-25. The Lords noted that taken in conjunction, § 16(1)(b) establishing general diplomatic immunity and Article 3 of the VCDR, there was a general obligation to act in a manner so as to not obstruct the functions of a foreign mission. *Id.* at 720-21.

172. The House of Lords was willing to accept the *bona fides* of the ambassador's note. *Id.* at 725. While the Court of Appeals recognized it, it refused to apply it on its terms. *Alcom (Court of Appeals)*, 22 I.L.M. at 1316.

mercial,"[173] which would depend on the kind of distinction made in the *Birch* and *Liberian Eastern* cases above, or on the unlikely finding of a waiver of immunity. Although the Supreme Court of Canada long ago addressed the propriety of taxation of diplomatic property,[174] it has not yet directly confronted the issue of mixed embassy accounts in its case law.

The ASIA, while allowing for execution against commercial property, explicitly classifies diplomatic property as non-commercial.[175] Diplomatic property includes "property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia."[176] Although the Australian courts have not explicitly interpreted this language, a diplomatic account used for some commercial transactions may easily be considered "maintaining" the diplomatic mission, and thus would be immune to execution.

ILC Draft Article 19 is unique because it explicitly exempts property that "is used or intended for use" by diplomatic missions and consular posts, "including any bank account."[177] While this language appears to resolve the issue of mixed accounts straight away, the ILC Commentary implies that purely commercial bank accounts of an embassy are not covered by the exclusion.[178] The ILC expresses no opinion on the issue of mixed accounts, except to note that "recent case law seems to suggest the trend that the balance of such a bank account . . . should not be subject to an attachment order."[179] The position of the ILC on this issue thus remains somewhat unclear.

### *b. Central Bank Property*

Central banks are inherently more vulnerable to an execution claim against foreign governments than any other agency or instrumentality. Central banks are likely both to hold the assets of its home government and to have those funds present in many foreign countries in the course of its regular business. As discussed above, the *Bancec* court held that there may be circumstances in which an agency or instrumentality will attract liability for the acts or debts of its government, even where the separate juridical status of an agency or instrumentality is recognized. As with the case of diplomatic property, the key issue becomes how to classify funds held by or on behalf of a central banking authority.

#### *i. United States Practice*

The FSIA, per section 1611(b)(1), establishes special protections for the funds of central banking authorities. The accounts of central banks "held on

173. *See* CSIA, § 12(b)
174. *See* Re: Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences [1943] 2 D.L.R. 481 (holding that foreign legations are immune from land taxes on their property).
175. ASIA, § 32(3)(a).
176. *Id.* § 3(1).
177. ILC Draft Articles, *supra* note 26, art. 19(1)(a).
178. ILC Draft Report, *supra* note 26, at 59, para. 1(3).
179. *Id.*

Quander: The Last Bastion of Sovereign Immunity: A Look at Section

their own account" are immune from execution in U.S. courts, absent an explicit waiver of that immunity by the bank.[180] Although there is a preliminary concern of what is a central bank,[181] once applied, this section accords particular deference to the fiscal and monetary sovereignty of foreign states, and is almost universal in its application in foreign sovereign immunity law.[182] In the United States, section 1611 is particularly necessary considering the decision of the Supreme Court in *Republic of Argentina v. Weltover*, which relied on the plain language of section 1603.[183] Without section 1611, a foreign central bank engaged in almost any investment or deposit in the United States would, by the nature of such an activity be acting as a private player rather than as a regulator, and hence, its property would fall within the commercial exception.[184] Congress apparently was thinking along these same lines when it included section 1611, stating that funds held on a bank's "own account" would include funds held "in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or foreign states. . . . Moreover, execution against the reserves of foreign states could cause significant foreign relations problems."[185]

According to this language, the courts also would appear to be required to distinguish between central banking activities and non-central banking activities of the central bank. According to one commentator, section 1611(b)(1) is subject to at least four legitimate interpretations,[186] which can be briefly described as follows:

> The first interpretation, based on a literal reading of 1611(b)(1), would provide protection to any property held by or for the central bank as its beneficial owner. The second interpretation, relying on the House Report language relating to "central banking activities" and giving that language a liberal reading, would provide protection for any central bank property used for the account of the central bank or indirectly for the account of its parent state or any agency or instrumentality. The third interpretation, relying on the House Report language relating to funds used for "commercial transactions of other entities or of foreign states," would provide protection for central bank property used for the account of the central bank or for a public or governmental activity of the foreign state or its agencies and instrumentalities, but not for commercial transactions of a foreign state or its agencies or instrumentalities. The fourth interpretation, relying on the commercial activity exception to limit the meaning of "central banking activities," would provide protection only for property of the central bank used for a public or governmental activity and not for property used for "commercial transactions" for the account of the central bank.[187]

180. FSIA, § 1611(b). At least one court has held that the general immunity in § 1611 did not preclude a set-off of central bank funds held at a private bank to fund the commercial activities of private entities. *See* Banco Central de Reserva del Peru v. Riggs Nat'l Bank, 919 F. Supp. 13 (D.D.C. 1994).

