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COMMENT

THE IRAN CASES—EXECUTIVE INTERVENTION IN PRIVATE LITIGATION

American corporations and financial institutions are conducting an increasing amount of business with foreign governments.[1] A private firm's interaction with a foreign sovereign[2] differs substantially from commercial transactions with foreign corporations or citizens of another country. The primary reason for this distinction is that the doctrine of sovereign immunity affords states absolute discretion in their affairs, unhampered by the laws of other states.[3] This doctrine of sovereignty, recognized under both American[4] and international law,[5] extends immunity to a sovereign from suit in its own courts as well as in the courts of another nation. Absent a government's waiver of immunity, Americans doing business with a foreign sovereign have only that government's honesty and good faith as assurance that it will fulfill its contractual obligations.

During the 1960's and 1970's, many American firms entered into contracts with Iran, trusting the reputation of Shah Mohammed Reza Pahlavi. Many of these businesses fell victim to contract repudiation and asset expropriation during the Iranian revolution.[6] As a result, more than 400 lawsuits were filed by American nationals damaged by the revolution and the policies of the new regime.[7] The settlement of these cases was complicated, however, by President Carter's actions in response to the seizure of the American embassy in Tehran, Iran. Initially, the President ordered that all Iranian

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1. D. Cohen, *Some Problems of Doing Business with State Trading Agencies*, in INTERNATIONAL TRADE, INVESTMENT, AND ORGANIZATION 186-87 (W. LaFave & P. Hay eds. 1967). *See* H.R. REP. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as HOUSE REPORT ON FSIA] (American citizens are increasingly coming into contact with foreign states as foreign enterprises are everyday participants in commercial activity).

2. A sovereign is an independent government which is vested with supreme authority over a state. L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 118-19 (H. Lauterpacht 8th ed. 1955).

3. J. BRIERLY, THE LAW OF NATIONS 8-9 (6th ed. 1963) [hereinafter cited as BRIERLY]. The doctrine of sovereignty was formulated by philosopher Jean Bodin in 1576 and has evolved to mean that the sovereign government has absolute dominion within its own state. *Id.* at 7-16.

4. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976). Under this Act, a foreign state is immune to the jurisdiction of United States courts, with only certain limited exceptions. *Id.* § 1604.

5. *See* BRIERLY, *supra* note 3, at 243 (foreign sovereign's immunity is customary in international law).

6. A. SAIKIL, THE RISE AND FALL OF THE SHAH 182-84 (1980) [hereinafter cited as THE RISE AND FALL OF THE SHAH]; JOINT ECONOMIC COMMITTEE, 96TH CONG., 1ST SESS., ECONOMIC CONSEQUENCES OF THE REVOLUTION IN IRAN 5-10 (Comm. Print 1979) (a compendium of papers submitted by B. Reich) [hereinafter cited as ECONOMIC CONSEQUENCES OF THE REVOLUTION].

7. Nat'l L.J., March 23, 1981, at 7, col. 2.

assets in the United States be "frozen."[8] The regulations issued pursuant to this order prohibited final disposition of the lawsuits filed by American nationals, except in certain limited situations.[9] Subsequently, President Carter signed the Iran Accords[10] which lifted the "freeze" on Iranian assets but stayed all judicial proceedings and nullified all judicial attachments of Iranian property. Further, the Accords established a separate tribunal to determine the validity of claims by American nationals.

The Iran cases provide the first significant opportunity to test the effect of two statutes governing the interaction of American businesses with a foreign government: the Foreign Sovereign Immunities Act of 1976 (FSIA),[11] which sets forth the circumstances under which a foreign government can be sued in United States courts, and the 1977 International Emergencies Economic Powers Act (IEEPA),[12] which allows the President to intervene in disputes between American creditors and foreign governments in emergency situations.[13] The Iran cases exemplify the inherent conflict between these two statutes.

This Comment examines the nature of the Iran cases and the treatment received by American plaintiffs under the FSIA. Additionally, to gain a better understanding of how the two federal statutes interact, IEEPA and its historical counterpart are presented. Finally, the legitimacy of the broad power claimed by the President in freezing Iran's property, suspending cases properly before United States courts, and nullifying judicial attachments of Iranian assets is analyzed. Understanding the struggle between the executive and judicial branches to exert control over claims by American businesses against foreign sovereigns is essential for an accurate evaluation of the risk involved in contracting with foreign governments. Excessive intervention by a President undermines the ability of American businesses to evaluate that risk.

SOURCE OF THE CONTROVERSY

During a visit to Tehran, Iran, on December 31, 1977, President Carter described Iran as "an island of stability in one of the more troubled areas of the world."[14] Though hindsight reveals the irony of that observation, Iran

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8. The freeze prohibited Iranian assets from being withdrawn from the United States or from branches of United States banks in other countries. Exec. Order No. 12170, 3 C.F.R. 457 (1981), *reprinted in* 50 U.S.C. § 1701 (Supp. III 1979).

9. Iranian Assets Control Regulations, 31 C.F.R. § 535.101-.904 (1980).

10. The Iran Accords constitute the agreement between the United States and Iran which provided for the release of American hostages held in Tehran in exchange for the release of Iranian assets from the United States. *See* note 72 *infra*.

11. 28 U.S.C. §§ 1602-1611 (1976).

12. 50 U.S.C. §§ 1701-1706 (Supp. III 1979).

13. *Id.* § 1702. In examining the IEEPA, reference to its predecessor, the Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44 (1976 & Supp. III 1979), is pertinent. *See* notes 73-96 and accompanying text *infra*.

14. *United States Policy Toward Iran: Hearings on Foreign Affairs before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 28

was then considered a trusted ally with whom the United States had developed extensive commercial ties.[15] The regime of Shah Mohammed Reza Pahlavi used oil revenues to purchase American technology, services, and manufactured products.[16] The rapidity of the Shah's modernization program, for which he engaged American firms in numerous and substantial commitments, was surpassed only by his successor's crusade to "de-westernize."[17] Ayatollah Ruhollah Khomeini endorsed the ideology that Iran could rid itself of the evils of western civilization only by disposing of all that was American.[18] Nationalization of the Iranian industries that had not already been consumed by the economically devastating revolution, was swiftly accomplished by the new government.[19] As hostility grew between Iran and the United States, fueled by the seizure of the United States embassy in Tehran,[20] Iran prepared to withdraw an estimated eight to twelve billion dollars from American banks.[21] American creditors that had not already filed suit did so, fearing that Iran eventually could be successful in removing its funds and assets from the United States.[22]

(1979) (statement by Lee H. Hamilton, quoting President Carter) [hereinafter cited as *House Comm. Hearings*].

15. *See* ECONOMIC CONSEQUENCES OF THE REVOLUTION, *supra* note 6, at 6-7.

16. *Id.* at 11 (Iran exported over 2.7 billion dollars worth of goods to the United States and imported over 3 billion dollars worth of goods and services in 1977).

17. *Id.* at 223-24.

18. THE RISE AND FALL OF THE SHAH, *supra* note 6, at 165.

19. *See* Getz, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189, 211-12 (1980) [hereinafter cited as Getz] (the rapidity of the economic dilapidation forbade a timely withdrawl of American interests). The rapidity of Iran's nationalization is exemplified by the following chronology. On May 5, 1979, Iran announced that all pending arms deals had been cancelled. On June 25, 1979, Iran nationalized all banks. On July 5, 1979, Iran nationalized the steel, copper, aluminum, aircraft, shipbuilding, automobile, and mining industries. ECONOMIC CONSEQUENCES OF THE REVOLUTION, *supra* note 6, at 223-24 (chronology of events prepared by Clyde R. Mark).

20. On May 19, 1979, Khomeini said he did not need the United States and on May 20, 1979, Iran asked the United States to delay the arrival of the newly appointed ambassador to Iran. ECONOMIC CONSEQUENCES OF THE REVOLUTION, *supra* note 6, at 223-24. Iran's demonstration of its intentions to put an end to long-standing political and commercial ties culminated when a group of Iranian "students" seized the American embassy on November 4, 1979, with the apparent approval of their government. New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 122 (S.D.N.Y. 1980) (court took judicial notice of controversy).

21. *See* N.Y. Times, Nov. 15, 1979, at 16, col. 5 (midwest ed.).

22. Many of the Iran cases have been litigated in New York. *See The Iran Agreements: Hearings before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 72 (1981) [hereinafter cited as *The Iran Agreements*] (one law firm represented plaintiffs in 107 lawsuits, all before the United States District Court for the Southern District of New York). American courts were obviously a more desirable forum for American plaintiffs due to the disarray of the Iranian courts. Immediately after the revolution Iranian courts were in chaos. American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 423 (S.D.N.Y. 1979). For a discussion on the state of the judicial system in Iran see generally Ottley, *The Revolutionary Courts of Iran*, 4 N. ILL. U. INT'L L.J. 1 (1980).