181. *See generally* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 350-60 (2003).

182. *See* UKSIA, § 14(4); ASIA, § 35; CSIA, § 12(4).

183. See *supra* note 102 for the text of section 1603.

184. 504 U.S. 607, 617 (1992).

185. H.R. Rep. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.

186. Lee, *supra* note 181, at 379-81.

187. *Id.* at 381.

U.S. courts have yet to give a definitive interpretation to the terms of 1611(b); given the possibility of confusion in interpreting it in light of Congressional intent, a clarification of the issue is necessary.

Aside from the characterization problems of defining a central bank and characterizing funds, section 1611(b) also presents a question of central bank waiver. The provisions of section 1611(b) allow only for an explicit waiver of immunity from execution, but make no mention of a waiver of pre-judgment attachment. As noted in the discussion of pre-judgment attachment above, a foreign state may waive its immunity from pre-judgment attachment by explicit waiver only.[188] The question remains whether, under the explicit language of the FSIA, a central banking authority's explicit waiver of immunity can be construed to allow for pre-judgment attachment, given the lack of reference to this issue in the language of section 1611(b).

The only court that has decided this issue refused to extend a waiver of post-judgment execution by a bank to include pre-judgment remedies. In *Weston Compaigne de Finance et D'Investissement, S.A. v. La Republic del Ecuador*,[189] the Court considered a waiver of execution immunity contained in debt instruments issued by the Central Bank of Ecuador. Interestingly, the waiver covered both pre and post-judgment execution remedies, but the Court still found it insufficient, siding with the government of Ecuador and holding that section 1611(b) invalidated the waiver.[190] The court pointed to the legislative history of the FSIA in determining that Congress explicitly recognized the imposition of pre-judgment attachment elsewhere in the Act and purposefully omitted it from section 1611(b).[191]

In upholding a narrow interpretation of the central banks' waiver, the *Weston* court created a significant anomaly in the FSIA scheme. Central banks, under the court's interpretation, now are given broader deference than a state itself in relation to waiver of pre-judgment attachment immunity. Under section 1610(d)(1), as noted, a state may waive such immunity explicitly, and the waiver is irrevocable. Under the rule of *Weston*, a central bank may not waive this immunity at all as to funds held on its own account; indeed, given the facts of the case, it seems that a central bank may rely on section 1611(b) to free them even from an explicit contractual waiver. The broad interpretive gloss put on section 1611(b)(1) becomes even more troubling when one realizes that section 1611(b)(1) also allows for an explicit waiver of the central bank's property by the "parent foreign government," but under *Weston*, not even the state could

188. FSIA, § 1610(d).

189. 823 F. Supp. 1106 (S.D.N.Y. 1993).

190. The Court in *Weston* faced an additional difficulty in deciding what funds in a central bank's accounts are indeed held for its "own account." The accounts at issue there apparently commingled funds belonging to private parties and to the state entity itself. In deciding the issue, the court looked to the district court opinions in *Liberian Eastern* and *Birch*, but failed to adopt the position of either. Instead, the court toed the line, finding that the facts before it were sufficient to distinguish between funds held for embassy purpose, and those held for private purposes. Under those circumstances, the best view was "to apply the distinction, instead of finding the account entirely immune or entirely not immune." 823 F. Supp. at 1114.

191. *Id.* at 1110-11.

waive immunity for funds held for the bank's "own account." This, of course, countermands the most fundamental notions of sovereign immunity as a privilege of a state in foreign courts, but since no appeal was taken in the *Weston* case, no higher court has spoken on this issue.

*ii. Comparative Analysis*

The provisions of the UKSIA differ from the FSIA in two key ways with regards to central bank property. First, per the terms of section 13 discussed above, pre-judgment attachment of central bank assets will be allowed where the state has given consent.[192] Thus, the structure of the UKSIA, which is simpler in form than the FSIA, avoids the problem put forth by *Weston.* However, the UKSIA prohibits treating the funds of a foreign central bank as commercial in order to abrogate immunity.[193] Taking these provisions together, the protection of the English statute is slightly broader than the FSIA in allowing for waiver, a less common case, but slightly narrower in prohibiting a commercial characterization of bank assets, a much more common case.

Under the ASIA, which is patterned along the line of U.K. precedent, central banks and monetary authorities are treated identically to a state itself.[194] Thus, they are given more protection than other instrumentalities, termed "separate entities," which are afforded immunity from execution only when the judgment upon which execution is sought resulted from the case where the separate entity would have been entitled to adjudicative immunity but for a waiver of that immunity.[195] The result of this construction is a requirement of an explicit waiver by a central bank instrumentality, which assumedly could come from the state as well, allowing execution against bank assets.

Conversely, the CSIA is patterned directly after section 1611 of the FSIA. Thus, property of a central bank or monetary authority "held for its own account" will be immune from execution in Canada.[196] As with other sections, one can assume that the interpretation would be similar to that under the FSIA, and, given the discussion above, would not be entirely clear.

The language of the ILC Draft simply exempts all "property of the central bank or other monetary authority of the State,"[197] without any of the qualifying language of the national statutory regimes. This prohibition is particularly broad, and while it has the benefit of requiring minimal interpretation, it rejects all possible recovery in situations where banking institutions have engaged in an essentially private commercial transactions.[198]

192. Fox, *supra* note 29, at 393.
193. UKSIA, § 14(4).
194. ASIA, § 35(1).
195. *Id.* § 35(2).
196. CSIA, § 12(4).
197. ILC Draft Articles, *supra* note 26, art. 19(1)(c).
198. In drafting Article 19, the Special Rapporteur suggested adding the words "and used for a monetary purpose" to qualify the central banking exception, but that limitation was rejected. *See* ILC Draft Report, *supra* note 26, at 59.

This issue of execution against a central banking authority has not arisen in continental systems, most likely because the activities of a central bank are considered fundamental to the economic powers of the state, which under the European framework would be considered *acta jure imperii.* In such a framework, claims against sovereign funds are unlikely to be attempted. Nevertheless, there is no such constraint in the litigation environment of the United States. Thus, the issue continues to be of importance in the framework of the FSIA due to the general availability of foreign central bank funds in the capital markets of the United States and some clarity on the issues discussed above is necessary.

## IV.
## PROGRESSIVE DEVELOPMENT OF EXECUTION IMMUNITY

At the utmost extreme, the principle of sovereign immunity from execution relies on arguments of protecting state debtors or tortfeasors from excessive liability—and perhaps insolvency—for damages arising from their acts, or more precisely their state acts. On a simplistic level, this argument is sound, but on a higher level, it has little practical application for modern states, which have access to international capital markets and face a limited real risk of insolvency.

The comity argument for foreign sovereign immunity has more substantive application, because it is predicated on a political notion of supra-legal state interaction and that, as stated in the seminal American case of *The Schooner Exchange v. McFaddon*,[199] "mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require."[200] To some extent, implicit in this notion of comity is the fact that sovereign immunity in all its forms, but most pointedly in the arrest and execution of the tangible assets of a foreign state, raises issues more properly located in the political rather than judicial realm. It is one thing to require a state to appear and defend an action, but quite another to allow private parties to initiate the liquidation of state assets.

This same sense of comity cuts the other way, however, in that the forum state cannot be expected to deny its citizens the right to compensatory recovery. This competing sovereign duty—expressed in the absolute power of a state over its domestic judicial proceedings—was also recognized under traditional regimes like that delineated in *The Schooner Exchange.*[201] Indeed this notion of allowing courts to control the proceedings before them, and in particular, to govern the rules of enforcement of the judgments it renders, is not an extraordinary one.

Taking these two competing, relatively simple ideals, this final section advocates for a coherent system of execution under the FSIA, using a study by the ABA[202] as a basis for promoting changes to the FSIA regime and building on that study with reference to the above comparative study. As a preliminary mat-

199. 7 Cranch 116 (1812).
200. *Id.* at 136.
201. *Id.* at 135-36.
202. ABA Report, *supra* note 23.

Ostrander: The Last Bastion of Sovereign Immunity: A Comparative Look at Iran

ter, the section details the policy implications of changes in the execution immunity regime and then considers each of the major subtopics addressed above: procedural questions, including waiver and pre-judgment attachment; substantive questions, including the nexus requirement and tort claims; and finally, questions of specific state property, including diplomatic and central bank property.