In addition, Iran's disregard for international law made American courts preferrable. *See* American Int'l Group v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) (resort

Three types of controversies underlie the numerous suits brought by American firms against Iran, its agencies, and instrumentalities. First, the revolution and civil strife in Iran made performance of many contracts for goods and services difficult, if not impossible, for both sides, thus forcing the failure of most contracts.[23] Also, the revolutionary government in Iran repudiated contracts that did not suit Islamic ideology and was reluctant to compensate the companies that had partially performed.[24] A second group of lawsuits was triggered by the new government's decision to nationalize Iran's economy. This nationalization policy resulted in the expropriation or conversion of American assets without compensation to the owners.[25]

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to Iran's courts would be futile); concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3 (Iran violated international law by allowing American diplomatic personnel to be taken captive).

23. The danger to United States employees in Iran forced their withdrawal from that country and subsequently prevented American companies from performing their contracts with the Iranian government. Getz, *supra* note 19, at 212. *Cf.* PRICE WATERHOUSE & Co., PRICE WATERHOUSE INFORMATION GUIDE—DOING BUSINESS IN IRAN 10 (1975) (Prior to the revolution, Iran's government had encouraged foreign investment); *House Comm. Hearings*, *supra* note 14, at 29 (radical change in official Iranian policy to "anti-Americanism" took American business concerns as well as the American government by surprise).

24. *See* National Airmotives Corp. v. Government of Iran, 499 F. Supp. 401 (D.D.C. 1980) (no recourse for American company seeking payment of debt pursuant to contract with Iranian Government); E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980) (denial of payment for services rendered on Iranian aircraft); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979) (payment for services denied to international commercial freight forwarder).

25. *See* American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980) (American insurance operations damaged by nationalization of industries in Iran), *proceedings stayed on appeal*, 657 F.2d 430 (D.C. Cir. 1981); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980) (conversion of American company's equipment, breach of contract and lost profits due to Iranian nationalization); Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979) (American plaintiff damaged from Iranian conversion of oil rig equipment).

Though the right of a sovereign to take assets of a private institution or individual is commonly accepted in international law, it is generally understood that adequate compensation must be offered to the victimized property owner. J. TRUITT, EXPROPRIATION OF PRIVATE FOREIGN INVESTMENT 18 (1974). Although there is some authority that condones a "taking" without compensation when it is nondiscriminating and required by an overriding public purpose, that is the minority position. BRIERLY, *supra* note 3, at 284-85. By treaty, Iran has agreed to observe the property rights of foreign investors. Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, art. XI, 8 U.S.T. 899, 903, T.I.A.S. No. 3853 [hereinafter cited as Treaty of Amity]. *See also* PRICE WATERHOUSE & Co., PRICE WATERHOUSE INFORMATION GUIDE—DOING BUSINESS IN IRAN 10 (1975) (the Iranian government guaranteed fair compensation in the event of expropriation). Iran and most other nations in the world community voted for a U.N. resolution requiring compensation for expropriated property. G.A. Res. 1803, U.N. GAOR, Supp. 17, U.N. Doc. A/PV1193 (1962).

It would be inconsistent with Iran's recently adopted Islamic constitution to reverse its previous position on expropriation. Bassiouni, *Protection of Diplomats Under Islamic Law*, AM. J. INT'L L. 609, 614 (1980) (under the principle of "pacta sunt servanda" or the principle that treaties are continually binding). The new Iranian constitution also recognizes the sanctity of property. *Id.* at 626. Thus, Iran violated both international law and its own law by not compensating American companies whose property it expropriated.

A final category of suits arose out of the common demand by Iranian entities for security in the form of standby letters of credit from American firms with whom they did business.[26] The crucial effect of these standby letters of credit was that the banks involved were required to pay the Iranians on demand regardless of whether their American customers had actually defaulted on their contractual obligations.[27] Because Iran inappropriately demanded payment on some of the outstanding standby letters of credit, and because further demands were expected after the President's freeze was lifted,[28] the American firms sought to enjoin the issuing American banks from paying the nationalized Iranian banks. A number of American courts granted "notice injunctions" requiring the banks involved to withhold payment for a specified period, generally ten to twenty days after demand, to give the American companies time to enjoin the transfer of funds to Iran.[29]

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26. The letter of credit is an instrument by which a bank, on behalf of its customer, evidences to a third party (the beneficiary) a commitment to honor a demand for payment to that third party so that the third party can more safely enter into a transaction with that bank's customer. Getz, *supra* note 19, at 190. *See* U.C.C. § 5-103 (1978 version) (regulating letters of credit under American law). On an international level, the standby letter of credit interposes an additional bank into the transaction for added security. Getz, *supra* note 19, at 193-94. Typically these transactions involved, as a third party, an Iranian entity that could demand payment from an Iranian bank. This bank, in turn, demanded payment from an American bank which would then seek compensation from its American customer. Generally, the customer was an American firm that had contracted with the Iranian entity. It was estimated that after the Iran Accords were signed, that there were over $700 million in disputed letters of credit outstanding. IRANIAN ASSETS LITIGATION REPORTER, Feb. 6, 1981, at 2,249 (M. Mealey ed. 1980) [hereinafter cited as IALR].

27. White, *Bankers Guarantees and the Problem of Unfair Calling*, 11 J. MAR. L. & COM. 121, 125-27 (1979) [hereinafter cited as *Bankers Guarantees*]. *Cf.* U.C.C. § 5-114 (1978 version) (issuer must honor demand for payment though goods may not conform to underlying contract). For a discussion of the dilemma faced by the courts in the Iranian letter of credit cases, see Becker, *Standby Letters of Credit and the Iranian Cases; Will the Independence of the Credit Survive?* 13 U.C.C. L.J. 335 (1980); Gable, *Standby Letters of Credit: Nomenclature Has Confounded Analysis*, 12 LAW & POL'Y INT'L BUS. 903 (1980) [hereinafter cited as *Letters of Credit*]. Thus, the American corporate customer would rely solely on the good faith of the beneficiary, Iran, not to call the letters absent a default. Courts will interfere with payment of standby letters of credit only in the exceptional case when the issuer of the letter of credit is able to demonstrate deliberate fraud on the part of the beneficiary. *Bankers Guarantees, supra*, at 126.

The problems that arise when a firm issues a standby letter of credit to a foreign state that later experiences a revolution may be threefold. The new government may frustrate the initial transaction, call in the letter of credit, or prevent the company from seeking remedy in the local courts. Getz, *supra* note 19, at 210-11.

28. *See, e.g.*, American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 422 (S.D.N.Y. 1979) (payment demanded by Iranian entity even though American company had partially performed), *proceeding stayed on appeal*, No. 79-7527 (2d Cir. Aug. 14, 1979). *See also Letters of Credit, supra* note 27, at 933-34 (civil unrest in Iran and statements by Iranian officials gave rise to legitimate fears of further attempts at unwarranted letter of credit redemptions).

29. *E.g.*, KMW Int'l v. Chase Manhattan Bank, 606 F.2d 10, 17 (2d Cir. 1979) (three day notice required before payment to Iran); Stromberg-Carlson Corp. v. Bank Melli Iran, 467 F. Supp. 530 (S.D.N.Y. 1979) (10 day notice to American creditors required).

All three types of controversies between American firms and Iranian agencies and instrumentalities were brought pursuant to specific exemptions to sovereign immunity within the FSIA.[30] Nevertheless, due to judicial reluctance to interfere with foreign policy matters, it was necessary for claimants to persuade American courts to exercise jurisdiction over the Iranian entities in accordance with the Act.

SUING IRAN IN AMERICAN COURTS

Foreign Sovereign Immunities Act of 1976

The FSIA provides guidelines under which a suit may be brought against a foreign state in a United States district court.[31] The FSIA is a statutory codification of the doctrine of sovereign immunity. This doctrine was first recognized in 1812 by the United States Supreme Court in *Schooner Exchange v. McFaddon*.[32] The *Schooner Exchange* Court held that acts of a foreign government are not within the jurisdiction of United States courts.[33] After *Schooner Exchange*, the courts adopted the practice of relying on an opinion from the State Department as to whether a particular sovereign was immune from United States courts, or whether the case could be properly heard.[34]

Prior to the enactment of the FSIA, State Department "opinions" were the determinative factor in the immunity decision.[35] Quite often, the decision

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At least one court refused to grant a "notice injunction," however, because Iran had not yet demanded payment, and the action was, therefore, untimely. Harris Corp. v. Bank Melli Iran, No. 79 C 560 (N.D. Ill. Mar. 22, 1979). For cases in which Iran demanded payment and the courts allowed payment to be made, see American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979), *proceeding stayed on appeal*, No. 79-7527 (2d Cir. Aug. 14, 1979); Balfour, Maclaine Int'l, Ltd. v. Manufacturers Hanover Trust, No. M-2787 (N.Y. Sup. Ct. Aug. 2, 1979). Furthermore, even those American plaintiffs that obtained "notice injunctions" were not guaranteed eventual success, since it still would be necessary to demonstrate that Iran was guilty of deliberate fraud.