### *a. Principles of Policy*

Given the difficult nuances of defining and protecting state property, there are a number of obvious difficulties. One of the more difficult of these questions asks how to clarify the *international law* of sovereign immunity, which requires the coordination and integration of two opposing camps of states. The first camp contains mostly Western industrialized states that are unwilling to reconsider the principles of the restrictive theory of immunity. The second camp contains other, less developed states that still adhere to the principles of absolute immunity.[203] Within the first group, many of which have been considered here, there is a lack of clarity in the definition of commercial, or private, activity of states; a lack of clarity in the propriety and procedure of pre-judgment attachment; and an inconsistent application of the nexus requirement. Between the two groups, there is conflict over principles of the waiver of execution immunity, both pre- and post-judgment, issues of tort liability for terrorist acts, and the treatment of diplomatic and consular property. The ILC has proposed various solutions to this fairly intractable problem, many of which involve programs of voluntary compliance or state-to-state dispute resolution.[204] Whether such a regime based on the voluntary compliance of nations could function is questionable, but, regardless, a tenable solution to the *international* differences

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203. The absolute theory of immunity, of course, does not invite much in terms of analysis. Under this traditional theory, which prevailed in most of the nations of the world until the mid-twentieth century, both immunity from adjudicative proceedings and immunity from execution of judgments were inviolable absent the consent of the foreign state. For the developments away from absolute immunity in the United States, see *supra* note 1.

204. ILC 1999 Report, *supra* note 30, ¶ 118. In discussing this voluntary compliance regime, the ILC report stated:

> First, it may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a State with a valid judgment. This may be achieved by providing the State with complete discretion to determine the property to be used to satisfy the judgment as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the convention which may obviate the need to satisfy a judgment owing to its invalidity. As a consequence of the first two elements, the power of a court to take measures of constraint would be limited to situations in which the State failed to provide satisfaction or to initiate dispute settlement procedures within a reasonable period. Since the State would be given complete discretion to determine the property to be used to satisfy a valid judgment and a reasonable period to do so, the court would have the power to take measures of constraint against any of the State's property located in the forum State which was not used for government non-commercial purposes once the grace period had expired.

*Id.*

in execution immunity is still lacking. It is beyond this article's scope to propose such a solution.

However, a more plausible undertaking is to reconsider the treatment of each of the difficulties discussed herein within the construction of the FSIA. Prior to addressing the statutory structure itself, it is necessary to construct a reasoned policy structure of the issues underlying the immunity from execution. Objectively, the development of the restrictive theory of sovereign immunity has proceeded with greater speed on the issue of adjudicative immunity than it has with execution immunity. This relatively limited development is based on a number of principles: (1) that the notion of execution immunity is more directly tied to the sovereign independence of states because it deprives a state of physical property; (2) that execution against sovereign assets causes a particular interference with the foreign relations of the forum state; and (3) and that developing nations, often the debtor-defendants in commercial transactions, are not protected by any measures of insolvency protection, necessitating deference to their sovereign responsibilities in some cases.

The first principle points to the distinction between adjudicative and execution immunity; in the prior case, a state, if it so chooses, simply may not appear or may ignore court orders, but in the latter case, the state may not simply ignore an order which attaches or seizes its property. By materially forcing the foreign sovereign to subject itself to the courts of another sovereign, limiting execution immunity infringes substantially on the traditional notions of sovereign activity. The second principle is implicated most clearly in the case of diplomatic and consular property, where seizure may limit the actual conduct of foreign relations, but also comes to the fore in cases regarding frozen assets and diplomatic leverage, as it has in recent U.S. cases. This principle may also apply to the activities of a foreign central banking authority acting within the United States, where such activity amounts to state action (for instance, in the case where state funds are held in an U.S.-based investment vehicle). The third principle actually cuts in both directions: on one hand foreign states are not given the same opportunity to absolve debts and get a fresh start as are private corporations and individuals but on the other hand creditors do not have the same rights against developing sovereign debtors.[205]

All three of these principles must be borne in mind when considering any alteration to the execution immunity regime, particularly given the trend to narrowing the scope of execution immunity. Typical concerns in a situation where a judgment creditor seeks enforcement must also be considered. These include the interest of the forum in enforcing their own decrees and the interests of the successful plaintiff in satisfying its settled expectations—in the case of commercial claims—or their compensatory interest—in the case of tort claims. The next section will first consider the ABA attempt to reformulate the FSIA execution provisions in light of these competing concerns, and, second, will analyze

205. ABA Report, *supra* note 23, at 590.

the problems highlighted above in the context of the impact of the ABA draft and the related policy concerns.

### *b. Analyzing Possible Alterations*

The ABA Report put forth in 2002 recommended some sweeping changes to the FSIA provisions dealing with execution immunity.[206] Although the ABA suggestions do not present the only means of altering the FSIA structure, they do serve as an interesting launch point for the current discussion. In general, the alterations are intended to promote the clear development of the law of sovereign immunity, but in some specific cases, the suggested reforms do little or fail to incorporate issues with the proper level of detail.

The relevant provisions of the FSIA, as noted above, are sections 1609, 1610, and 1611.[207] For our purposes, the important provisions are those dealing with waiver, 1610(a)(1); the commercial nexus requirement, 1610(a)(2); insurance claims, 1610(a)(5); and 1611, which specifically exempts certain types of state property, will also be considered.