30. 28 U.S.C. § 1605 (1976).

31. The FSIA definition of a foreign state includes agencies and instrumentalities of a foreign government, as well as commercial enterprises owned and controlled by that government. *Id.* § 1603. *See, e.g.*, Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 728 n.2 (S.D.N.Y. 1979) (action against state owned oil company).

32. 11 U.S. (7 Cranch) 116 (1812). Napoleon had seized a ship owned by an American citizen while the ship was on the high seas. An American brought suit against Napoleon while the ship was on business in an American port. *Id.* at 117. Chief Justice Marshall stated that the province of a nation to conduct its affairs without being subjected to the jurisdiction of another country's courts is beyond dispute. The only exception, added the Chief Justice, was if the foreign nation itself consented. *Id.* at 136. Therefore, since France had not consented to jurisdiction, the French army ship then in Philadelphia was immune from the jurisdiction of United States courts. *Id.* at 147.

33. *Id.* at 136.

34. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (according to State Department opinion, the federal courts could exercise jurisdiction over a ship owned, but not in possession of, Mexico); *Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943) (State Department opinion that the district court could not exercise jurisdiction over a steamship owned by Peru).

35. Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 431-32 (1977) [hereinafter cited as *Judicial Control*].

would be based on the amount of political pressure the State Department received from the foreign government in question.[36] As a result, the FSIA was adopted to de-politicize the grant of immunity by giving the courts authority to decide the conditions under which a foreign government would be subject to the jurisdiction of the United States courts.[37] The Act provides specific exceptions to the general rule of sovereign immunity,[38] thereby establishing a definite framework from which a potential litigant can determine the amenability of a foreign government to the jurisdiction of an American court.

Exceptions to Sovereign Immunity Under the FSIA

There are two major exceptions to the general rule of sovereign immunity in federal courts.[39] Under section 1605 of the FSIA, a foreign state may expressly or impliedly waive its immunity to jurisdiction.[40] In the 1955 Treaty of Amity between the United States and Iran, Iran impliedly waived its immunity from jurisdiction in United States' courts.[41] Nevertheless, Iran's revolutionary government sought to disavow their commitments under the Treaty of Amity by claiming that the Shah's undertakings were not binding on the new Islamic republic.[42] A change in governments, however,

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Cf. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (practice founded upon State Department policy upheld); *Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943) (where recognition by State Department was lacking, district court had authority to decide immunity issue).

36. *Judicial Control*, *supra* note 35, at 436.

37. HOUSE REPORT ON FSIA, *supra* note 1, at 6604-06. *See* Jet Line Serv., Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1170-71 (D. Md. 1978) (determination of American courts' jurisdiction to hear claims regarding foreign governments must be made without reference to political considerations).

38. *See* 28 U.S.C. §§ 1604-1607 (1976).

39. While there are other exceptions to sovereign immunity, they are not applicable to the Iran cases. Other exceptions encompass foreign property taken in violation of international law, rights in property acquired by the United States as a gift, or money damages sought from a foreign government for injury due to tortious conduct. 28 U.S.C. § 1605(a)(3)-(5) (1976).

40. 28 U.S.C. § 1605(a)(1)(1976).

41. Treaty of Amity, *supra* note 25, art. XI, para. 4, 8 U.S.T. at 909. The waiver of immunity in the Treaty is sufficient to grant personal jurisdiction over Iranian defendants, provided that the "minimum contacts" requirement for in personam jurisdiction is met. Thus, whether the waiver of immunity is operative in a particular case depends on the sufficiency of the contacts between the Iranian entity and the United States with respect to the specific activity in question. *See* HOUSE REPORT ON FSIA, *supra* note 1, at 6612 (the exceptions to the FSIA are nevertheless governed by the minimum contacts requirement of International Shoe Co. v. Washington, 326 U.S. 310 (1945)); Chicago Bridge & Iron Co. v. Iran, 506 F. Supp. 981, 985 (N.D. Ill. 1980) (implied consent through treaty does not obviate the need for minimum contacts with the forum).

It must be noted that this explicit waiver of immunity to jurisdiction is not necessarily applicable to the issue of immunity from prejudgment attachment. *See* notes 56-70 and accompanying text *infra*.

42. Iran has repeatedly attempted to escape its treaty commitments. In New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120

does not relieve a state of the obligations undertaken by a previous legitimate government.[43] Under international law, obligations are made between states, with governments as their representatives, and it is the state that is ultimately responsible for those commitments.[44]

A second exception to sovereign immunity is set forth in section 1605(a)(2) of the FSIA. This section provides for federal court jurisdiction over any commercial activities carried on by a foreign sovereign.[45] For the purposes of the Act, activities that normally could be engaged in by a private party are commercial activities, and activities that only a sovereign can perform are noncommercial.[46] Thus, the nature of the activity rather than the purpose for which it is performed, determines its status as commercial or governmental.[47] Since many of the Iranian cases involve activities that are of a commercial nature, this is an important exception to Iran's immunity from jurisdiction in federal district courts.[48]

Act of State Doctrine

Even if Iran could be brought before an American court pursuant to an exception under the FSIA, the act of state doctrine could have been invoked

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(S.D.N.Y. 1980), the court stated "the essence of the [96] claims [here in question] is that the government of Iran, its agencies and instrumentalities, have expressed an unequivocal intention of avoiding their just debts." *Id.* at 122 n.1. Iran's Foreign Minister, Abolhassan Bani Sadr repudiated all foreign debt as an obligation of the former illegal regime. N.Y. Times, Nov. 23, 1979, at 1, col. 6. Subsequently, however, Iran pledged to pay all its legitimate foreign debts. Wall St. J., Dec. 3, 1979, at 26, col. 1.

43. BRIERLY, *supra* note 3, at 145. There is no real question that the present government in Iran is responsible for the obligations of the State of Iran. The executive branch of the United States Government recognized the new Iranian Government and that recognition is binding on American courts. Recognition of a government bestows legitimacy on that government, and a concomitant responsibility for the obligations undertaken by a former regime. American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 423 (S.D.N.Y. 1979). *See* KMW Int'l, Inc. v. Chase Manhattan Bank, 606 F.2d 10, 16-17 (2d Cir. 1979) (following United States' recognition, the new Iranian government has the same contractual rights and duties of the former). Therefore, in the eyes of American courts, the present Iranian government is legitimate and responsible for its treaties and contracts.

44. *Id. See also* 28 U.S.C. § 1605(a)(1)(1976), which prohibits immunity based on any withdrawal of the waiver which the foreign state may purport to effect . . . ." *Id.* Thus, the FSIA also prohibits an unauthorized, unilateral withdrawal of a waiver of immunity.

45. 28 U.S.C. § 1605(a)(1)(1976). The famous Tate letter of 1952 expressed the State Department's policy to deny immunity to states regarding their purely commercial activities. 26 DEP'T STATE BULL. 984-85 (1952). This so-called "restrictive theory" of sovereign immunity embraced by the State Department has been codified at § 1605 of the FSIA. International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553, 565 (D.C. Cal. 1979), *aff'd on other grounds,* 649 F.2d 1354 (9th Cir. 1981).

46. International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553, 566-67 (D.C. Cal. 1979), *aff'd on other grounds,* 649 F.2d 1354 (9th Cir. 1981).

47. HOUSE REPORT ON FSIA, *supra* note 1, at 6615. "A contract by a foreign government to buy provisions or equipment for its armed forces . . . constitutes a commercial activity." *Id.*

48. *Cf.* New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 125 (S.D.N.Y. 1980) (the 96 cases consolidated in this decision were based on commercial activities).

as a defense to subject matter jurisdiction in United States courts.[49] The act of state doctrine, a principle of both international and American law, precludes the substantive adjudication of issues that involve a foreign government's discretion within its own country.[50] Accordingly, American courts could have refused to review the validity of the Iranian actions underlying the lawsuits against Iran. The courts that have considered this defense, however, have not permitted it to bar judicial consideration, reasoning that the Treaty of Amity acted as a waiver of the defense or that the activities involved were of a commercial nature.[51] Thus, the Iranian government is liable for its obligations notwithstanding the applicability of the act of state doctrine.

Prejudgment Attachment of Iranian Property

Many American litigants sought prejudgment attachments of Iranian assets for the purpose of retaining the assets in this country to satisfy potential judgments.[52] The attachments were also sought to maintain control over

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49. *See, e.g.*, National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639-40 (S.D.N.Y. 1978) (act of state doctrine precludes issues whereas the sovereign immunity doctrine raises a jurisdictional bar), *aff'd*, 597 F.2d 314 (2d Cir. 1979). Thus, the two doctrines are similar but not identical. For a comparative analysis of the two doctrines, see generally Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. CHI. L.J. 193, 194 (1980).

50. In Underhill v. Hernandez, 168 U.S. 250 (1897), the Supreme Court stated that: "[e]very sovereign state is bound to respect the independence of every other state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252.

51. *See* American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D.D.C. 1980) (act of state doctrine inapplicable because there was a relevant treaty waiver provision and the activity of the defendant was commercial), *proceeding stayed on appeal*, 657 F.2d 430 (D.C. Cir. 1981); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 401 (D.N.J. 1979) (act of state doctrine denied because the activities were commercial in nature). Both cases relied on the recent Supreme Court consideration of the act of state doctrine in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). A plurality of Justices in *Dunhill* agreed that "an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Id.* at 695. Although only four Justices recognized a commercial exception in *Dunhill*, the opinion, in conjunction with the inclusion of a commercial exception in the FSIA, has been broadly interpreted as establishing a commercial exception to the act of state doctrine. *See, e.g.*, International Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354, 1360 (9th Cir. 1981) (purely commercial activity may not rise to the level of an act of state); Hunt v. Mobil Oil Corp., 550 F.2d 68, 79 (2d Cir. 1977) (this case not within the purely commercial exception). *But see* Industrial Inv. Dev. v. Mitsui & Co., 594 F.2d 48, 52 n.9 (5th Cir. 1979) (although a majority of the Supreme Court has never recognized a purely commercial exception, one circuit court did).

52. Prior to the Iran Accords, judicial attachments of Iran's assets in the United States totalled about two billion dollars. IALR, *supra* note 26, at 2,085.

Attachment is the act of seizing or blocking persons or property by judicial order to bring them or it under the control of the court. A prejudgment attachment is one which is issued before judgment for the purpose of securing the assets of the defendants in preparation for execution of judgment. Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 726 (S.D.N.Y.

Iranian property in the event the presidential freeze was revoked and attempts were made to return the assets to Iran.

To have a prejudgment writ of attachment, one must generally show that there is a reasonable likelihood of eventual success on the merits of the case and that there are grounds for insecurity concerning the property sought to be attached.[53] Prejudgment attachment is a rare and harsh remedy since it can deny the defendant possession of his property pending final disposition of the controversy.[54] For this reason, the FSIA treats the waiver of immunity from prejudgment attachment differently than waiver of immunity from other types of judicial processes.[55]

While an implicit waiver is sufficient to gain jurisdiction over a foreign sovereign,[56] section 1610(d) of the FSIA states that a foreign country, even if engaged in activities of a commercial nature, shall be subject to prejudgment attachment only if it has explicitly waived immunity.[57] Nevertheless, in *Behring International v. Imperial Iranian Air Force*,[58] the District Court of New Jersey held that the explicit waiver requirements of FSIA section 1610(d) were superseded by an implicit waiver of immunity from prejudgment attachment found in the Treaty of Amity.[59] The *Behring* court reasoned that international agreements are superior to the FSIA and should be governed by ordinary principles of statutory construction, not by reference to the FSIA.[60] The Treaty of Amity was intended to set Iranian entities doing business with United States companies on equal footing with American litigants in United States courts.[61] Thus, "equal footing" necessarily includes finding Iranian entities subject to prejudgment attachment.[62]

Other courts, however, have been reluctant to issue writs of prejudgment attachment because of the special treatment given such writs under the FSIA

1979). Requirements necessary for obtaining prejudgment attachment are dependent upon the state law in which the district court is located. FED. R. CIV. P. 64.

53. Because most of the Iran cases were filed in New York, New York law controlled on the requirements for many attachments. *See* N.Y. CIV. PRAC. LAW §§ 6201, 6223(b) (McKinney 1980). *See also* New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 132 (S.D.N.Y. 1980) (attachments should be confirmed given a demonstration of success on the merits since insecurity stemmed from Iran's attempt to withdraw its funds and the New York statute authorized attachments in these cases).

54. New England Merchants Nat'l Bank v. Iran Generation & Transmission Co., 502 F. Supp. 120, 126-27 (S.D.N.Y. 1980).

55. *Id.* at 126. *See* Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 728 (S.D.N.Y. 1979) (Congress recognized that prejudgment attachments are potentially more harassing, and therefore, require an explicit waiver).

56. 28 U.S.C. § 1605(a)(1) (1976). *See* notes 40-41 and accompanying text *supra*.

57. 28 U.S.C. § 1610(d)(1) (1976). In addition, the purpose for which the party seeks attachment must be to secure a judgment. *Id.* § 1610(2).

58. 475 F. Supp. 383 (D.N.J. 1979).

59. *Id.* at 385-87, 395-96. While the Treaty of Amity contained an explicit waiver of immunity to jurisdiction, *see* note 41 and accompanying text *supra*, the waiver of immunity to prejudgment attachment was found implicitly by the *Behring* court.

60. *Id.* at 394-95.

61. *Id.* at 395.

62. *Id.*

and the special nature of the attachment remedy. In *E-Systems, Inc. v. Islamic Republic of Iran*,[63] for example, an American manufacturer sought to attach Iranian assets in the United States as security in its suit to recover on the conversion of its property and to receive payment for services performed on a contract. The *E-Systems* court found that at the time the Treaty was signed, it was standard practice not to subject foreign governments to attachments.[64] Moreover, the court reasoned that Congress intended the FSIA control matters on which a treaty is silent.[65] Thus, the court held that although there was a waiver of jurisdiction in the Treaty of Amity, it was not explicit and, therefore, insufficient to waive immunity from prejudgment attachment under the FSIA.[66] In essence, the court viewed the FSIA as a mechanism for interpreting treaties rather than as a substantive statute that would be subordinate to a treaty.[67]

The rationale employed by the *Behring* court supported a more equitable result than *E-Systems* with respect to the conflict between the Treaty of Amity and the FSIA. To allow Iran immunity from prejudgment attachment would give it an unfair advantage over American companies and would defeat the intention of the Treaty.[68] It is a general rule of law that treaties should be liberally construed to effectuate the apparent intention of the parties.[69] The *Behring* court correctly viewed the FSIA as substantive legislation to which a treaty is superior,[70] rather than as a rigid mechanism for treaty interpretation. Under the Treaty of Amity, therefore, the prejudgment attachments of Iranian assets constituted a valid security measure by American claimants.

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63. 491 F. Supp. 1294 (N.D. Tex. 1980).

64. *Id.* at 1300.

65. "To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest." HOUSE REPORT ON FSIA, *supra* note 1, at 6616. The Treaty, however, does not explicitly mention attachment. It provides that "[n]o enterprise of either [Iran or the United States] . . . if it engages in commercial . . . or other business activities . . . [shall claim] . . . immunity . . . from taxation, suit, execution or judgment *or other liability* to which privately owned and controlled enterprises are subject therein." Treaty of Amity, *supra* note 25, art. XI, para. 4, 8 U.S.T. at 909 (emphasis added).

66. 491 F. Supp. at 1300. *See also* Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 728 (S.D.N.Y. 1979) (though strict rules of construction do not require that the FSIA be binding on the Treaty, policy requires that the waiver of prejudgment attachment be explicit).

67. *Id.* at 1304. *But see* C. ANTIEAU, MODERN CONSTITUTIONAL LAW 574 (1969) (treaties are subordinate to later acts of Congress).

68. The court in *Pfizer, Inc. v. Lord* articulated the Treaty's intent by stating that the Treaty of Amity guarantees Iran access to United States courts on the "same terms available to United States Nationals. . . ." 522 F.2d 612, 619 n.9 (8th Cir. 1975).

69. *See* Jordan v. Tashiro, 278 U.S. 123, 127 (1928) (treaties must be liberally construed to effectuate the intention of the parties); Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) (treaties should be interpreted in a broad and liberal fashion).

70. 475 F. Supp. at 393. *See also* 28 U.S.C. § 1604 (1976) (FSIA is subordinate to existing international agreements). Even without this statutory provision, however, it has been widely

EXECUTIVE INTERVENTION IN THE IRAN CASES

The efforts of plaintiffs seeking redress against Iran in American courts were impeded by two separate presidential initiatives. First, President Carter implemented the freeze which prevented Iran from withdrawing its assets from the United States.[71] Second, more than a year later, the President signed the Iran Accords.[72] The effect of this agreement on private litigation was twofold. It suspended judicial findings of jurisdiction over Iran and cancelled prejudgment attachments of Iranian property.[72]

These actions by President Carter raise the issue of whether the executive is authorized by Congress and the Constitution to intervene in disputes between American nationals and foreign governments or whether the resolution of such disputes lies more appropriately within the province of the judiciary. Thus, the broad scope of the President's authority to direct foreign affairs must be examined in light of the judiciary's authority pursuant to the FSIA. Such an examination reveals that the implementation of the freeze was justified under the President's power, pursuant to the IEEPA, to issue sanctions in times of national emergencies. The President's perceived authority to alter the adjudicatory rights of American creditors, however, infringed upon the judiciary's power under the FSIA to hear these disputes.