The ABA Report proposed the most significant changes to the first two provisions of section 1610(a). First, as to waiver, the ABA Report recommends removal of the language allowing for the possibility of an implied waiver of execution immunity from section 1610(a)(1). As to the remainder of section 1610(a), the ABA proposed a new section, section 1610(a)(2), to replace all of the remaining provisions. The proposed language reads:

> The judgment relates to a claim for which the foreign state is not immune under section 1605, provided that, where a judgment is based on an order confirming an arbitral award rendered against the foreign state, the attachment in aid of execution, or execution, shall not be inconsistent with any provisions in the arbitral agreement.[208]

By removing the enumerated exceptions, the ABA Report greatly simplifies the execution immunity provisions such that, if adopted, it would have a tremendous impact on litigation against foreign sovereigns. The new formulation has two major effects: (1) by removing the specific immunity exclusions under section 1610, other than waiver, the proposed section 1610(a)(2) would allow non-commercial tort plaintiffs to execute their judgments against commercial property of a foreign sovereign; and (2) the proposed section 1610(a)(2) does not contain the nexus requirement, which would benefit both commercial plaintiffs and non-commercial tort plaintiffs alike. In formulating these alterations, the ABA Report drafters noted that the new format would be more "consistent with the international law on the subject."[209]

However, the report did not significantly alter the other execution immunity provisions. It suggests that no changes be made to the provisions of the

206. *See id.* at 581-594.
207. The text of these sections is reproduced *supra* note 5.
208. ABA Report, *supra* note 23, at 587.
209. *Id.*

FSIA related to prejudgment attachment[210] or to concerns of central bank property. The report does suggest a minor alteration to section 1611(b) to clarify the position of diplomatic and consular property within the framework of the act. The modified language reads:

> Subject to section 1610(f), the property is protected from execution or attachment by the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227), the Vienna Convention on Consular Relations (April 24, 1963, 21 U.S.T. 77), or any treaty, international convention, other international agreement, or other federal statute of the United States related to property of foreign states or instrumentalities of foreign states.[211]

This section simply consolidates the provisions dealing with diplomatic and consular property, which now are contained in section 1610(a)(4)(B) and 1611(c), and makes a clear statement about the sources of international and domestic law that should be considered when applying the principle of diplomatic immunity. Having looked at these proposed alterations as a starting point, we can now explore whether the ABA Report goes far enough or whether more specificity is needed in each of the broad categories of difficulty described above. We first turn to the procedural concerns of waiver and pre-judgment attachment, then to the substantive concerns of the nexus requirement and treatment of tort plaintiffs, and finally to the treatment of specific types of sovereign property.

#### *i. Procedural Concerns: Waiver of Immunity from Execution and Pre-Judgment Attachment*

The ABA Report retains section 1610(a) pertaining to waiver of execution immunity, but removes the allowance for an implied waiver. Removing this language is reasonable, considering the circumstances in which waivers are relevant. Waivers only arise in commercial transactions engaged in by the foreign state, because waivers are typically contractual in nature. They do not, therefore, implicate many of the concerns of uncompensated plaintiffs because sophisticated commercial actors are expected to consider the terms of sovereign immunity when conducting business with foreign states. Furthermore, the typical size of state commercial contracts implicates concerns of sovereign insolvency, particularly in the case of development contracts and foreign bank debt.[212] Thus, the principle of waiver should likely be narrowed to explicit provisions where the state and private actor can collectively establish the contractual expectations, including the propriety of execution immunity.

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210. FSIA, § 1610(d)

211. ABA Report, *supra* note 23, at 589.

212. *See* A.I. Credit Corp. v. Government of Jamaica, 666 F. Supp. 629, 633 (S.D.N.Y. 1987) (refusing to consider claims by the defendant state, buoyed by evidence from the International Monetary Fund, that the entry of judgment on a defaulted loan would have a "devastating financial impact"); *see also* National Union Fire Ins. Co. v. Peoples Republic of Congo, 729 F. Supp. 936, 944-45 (S.D.N.Y. 1989) ("The mere recognition by a lender that enforcement of its contractual rights may have adverse effects upon a borrower (which in turn could be expected to place pressure on the borrower to comply with its contractual duties) does not render enforcement of its contractual rights 'illegitimate.'").

As noted, an explicit written waiver of execution immunity is generally required under the common law jurisdictions considered here.[213] Furthermore, in both France and the United States, where implied waivers are allowed, courts have had difficulty in interpreting and applying the concept of implied waivers.[214] Thus, the abolition of implied waivers under the FSIA is in accord with the reasoned practice of states and the policies underlying sovereign immunity.