International Emergencies Economic Powers Act

The authority for both the freezing of assets and Iran Accords was principally derived from the International Emergencies Economic Powers Act.[73]

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held that treaties are superior to statutes. For cases articulating this premise see Missouri v. Holland, 252 U.S. 416 (1920), and Geofroy v. Riggs, 133 U.S. 258 (1890).

71. Exec. Order No. 12170, 3 C.F.R. 457 (1981), *reprinted in* 50 U.S.C. § 1701 (Supp. III 1979). The order provides in pertinent part: "I, Jimmy Carter . . . hereby order blocked all property and interests in property of the government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ." *Id.*

72. The Iran Accords were embodied in the following four documents: Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981, DEP'T STATE BULL., Feb., 1981, at 1; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States, January 19, 1981, DEP'T STATE BULL., Feb., 1981, at 3; Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981, DEP'T STATE BULL., Feb., 1981, at 4; Escrow Agreement, January 19, 1981, DEP'T STATE BULL., Feb., 1981 at 6 [hereinafter collectively cited as Iran Accords]. For additional information on the Accords and the details of their implementation, see *Statement of Adherence by the United States, January 19, 1981*, DEP'T STATE BULL., Feb., 1981, at 7; *Technical Arrangement Between Banque Centrale D'Algerie As Escrow Agent and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York As Fiscal Agent of the United States, January 19, 1981*, DEP'T STATE BULL., Feb., 1981, at 14; Exec. Orders 12276-12285, 46 Fed. Reg. 7911-7932 (1981).

73. 50 U.S.C. §§ 1701-1706 (Supp. III 1979). President Carter relied on both the IEEPA and the executive powers under the Constitution in implementing the Iran Accords. Message to the

The IEEPA was modeled after the Trading With the Enemy Act (TWEA),[74] which has been used by Presidents throughout this century to block the assets of enemies during wartime or to deal with other national emergencies.[75] Scrutiny of the provisions in the IEEPA, in light of its predecessor the TWEA, yields some understanding of the President's scope of authority in this field.

Section 5(b) of the TWEA is the forerunner of that portion of the IEEPA which permitted the blocking of Iran's assets. Under the original 1917 Act, section 5(b) only could be invoked to deal with alien property in wartime.[76] President Franklin D. Roosevelt, however, used it to declare a banking holiday when the country went off the gold standard, and Congress swiftly amended the section to allow similar actions by the President to deal with peacetime emergencies.[77] The TWEA has more recently been used to freeze Cuban and North Korean assets after communist takeovers in those countries.[78]

The constitutionality of the TWEA has been frequently challenged.[79] In *United States v. Chemical Foundation*,[80] a group of American creditors brought suit against the federal government challenging the disposition of German property confiscated during World War II. The Alien Property Custodian,[81] appointed by the President, secured the assets of German nationals located in the United States. The Supreme Court held that the Alien Property Custodian had absolute dominion over all the property and could

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Congress, 17 WEEKLY COMP. OF PRES. DOC. 3041, 3044 (Jan. 19, 1981) [hereinafter cited as Message to the Congress].

74. 50 U.S.C. app. §§ 1-40 (1976 & Supp. III 1979).

75. *See generally* M. DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943); J. GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940). For a history of the use of the TWEA and the purpose of recent changes, see HOUSE COMM. ON INT'L RELATIONS, TRADING WITH THE ENEMY ACT REFORM LEGISLATION, H.R. REP. NO. 459, 95TH CONG., 1ST SESS. 2 (1977) [hereinafter cited as HOUSE REPORT ON IEEPA], and Note, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515 (1978) [hereinafter cited as President's Emergency Powers]. For a history of related statutes before the TWEA, see C. HUBERICH, THE LAW RELATING TO TRADING WITH THE ENEMY (1918).

76. HOUSE REPORT ON IEEPA, *supra* note 75, at 4.

77. *Id.*

78. *Id.* at 5-6.

79. *See, e.g.*, Propper v. Clark, 337 U.S. 472, 484 (1949) (as federal legislation founded on Constitutional provisions, the TWEA properly enabled the President to appoint a custodian to take possession of Austrian property); Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 111-12 (2d Cir.) (the freezing of Cuban assets pursuant to the TWEA was a constitutional means of protecting United States citizens and the national interest), *cert. denied*, 385 U.S. 898 (1966); Ecker v. Atlantic Refining Co., 222 F.2d 298, 299 (4th Cir. 1955) (TWEA not unconstitutional violation of due process requirements); United States v.Leiner, 143 F.2d 298, 299 (2d Cir. 1944) (TWEA is not unconstitutional due to vagueness).

80. 272 U.S. 1 (1926).

81. The President is authorized to appoint such a custodian in order to hold enemy property until an order of payment is made by the President or a federal court. 50 U.S.C. app. § 6 (1976).

dispose of it as he chose.[82] The Court also held that the TWEA was to be liberally construed to allow the President sufficient authority to lead the country in its war effort.[83]

Furthermore, the constitutionality of regulations issued under the TWEA have also been challenged. For example, in *Sardino v. Federal Reserve Bank of New York*,[84] the validity of the Cuban Assets Control Regulations, the model for the Iranian Assets Control Regulations, was tested. The Second Circuit in *Sardino* held that the TWEA was not an unconstitutional delegation of power to the executive and that the regulations were a proper use of this Act.[85] The court also stated that the judiciary could not review a declaration of emergency by the President, as it is "peculiarly within the province of the Chief Executive" to determine when such action is necessary.[86] Thus, *Sardino* and *Chemical Foundation* are examples of the extreme deference with which the courts have viewed executive actions based on the TWEA.[87] Consequently, American creditors of alien property have been obliged, during periods of emergencies, to bow to the foreign affairs prerogatives of the President.

There are two major differences between the IEEPA and the TWEA which reflect a congressional intention to curtail the unbridled power of the President under the older statute.[88] Similar to the TWEA, the IEEPA allows the President to block the transfer of enemy property.[89] Unlike the TWEA, however, it does not permit the President to vest legal title to the property in the federal government.[90] Under the TWEA, the courts held that the executive had absolute dominion over the confiscated property and could determine its disposition.[91] In contrast, the IEEPA prohibits confiscation of

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82. 272 U.S. at 12-13.

83. *Id.* at 10.

84. 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966).

85. 361 F.2d at 110.

86. *Id.* at 109.

87. *See also* Propper v. Clark, 337 U.S. 472 (1949). The Court stated that the President's power pursuant to the TWEA "in peace and in war must be given generous scope to accomplish its purpose." *Id.* at 481.

88. *President's Emergency Powers*, *supra* note 75, at 515. The IEEPA revised the TWEA "providing somewhat narrower powers subject to congressional review in times of 'national emergency' short of war." HOUSE REPORT ON IEEPA, *supra* note 75, at 1.

89. 50 U.S.C. § 1702 (Supp. III 1979).

90. HOUSE REPORT ON IEEPA, *supra* note 75, at 15; S. REP. No. 466, 95th Cong., 1st Sess. 5, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4540, 4543 (authority to vest property is not granted to the President through the IEEPA).

91. *See* United States v. Pink, 315 U.S. 203, 229 (1942) (the authority of the President to settle claims of our nationals with a foreign government is a modest implied power); United States v. Belmont, 301 U.S. 324, 330 (1937) (the President may provide for settlement of claims with a foreign government without an actual treaty in effect); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 102, 110 (1801) (courts cannot settle the right of an American litigant contrary to a claim provision in a treaty); Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951) (the power of the President "extends to the settlement of mutual claims between a foreign government and the United States, at least when it is incident to the recognition of that government").

assets,[92] thereby considerably weakening the executive branch's authority to dispose of the property by its own plan.

A second important difference is that the IEEPA established guidelines by which a President may declare a national emergency.[93] As previously noted, the TWEA set no limits on the President's authority to declare a national emergency. Section 1701 of the IEEPA, however, provides that the executive authority under the Act may be used only to deal with an extraordinary threat to the security, foreign policy, or economy of this country that originates substantially outside the United States.[94] The President is also required to follow the procedures established in the National Emergencies Act (NEA) to declare a national emergency.[95] Thus, although Congress retained much of the same language in the new statute, the changes made were intended to curtail the President's domestic use of the IEEPA during peacetime periods.[96]

The "Freeze" and Its Affect on the Litigation

On November 14, 1979, President Carter issued an Executive Order that declared a national emergency and blocked the transfer of Iranian assets, including funds in United States banks and their branches in foreign countries.[97] The freeze lasted for over a year and ultimately was used to negotiate for the return of fifty-two American embassy personnel held hostage in Iran.[98] The Executive Order freezing the Iranian property was based on the IEEPA and authorized the implementation of Iranian Assets Control Regulations (IACR).[99] These regulations were administered by the Office of Foreign Assets Control of the Department of the Treasury, and were similar in form to the rules that governed the freezing of Cuban property after Fidel Castro's takeover.[100] The IACR described and implemented the freeze in detail, and provided for licensed transfers of Iranian property only in limited situations.[101] Section 504 of the regulations authorized judicial proceedings relating to property in which Iran had an interest, but prohibited both the entry of final judgments in Iranian related litigation and the payment of

92. 50 U.S.C. § 1702 (Supp. III 1979).

93. *Id.* § 1701.

94. *Id.*

95. *Id.* §§ 1601-1651, 1706.

96. HOUSE REPORT ON IEEPA, *supra* note 75, at 10-11.

97. Exec. Order No. 12170, 3 C.F.R. 457 (1981), *reprinted in* 50 U.S.C. § 1701 (Supp. III 1979). For the text of the order, see note 71 *supra*..

98. *See* Message to the Congress, *supra* note 73, at 3044.

99. 31 C.F.R. §§ 535.101-.904 (1980).

100. Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-.809 (1981). In the past, similar regulations have also been issued with regard to property of other nations. *E.g.*, Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-.809 (1981).

101. 31 C.F.R. §§ 535.502-.578 (1980) (an example of a special circumstance is the remittance of under $1000 per month to a close relative in Iran by a United States citizen from other than a blocked account pursuant to § 535.563).

funds from blocked Iranian accounts.[102] During the freeze, the regulations were one part of the executive's attempt to prevent the courts from interfering with the President's handling of the Iran crisis.

The Justice Department filed Statements of Interest in many of the Iran cases supporting the executive's request for a stay of judicial proceedings.[103] The executive branch did not want the courts to reach final decisions in the cases that would restrict the United States government's flexibility in negotiating for the release of the hostages.[104] Of those courts that addressed the executive's request for stays, most granted temporary rather than indefinite stays.[105] In *National Airmotive Corp. v. Government of Iran*,[106] for example, the District Court for the District of Columbia balanced the rights of the plaintiff to its "day in court" against the foreign affairs prerogative of the President, and granted a temporary stay for seventy days.[107] Denying the State Department's request for an unlimited stay, the court wrote: "An immobilization of the judicial system through the grant of an indefinite stay under these circumstances would simply add the American system of law and justice to the hostage rolls."[108]

In *New England Merchants National Bank v. Iran*,[109] the effect of the President's involvement in the Iranian situation was contrary to the result intended. In *New England Merchants*, ninety-six cases brought by American plaintiffs against Iran were consolidated for the sole purpose of determining whether prejudgment attachment of Iranian assets was appropriate.[110] The federal district judge reasoned that since the President thought it necessary to indiscriminately freeze all of Iran's assets by Executive Order, a judicial attachment, tantamount to a judicial "freeze," was justifiable as there were specific and legitimate claims against the subject property.[111] The State Department requested that the attachments not be allowed, but the judge

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102. *Id.* § 535.504 (1980). *See also id.* § 535.418 (prejudgment attachment is allowed, but not payment from a blocked account).

103. *See, e.g.*, New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 133 (S.D.N.Y. 1980) (the government requested an indefinite stay in all 96 cases); National Airmotive Corp. v. Government of Iran, 499 F. Supp. 401, 403 n.1 (D.D.C. 1980) (court took judicial notice that similar Suggestions of Interest had been filed in suits against Iran throughout the country).

104. McGreevy, *The Iranian Crisis and U.S. Law*, 2 NW. J. INT'L L. & BUS. 384, 416-19 (1980) (the United States foreign policy would be damaged by decisions in the cases pending against Iran) (citing Letter of Robert B. Owens, Legal Adviser, Department of State, to Attorney General Benjamin R. Civiletti (Jan. 4, 1980)).

105. For a discussion of judicial dispositions on the executive's request for stays, see generally IALR, *supra* note 26, at 1618 (Oct. 17, 1980), 2087 (Jan. 2, 1981).

106. 499 F. Supp. 401 (D.D.C. 1980).

107. *Id.* at 405-07.

108. *Id.* at 406 n.11.

109. 502 F. Supp. 120 (S.D.N.Y. 1980).

110. *Id.* at 121-22.

111. *Id.* Judge Duffy stated that, "if Iran's threat was serious enough to trigger the blocking of all Iranian assets in this country without reference to any specific debt, then certainly when the specific debts are enunciated, individual orders of attachment are warranted." *Id.* at 133.

pointed out that prejudgment attachments were licensed by the IACR.[112] Since the basis for the attachments was the executive freeze, the question of whether an unblocking of the assets by the President would also suspend the judicial "freeze" was left undecided.[113]

President Carter's "freezing" of the Iranian assets was a valid use of the IEEPA. Previously, the courts held that identical language in the TWEA could sustain similar interferences with foreign property by the President.[114] The changes in the new law do not affect that prerogative.[115] Secondly, the blocking cannot be challenged on the ground that the national emergency did not exist,[116] because courts traditionally have not reviewed the legitimacy of national emergencies as declared by the President.[117] Finally, the freeze was compatible with the intentions of Congress as expressed by the enactment of the IEEPA because the President followed the procedures established by the NEA for the declaration and continuation of a national emergency,[118] and the foreign property was merely blocked, thus legal title thereto was not vested in the federal government. Therefore, the blocking of Iran's property is sustained by precedent and is not contrary to the expressed will of Congress.

THE IRAN ACCORDS

On his last day in office, President Carter implemented the Iran Accords, which provided for the release of the American hostages and the unblocking

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112. *Id.* at 130. *See* IACR, 31 C.F.R. § 535.504(b)(1) (1980).

113. Just before the freeze was lifted, on December 22, 1980, Judge Duffy delivered a certification of issues opinion pursuant to 28 U.S.C. § 1292 (Supp. IV 1980). In New England Merchants Nat'l Bank v. Iran, 508 F. Supp. 49 (S.D.N.Y. 1980), the parties requested the court to determine whether the attachments would be affected by the President's lifting of the freeze. At that time Justice Duffy stated, "Such a contingency is simply not a 'case or controversy' properly before any court at the present time. . . I will not certify it to the Court of Appeals." *Id.* at 51. On appeal, the Second Circuit remanded the case to allow the district court to consider the effect of the Iran Accords. New England Merchants Nat'l Bank v. Iran, 646 F.2d 779 (2d Cir. 1981). In compliance with the court of appeals, Justice Duffy chose one of the 96 consolidated cases, Marschalk Co. v. Iran National Airlines Corp., 518 F. Supp. 69 (S.D.N.Y.), *rev'd and remanded*, 657 F.2d 3 (2d Cir. 1981), and issued an opinion only weeks before a contrary opinion was rendered by the Supreme Court in Dames & Moore v. Regan, 101 S. Ct. 2972 (1981). *See* notes 134-37 and accompanying text *infra*.

114. The nearly identical Cuban Assets Control Regulations were found to be a valid use of the TWEA in Real v. Simon, 510 F.2d 557, 560 (5th Cir. 1975) and Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 109 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966).

115. The section of the IEEPA authorizing presidential action is identical to the earlier TWEA provision. *See* 50 U.S.C. § 1702 (Supp. III 1979).

116. IEEPA requires that the President declare a national emergency before blocking the free flow of assets. *See* notes 93-94 and accompanying text *supra*.

117. *See, e.g.*, Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 109 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) (courts will not review a declaration of national emergency because such an act is so peculiarly within the scope of presidential authority).

118. National Emergencies Act of 1976, 50 U.S.C. §§ 1601-1651 (Supp. III 1979).

of Iranian assets.[119] To unblock the assets, the agreements and the accompanying Executive Orders stayed all judicial proceedings and nullified all judicial attachments.[120] The Accords established an International Tribunal to hear claims by American nationals against Iran, displacing the jurisdiction of federal district courts under the FSIA.[121]

The indefinite stay of all legal proceedings in United States courts brought about by the Iran Accords is difficult to sustain because it infringes on the power of the judiciary under the FSIA to hear these disputes.[122] Additionally, the nullification of judicial attachments constituted a taking of private property, in violation of the United States Constitution,[123] and may have exceeded the President's authority. The President's broad foreign affairs powers and his authority to consummate this type of agreement will be analyzed to determine whether the Iran Accords represent a legitimate use of those powers.[124] More specifically, the FSIA and IEEPA must be contrasted insofar as they affect the powers of the executive branch. Finally, the alleged national interest, as perceived by the executive must be weighed against the individual liberties of American plaintiffs.

The President's Foreign Affairs Powers

The resolution of foreign policy issues frequently prohibits judicial activity. In the field of foreign affairs, the government must be able to speak with

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119. *See* notes 72-73 *supra*..

120. "All rights, powers and privileges relating to the properties [of Iran] are nullified. . . ." Exec. Order No. 12277, 46 Fed. Reg. 7915 (1981).

121. Iran Accords, *supra* note 72, DEP'T STATE BULL., Jan. 1981, at 3. Article II, para. 1, provides: "[a]n International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established. . . ." *Id. Cf.* Exec. Order No. 12294, 46 Fed. Reg. 14, 111 (1981) (if the Tribunal determines that it does not have jurisdiction, the suspension of the claims would be lifted).