Of course, a separate waiver is required for both adjudicative immunity and execution immunity, but this requirement is well accepted under international law.[215] Moreover, the commercial underpinning of waiver provisions, which implicates greater sophistication on the part of contracting parties, mitigates any difficulty that this requirement might cause. Under the FSIA, however, a separate waiver from that allowing for post-judgment attachment is required to allow for pre-judgment attachment.[216] This is also the established principle in the United Kingdom, Canada and under the ILC Draft Articles.[217] Under all of these regimes, waiver is the only means to obtain any prejudgment measure of constraint.

In this author's view, retaining section 1610(d) regarding prejudgment attachment is not tenable. Although the ABA Report notes that the "grounds for obtaining a pre-judgment attachment are even more limited" than post-judgment measures,[218] it fails to explore the issues in any more depth. There may be some justification for retaining this separate waiver regime, because prejudgment attachment threatens to violate the core of sovereign immunity by arresting state property before any adjudicative process takes place.

However, the fundamental problem with retaining the requirements of section 1610(d) is that it applies to any attempt to restrain state property within the United States. Under the ABA formulation, this would include both situations of waiver, under section 1610(a)(1), and under the new section 1610(a)(2). When a state has waived its post-judgment immunity, that same state should not be able to raise a sovereignty justification for requiring a separate waiver where it has already given consent to subject some measure of its property to execution. Allowing this would permit the state to effectively nullify that waiver by removing those assets in the absence of injunctive relief.[219] Even for the most sophisticated parties, allocating negotiation power to the treatment of assets along a time continuum strains our notions of contractual relations. Once a state duly consents to a waiver, it should apply.

The provisions of section 1610(d) also will apply where there is commercial property in the United States that may be subject to execution, but no waiver

213. *See* UKSIA, § 13(3); ASIA, § 31(1); ILC Draft Articles, *supra* note 26, art. 18(1).

214. See, for example in the United States, *Mangattu v. M/V Hayyan*, 35 F.3d 205 (5th Cir. 1994) and the discussion of the line of French cases, *supra* text accompanying notes 64-71.

215. *See* Philippine Embassy Case, *supra* note 61; ILC Draft Articles, *supra* note 26, art. 18(2).

216. FSIA, § 1610(d)(1).

217. See the discussion, *supra* part I.b.ii.

218. ABA Report, *supra* note 23, at 584.

219. It is this very possibility, the flight of assets from the jurisdiction considering the claim, which the ILC hoped to deal with through a voluntary compliance regime. *See supra* note 204.

has been granted as to that property. In this situation, the sovereign rights of a state would not likely be implicated to the extent necessary to outweigh the forum's interests in executing judgments or fulfilling the plaintiffs' interest in relief. Indeed, promoting such incentives for defendants is inimical to the basis of the restrictive theory of immunity; namely, when a state enters the commercial arena, it takes on the persona of a private actor and must face all of the ensuing limitations and responsibilities

This situation is especially likely to occur when considering that whatever potential infringement there is on the sovereign rights of the foreign state will be mitigated by the judicious application of section 1610(c), which requires a reasonable period of time to pass before the application of any execution measures under 1610(a) or (b).[220] By removing section 1610(d), this proposed provision would apply to prejudgment measures as well, and would present courts with a ready means to respect the ability of sovereign entities to order their assets before entry of judgment. Thus, commercial property should be treated the same at the pre and post-judgment stages of execution, in accordance with the practice of Australia and the proclamation of the French Court of Cassation in *Eurodif.*

*ii. Nexus Requirement and Tort Claims*

The primary concern of the drafters of the ABA Report, in terms of immunity from execution, was the removal of the nexus requirement. Recall that section 1610(a)(2) of the FSIA requires, in a claim against general commercial property, that such "property is or was used for the commercial activity upon which the claim is based." The problem with this requirement, as the Report notes, is that "[o]nly in rare instances would a foreign state have property in the United States, perhaps an office, warehouse, or goods awaiting export, 'used' for the activity giving rise to the claim."[221]

The ABA committee intended to remove the nexus requirement in order (1) to allow commercial creditors access to more property than that which their claim was based upon and (2) to allow for a remedy for tort claimants to execute against more than just insurance policies in the United States.[222] The complete construction put forth by the ABA would meet both these goals. Removing the nexus requirement allows execution against any commercial property within foreign states for both commercial and tort creditors. In the United States, this is a definitive boon for accidental tort creditors, such as a typical auto tort plaintiff, because they no longer have to rely solely on the fortuitous presence of an insurance policy covering their claim to recover under section 1610(a)(5).

220. The full text of § 1610(c) reads:
(c) 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 § 1608(e) of this chapter.

221. ABA Report, *supra* note 23, at 585.

222. *Id.* at 586.