There were advocates for a repudiation of the Accords. *See, e.g.*, Wall St. J., Jan. 21, 1981, at 26, col. 1. (editorial). And, not surprisingly, American creditors were openly skeptical of the integrity of Iran. Nat'l L.J., March 2, 1981, at 8, col 2.

122. This represents a more serious deprivation of individual rights, as compared to the freezing of assets since the delay of proceedings is indefinite. The American courts had assumed jurisdiction over the cases and some judicial attachments were granted. The agreement with Iran also makes concessions or promises regarding America's foreign policy toward Iran, nationalization of the late Shah Mohammed Reza Phalavi's assets, and the rights of the Americans who were held as hostages in the United States embassy in Tehran. These issues, however, are beyond the scope of this Comment. *See, The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822 (1981) [hereinafter cited as *Hostage Agreement*]; *Symposium on the Settlement with Iran*, 13 LAW. AM. at *i* (1981) [hereinafter cited as *Iran Symposium*].

123. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

124. The President relied on those powers as justification for his action. Message to the Congress, *supra* note 73, at 3044.

a single voice.[125] Thus, the courts are generally willing to defer to the actions of the executive in matters involving his foreign affairs prerogative.[126]

One of the most compelling justifications for intervention in the Iran cases, the President's executive agreement authority, arises out of his foreign affairs powers. The authority of the President to bind the nation in international agreements is broad in scope.[127] In contemporary times, executive agreements are used to perform virtually any function that could be performed by a treaty[128] and the treaty making power extends to all matters not specifically prohibited by the Constitution.[129] Nevertheless, some executive agreements that have directly contravened federal law have been struck down by the courts.[130] If the courts find that the Iran Accords directly defeated the explicit intention of Congress, as manifested in the grant of jurisdiction to the courts in the FSIA or as manifested by the new restrictions in the IEEPA, the executive agreement need not be sustained. Thus, it is more telling to examine the statutes, case law, and policies that support or oppose the President's claim to nullify attachments and cancel jurisdiction rather than merely deferring to the broad foreign affairs power of the President.

The validity of the Iran Accords has been challenged in various federal courts.[131] In *Marschalk Co. v. Iran National Airlines Corp.*,[132] a federal

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125. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). In Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), the Supreme Court stated that courts should refuse to become involved in executive decisions regarding foreign policy "of a kind for which the judiciary has neither the aptitude, facilities, nor responsibility. . . ." *Id.* at 111.

126. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936) (President has broad authority to conduct foreign affairs).

Under the political question doctrine, a principle separate and distinct from the President's foreign affairs powers, the courts will not become involved in cases that require the adjudication of political issues. One commentator has noted that the Iran cases were truly commercial claims and thus the courts properly had authority to hear them. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 191, 196 (1981). Even if these cases could be deemed political because of the President's involvement, the Court in *Baker v. Carr* stated "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 217 (1962). Moreover, these are the very type of claims that Congress intended the courts to adjudicate when it enacted the exceptions to the FSIA.

127. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936). On the extent of executive agreement power and treaty making power of the President, see generally, G. SCHUBERT, THE PRESIDENCY IN THE COURTS 102-18 (1957).

128. United States v. Pink, 315 U.S. 203, 230 (1942) (executive agreements are to be afforded a dignity similar to that given treaties).

129. *See* Missouri v. Holland, 252 U.S. 416 (1920).

130. *See, e.g.*, United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (an executive agreement that was in clear opposition to a congressional statute was unconstitutional); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (an executive agreement cannot nullify Congress's waiver of the government's immunity to suit).

131. *See, e.g.*, American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981); Charles T. Main Int'l, Inc. v. Khuzestan Water Power Auth., 651 F.2d (1st Cir. 1981); Security Pac. Nat'l Bank v. Iran, 513 F. Supp. 864 (C.D. Cal. 1981); Unidyne Corp. v. Government of Iran, 512 F. Supp. 705 (E.D. Va. 1981).

132. 518 F. Supp. 69 (S.D.N.Y.), *rev'd*, 657 F.2d 3 (2d Cir. 1981).

district court in New York held that the President exceeded his authority both in nullifying the judicial attachments and cancelling the jurisdiction of American courts over those claims.[133] Although the well-reasoned *Marschalk* opinion was firmly based on the pertinent statutes and case law, it has been effectively reversed by the Supreme Court's ultimate disposition of the issue in *Dames & Moore v. Regan*.[134]

The Court in *Dames & Moore* upheld the Accords finding that the President was authorized to nullify the judicial attachments of Iranian property under the IEEPA and to suspend the claims of American citizens under his foreign affairs powers.[135] In an admittedly rushed opinion, Justice Rhenquist attempted to base the holding "on the narrowest possible grounds capable of deciding the case."[136] The Court relied heavily on the deference which Congress and the Court have traditionally given Presidents when dealing with foreign nations.[137]

The President's Nullification of Judicial Attachments

As a basis for upholding the President's nullification of prejudgment attachments, the *Dames & Moore* Court relied on *Orvis v. Brownell*.[138] In *Orvis*, an American claimant with an attachment against the property of a Japanese national brought suit against the Enemy Alien Property Custodian to enforce his judgment.[139] After careful analysis of *Orvis*, however, the glaring differences between it and the present controversy become apparent.[140] In *Orvis*, the suit by American creditors was against enemy property possessed by the United States Government,[141] whereas in *Dames & Moore* the attachment was against property owned by Iran but not in possession of the federal government.[142] The *Orvis* Court did not allow attachments to affect the government's disposition of enemy property, but explicitly found the attachments to be enforceable against the enemy debtor.[143] This necessarily implies that neither the enemy debtor, nor the United States Government acting as its agent, could disregard those attachments by removing the assets from the country. Since that is precisely what the Iran Accords did, Justice Rehnquist's reliance on *Orvis* is less than persuasive. The *Orvis* Court

133. *Id.* at 78-81.
134. 101 S. Ct. 2972 (1981).
135. *Id.* at 2984, 2986.
136. *Id.* at 2981. The Court was rushed into a decision by the government's deadline of July 19, 1981 for the transfer of the final $2.2 billion of Iran's assets. *Id.*
137. *Id.* at 2984-90.
138. 345 U.S. 183 (1953).
139. *Id.* at 184-85.
140. It is noteworthy that these differences were recognized by Judge Duffy in *Marschalk*. *Marschalk*, 518 F. Supp. at 96-97.
141. 345 U.S. at 185.
142. 101 S. Ct. at 2983 n.5.
143. 345 U.S. at 185.

distinguished two previous cases; one in which the property had vested in the government, and one in which it had merely been subject to an executive freeze.[144] When the property vested, the Court held that the government agent was entitled to possession,[145] but in the other instance, the attachment was not within the authority of the government to extinguish.[146] This distinction is particularly important because the government, in accordance with IEEPA, is no longer allowed to vest or take title to the property.[147]

In *Dames & Moore*, the section of the IEEPA that allows the President to "nullify any property in which any foreign country has in interest"[148] was examined to determine whether it authorized the nullification of prejudgment attachments of Iranian property.[149] Justice Rehnquist rightly asserted that the plain language of the statute is broad, and if taken literally, supports the government's position.[150] On previous occasions, however, the Supreme Court has reasoned that the IEEPA's predecessor, the TWEA, was patchwork legislation which should not be applied literally.[151] Surely, the purpose of the TWEA "to define, regulate, and punish trading with the enemy"[152] is inapposite to the government's deliverance of judicially attached property to Iran. Moreover, the IEEPA restricts the President's authority in peacetime by forbidding the manipulation of purely domestic transactions and the taking of title to foreign property.[153] The statute's enactment was not a vain exercise by Congress, rather the statute was intended to be a limitation on the President's power.[154]

The Iran Accords may also have exceeded the President's authority on constitutional grounds. The judicial attachments of Iranian assets were property rights of the American creditors that could not be taken without due process of law.[155] The President's nullification of those attachments constitutes a taking requiring that adequate compensation be given to the deprived

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144. *Id.* at 186. *See* Zitman v. McGrath, 341 U.S. 446 (1951); Zitman v. McGrath, 341 U.S. 471 (1951).

145. Zitman v. McGrath, 341 U.S. 471, 474 (1951).

146. *See* Zitman v. McGrath, 341 U.S. 446, 463-64 (1951) (the custodian steps into the shoes of the enemy and only his vesting power would allow the distribution of enemy's assets).

147. *See* notes 90-92 and accompanying text *supra*.

148. 50 U.S.C. § 1702 (Supp. III 1979).

149. 101 S. Ct. at 2982-84.

150. *Id.* at 2983-84.

151. Guessefeldt v. McGrath, 342 U.S. 308, 319 (1952) (such legislation weighs against a literal application). *See also* Clark v. Uebersee Finanz-Korp, 332 U.S. 480 (1947); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Markham v. Cabell, 326 U.S. 404 (1945).