Ostrander: The Last Bastion of Sovereign Immunity: A Comparative Look at Com

The abolition of the nexus requirement and the concomitant benefits to tort and contract claimants only makes sense in terms of the policy underpinning immunity from execution. By acting as a commercial actor, a state cedes its sovereign status and should be responsible for properly allocating its assets to commercial and sovereign practices. As with any actor, when engaging in a commercial area, the state would then be able to measure its potential liability and begin to form settled expectations regarding its exposure. Further, where property is commercial—by definition outside of the public sphere—it is unlikely that removing the nexus requirement would have detrimental effects on the foreign relations of the United States.[223] Finally, at least as to most tort plaintiffs, there is little likelihood of enabling typical plaintiffs to bankrupt a sovereign state or threaten its financial stability.

The simplification of requirements has an additional benefit of making the separate treatment of immunity of execution for instrumentalities superfluous. Section 1610(b)(2) currently exempts the commercial property of instrumentalities from the nexus requirement. Since a state includes all of its instrumentalities under section 1603 of the FSIA,[224] such property would be included under the general reformed provisions. Thus, the ABA reforms adapt the simplicity of the ASIA and the UKSIA, which do not make a distinction between states and their instrumentalities, while at the same time maintaining the power to execute against the property of instrumentalities. Of course, these reforms do not mean that there can be unbridled execution of judgments against the property of foreign instrumentalities operating within the United States; indeed, the reforms do not significantly change the treatment of instrumentalities. Instrumentalities would still be considered under the presumption of separate juridical status, as in the holdings of cases like *Bancec*[225] and *Sonotarch*.[226]

In all, the proposed changes to the commercial property exception are beneficial to the overall structure of the FSIA. Previously the balance tipped against plaintiffs who had to prove first that the property was commercial and then that it was related to the claim at hand. In this author's view, the second stage was an unnecessary infringement of a plaintiff's right to recovery when a foreign state is perfectly capable of ordering its affairs upon proper lines. The emergence of more stringent protections of the most common sovereign property emerging, as discussed below, makes it unlikely that sovereign rights will be destroyed by these proposed changes.

223. To assure such a result, the ABA offers a broader definition of immunity for certain property that at times has been deemed commercial, particularly diplomatic property. This extension, and its limitations, will be discussed below.

224. Section 1603(a) reads: "(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."

225. 462 U.S. 611 (1983).

226. Court of Cassation (France), 1 October 1985, 26 I.L.M. 998 (1987).

*iii. Specific Sovereign Assets*

The ABA Report would make minor additions to section 1611, as noted above. Yet, given the changes proposed concerning the nexus requirement, which establish a general rule of execution against commercial property, there would be a need to adequately define exceptions to that general rule enumerated in section 1611. Under the proposed regime, there is a possibility that such property will be subject to a greater number of attachment and execution attempts. Even outside of that proposed new framework, however, section 1611 suffers from stilted and mixed judicial interpretation, particularly in the area of central bank property and mixed embassy accounts. Since these types of property go to the core of the sovereign identity of a state, and execution against them presents a legitimate threat to the facilitation of foreign relations, the boundaries of possible execution should be clearly delineated.

The structure of the FSIA was previously slightly askew in its treatment of diplomatic property, with relevant sections referring to the VCDR being found in section 1610(a)(4)(B) and a general diplomatic immunity provision in 1611(c). The ABA Report would amend section 1611(b) to include a more explicit definition of immune diplomatic and consular property.[227] This explicit addition is congruent with the structure of the UKSIA,[228] the ASIA,[229] and the ILC Draft Articles.[230]

While this amendment clarifies the location of the provisions of the FSIA dealing with diplomatic property, it does little to address the more specific problem of embassy bank accounts. While the VCDR itself arguably protects embassy bank accounts,[231] a specific statutory prohibition on the issue would be more effective. Without prejudice to the requirements of section 1610(f)(1), which allows execution against diplomatic property for claims based on the terrorism provisions of section 1605, the diplomatic property of a state should be protected in the core interest of the foreign relations of states. Only in the case of terrorist crimes arising to the level defined under the act should that core interest be infringed. A formulation like that in Article 19 of the ILC Draft Articles would be preferable.[232]

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227. *See* ABA Report, *supra* note 23, at 589.

228. *See* § 16(1).

229. *See* § 32(3).

230. *See* art. 19(1)(a).

231. *See* Philippine Embassy Case, Bundesverfassungsgericht (German Federal Constitutional Court) 46 BVerfGE 342 (Nov. 1977), *available at* http://www.ucl.ac.uk/laws/global_law/ german-cases/cases_bverg.shtml?13dec1977.

232. *See* ILC Draft Articles, *supra* note 26, art. 19. Article 19 reads:

> Article 19 Specific Categories of Property
>
> 1. The following categories . . . shall not be considered as property in use or intended for use by the State for other than government non-commercial purposes
>
> a. Property, including any bank account, which is use or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions, to international organizations, or delegations to organs of international organizations or to international conferences.
>
> . . .

Furthermore, while the concern of the *Birch Shipping*[233] court that all state funds could theoretically be mixed with diplomatic funds is reasonable, such a danger is unlikely in any situation where a state has anything but the most minimal contact with the United States. Instead, the impact of the VCDR, alluded to in *Liberian Eastern*,[234] and the foreign precedents of the *Philippine Embassy Case*[235] and *Alcom, Ltd*[236] establish that there should be a general rule against execution on embassy bank accounts.

The ABA report proposed no changes for central bank property. Unfortunately, as it stands, section 1611 currently presents difficulties in interpretation and structure; any attempt to broaden the terms of section 1610 should also make an attempt to clarify these difficulties. On its terms, section 1611(b)(1) precludes attachment of any funds held by a central bank "for its own account." In practice, the structure of the "own account" test probably reflects a watered down version of the commercial activity test, which allows for a reasoned case-by-case analysis of the nature of the property dealt with. As a matter of law, however, this test is subject to more than one interpretation, as discussed earlier in part III.b. Given the normally strict application of central bank immunity in the sovereign immunity regimes discussed above,[237] it is difficult to formulate a proper construction of this provision by comparative analysis. It is necessary to mesh the central banking exception with the broader idea of commercial property in the proposed change to section 1610. Along the lines of the third interpretation of section 1611(b)(1) and the supporting House documentation presented above,[238] the ideal formulation "would provide protection for central bank property used for the account of the central bank or for a public or governmental activity of the foreign state or its agencies and instrumentalities, but not for commercial transactions of a foreign state or its agencies or instrumentalities." This could be accomplished by reformulating section 1611(b)(1) with a clear definition of "own account," which would incorporate by reference the commercial/non-commercial distinction.

Even after clarifying this issue, the procedural anomaly created by *Weston*[239] remains. Recall that the Court there invalidated a waiver pre-judgment attachment because section 1611(b) did not allow for such waivers by a central bank, despite the fact that section 1610(d), dealing with pre-judgment attachment in general, would allow for such a waiver. Further, from the breadth of the interpretation, it appeared that the state owner of the bank could not have waived immunity to pre-judgment attachment either. Although defensible in accordance with the current text of the FSIA, this interpretation countermands the fundamental notions of state sovereignty it purports to protect. It also dismisses any

233. 507 F. Supp. 311 (D.D.C. 1980).
234. 659 F. Supp. 606 (D.D.C. 1987).
235. *See* Philippine Embassy Case, 46 BVerfGE 342.
236. [1984] 2 All ER 6 HL, *reprinted in* 23 I.L.M. 719 (1984).
237. See the discussion of UKSIA, §13, ASIA, § 35(1), and the ILC Draft Articles, *supra* note 26, art. 19(1)(c), *supra* part III.b.
238. *See* Lee, *supra* note 181, at 381.
239. 823 F. Supp. 1106 (S.D.N.Y. 1993).

possibility of central banks, the key state financial instrumentality, partaking of normal commercial relations in the private sphere. In accordance with the above discussion of pre-judgment waivers, this author proposes that a separate waiver as to pre-judgment remedies should never be required if the state entity has waived execution against specified assets prior to a conflict. Thus, removing section 1610(d) and specifically allowing for waivers of pre-judgment attachment in section 1611(b) would eliminate the anomaly of *Weston*.

## CONCLUSION

The FSIA execution provisions have been described "as among the most confusing and ineffectual in the state,"[240] and are in dire need of reform. This note has undertaken an analysis of a preliminary effort to undertake such a reform. Yet, it can be difficult to measure where improvement can be made when doing so involves striking the proper equilibrium between the narrowing scope of sovereign immunity and the increasing presence of foreign plaintiffs in U.S. courts. It is clear that the older regimes of immunity, based on basic principles of comity and absolute state immunity, should not survive in a changing environment of international commercial interaction and international rogue states. However, a functional statutory regime to govern claims against foreign sovereigns is a complex beast, which at times needs to adjust to pressures put upon it, both procedural and substantive. As is apparent in the history of terrorism and the FSIA laid out in the introduction, execution immunity has been the last wall to be assailed. Unfortunately, changes to the execution regime have to this point been entirely *ad hoc*, in some cases applying only to specific claimants. A more complete reassessment of the statutory framework is necessary to achieve a comprehensive simplification of the execution provisions and can be developed with reference to the decisions of other jurisdictions.

240. ABA Report, *supra* note 23, at 581.