152. H.R. 4960, 65th Cong., 1st Sess. (1917).

153. HOUSE REPORT ON IEEPA, *supra* note 75, at 15.

154. *See* notes 88-96 and accompanying text *supra*.

155. *Dames & Moore*, 101 S. Ct. at 2992-93 (Powell, J., concurring in part and dissenting in part). Justice Powell stated that an attachment "is a property right compensable under the Fifth Amendment. . . ." *Id.* at 2992 n.1 (citing Armstrong v. United States, 364 U.S. 40 (1960); Louisville Bank v. Radford, 295 U.S. 555 (1935)). *See also* New England Merchants Nat'l Bank v. Iran, 508 F. Supp. 49, 51 (S.D.N.Y. 1980) (the attachments were property rights, the cancellation of which required due process of law).

parties.[156] Thus, American creditors that are legitimately dissatisfied with the determination of their case by the International Tribunal have an action against the federal government for satisfaction of those claims.[157] In the event Iran does not fulfill its obligations under the Accords, the United States Government could become liable for the billions of dollars of claims against Iran.[158]

Finally, the President's power to void judicial attachments against foreign property must be weighed against the rights of individual American creditors to secure their claims against foreign governments. The President's ability to provide for the settlement of claims is inextricably tied to this balancing. If the President truly has the authority to provide for the settlement of American claims against Iran,[159] providing for the transfer of those funds abroad through the nullification of judicial attachment is, arguably, a concomitant authority. In any event, the attachments of Iranian assets must, at the very least, mitigate against the President's power to settle claims so encumbered.

Cancellation of Jurisdiction Over the American Claims

In upholding President Carter's cancellation of claims in United States courts, the *Dames & Moore* Court relied on the discretionary foreign affairs power of the Presidency, the President's claim settlement authority, the IEEPA, and the Hostage Act of 1868.[160] The Court's reasoning, however, failed to recognize relevant congressional direction as well as the distinctions between the Iran settlement and previous foreign claim settlements. As a result, the Court promulgated an expansive precedent for the exercise of presidential prerogatives.

The most persuasive argument for upholding the cancellation of claims is the President's claim settlement authority.[161] Justice Rehnquist, in *Dames &*

156. U.S. CONST. amend. V. *But see Hostage Agreement, supra* note 122, at 874-76 (arguing that the President's action was not a taking).

157. *Cf. Dames & Moore*, 101 S. Ct. at 2991 (the question of whether there had been a taking was not ripe for review, but the Court of Claims would later have jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (1976), to make that determination).

158. *See Dames & Moore*, 101 S. Ct. at 2993 (Powell, J., concurring in part and dissenting in part). According to Justice Powell, "[t]he government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.*

159. An apt analogy can be drawn between the President's initiatives in the Iran cases and President Truman's seizing of the steel mills during the Korean conflict. In both cases the President attempted to manipulate domestic property rights because of foreign policy implications. The Supreme Court overturned Truman's decision, but failed to do so with Carter's agreement. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

160. The Iran Accords, as signed by Assistant Secretary of State Warren B. Christopher, called for a cancellation of claims. *See* note 72 *supra*. President Reagan's implementing executive orders and subsequent regulations merely suspended the jurisdiction of federal courts. The designation of the President's order as temporary or permanent is irrelevant because in either case the American plaintiffs are prevented from adjudicating claims that are rightly within the jurisdiction of the international tribunal.

161. *See Dames & Moore*, 101 S. Ct. at 2986-88. The President's claim settlement authority is an outgrowth of his executive agreement power. *See* notes 127-37 and accompanying text *supra*.

Moore, asserted that the President may provide for the lump sum settlement of all the claims by American nationals against a foreign government when it is necessary to accomplish the foreign policy pursuits of the United States Government.[162] Furthermore, he reasoned that continual congressional acquiescence suggested that Congress supported this practice by the President. This reasoning, however, is based upon previous claim settlements which differ in major respects from the present agreement with Iran.[163] This major distinction renders impotent Justice Rehnquist's most alluring argument.

The prior claim settlements relied on in *Dames & Moore* involved the Litvinov Assignment, which provided for the eventual possession by the Soviet Union of property owned in the United States by Russian nationals.[164] As part of a larger effort to normalize diplomatic relations with the Soviet Union, the Litvinov Assignment recognized the right of the Soviet Union to nationalize the property of Russian nationals in the United States.[165] Significantly, in at least one case involving the Litvinov Assignment, the Supreme Court stated that claims of American citizens had been paid prior to the Assignment.[166] Conversely, the Iran Accords included the President's disposition of unsatisfied claims by American citizens. An agreement normalizing domestic relations with the Soviet Union, which did not deprive American nationals of legitimate individual rights, cannot serve as precedent for the Iran Accords. Justice Rehnquist ventured too far in equating nationalization of Russian property with the litigation rights of American citizens.[167] The result is unpersuasive.

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162. *Id.* at 2987.

163. These major distinctions were recognized by Judge Duffy in *Marschalk*. Marschalk Co. v. Iran National Airlines Corp., 518 F. Supp. 69, 88-90 (S.D.N.Y. 1980).

164. *Dames & Moore*, 101 S. Ct. at 2988.

165. *See* United States v. Pink, 315 U.S. 203, 211 (1942) (the United States Government, acting as assignee of the Soviet Government pursuant to the Litvinov Assignment, brought suit to recover the assets of American branches of Russian firms); *See also* United States v. Belmont, 301 U.S. 324, 330 (1937).

166. *Pink*, 315 U.S. at 211, 226.

167. While an evaluation of the purpose and political wisdom of the accords is beyond the scope of this comment, the striking differences between the Iran Accords and previous claim settlement agreements are worthy of mention. Because the Litvinov Assignment with the Soviet Union was required prior to normalization of diplomatic relations, *see* note 165 and accompanying text *supra*, the cases that upheld the agreement reflect the gravity of that foreign policy goal. *See Pink*, 315 U.S. at 232-33 (recognition of the Soviet Government depended on the Litvinov Assignment); *Belmont*, 301 U.S. at 230 (Court took judicial notice that coincident with the Litvinov Assignment, diplomatic relations with the Soviet government were established). Moreover, since recognition of the Soviet Union had obvious long-term foreign policy implications for the United States, the courts were more willing to uphold the Litvinov Assignment. Though the Iran Accords should not be cavalierly dismissed as wholly irrelevant to long-term foreign policy, it is difficult to view them as little more than a ransom payment for American hostages.

Additionally, the Accords were prompted by a coercive act and thus are not binding under international law. Article 52 of the Vienna Convention on the Law of Treaties provides: "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." 8 I.L.M. 679, 698 (1969) (both Iran and the United States adopted this convention).

In previous instances of presidential claim settlements, the claims by American nationals against the enemy debtor far exceeded the enemy's property in this country.[168] Iran's assets in the United States during President Carter's freeze, however, were more than adequate to pay all American claims.[169] Thus, executive intervention in the Iranian cases cannot be justified as an attempt to settle the pro rata distribution of a limited amount of property among American creditors.[170] In many of the claim agreements relied on in *Dames & Moore*, the government's involvement was upheld as necessary to assist the equitable payment of all claims. Through the Iran Accords, however, President Carter hindered rather than assisted American plaintiffs in their private controversies with Iran.[171]

Justice Rehnquist's reliance in *Dames & Moore* on implicit congressional acquiescence as a justification for cancellation of American claims is equally unsupported. It is a fundamental precept of our federal system that the President may only exercise those powers to which he is entitled by virtue of the Constitution or explicit legislative enactment.[172] Consequently, the President cannot justify the use of power by stating that Congress could pass a law prohibiting his actions if it chose, and that by not doing so Congress approved of the presidential actions.[173] Indeed, Congress has shown its dissatisfaction with presidential claim settlements.[174] The enactment of the

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168. *See, e.g.*, Codray v. Brownell, 207 F.2d 610, 613 n.6 (D.C. Cir. 1953) (citing affidavit of United States Attorney General stating that claims against Hungary exceed Hungarian assets).

169. The total amount of Iran's assets in the United States exceeded $10 billion. Wall St. J., Jan. 20, 1981, at 3, col. 1. Claims against Iran nullified by the Iran Accords were approximately $6 billion. Washington Post, Oct. 26, 1980, at 23, col. 1.

170. The TWEA has a specific provision for pro rata distribution of claims. 50 U.S.C. app. § 34(f)-(g) (1976). Most lump sum settlement agreements of international monetary claims have returned only a fraction of the amount claimed. Gordon, *The Blocking of Iranian Assets*, 14 INT'L LAW. 659, 686 (1980). *See The Iran Agreements*, *supra* note 22, at 3. In response to questions by Senator Claiborne Pell, former Secretary of State Edmund Muskie stated, "[t]ypically, lump-sum settlements have been negotiated at around 40 cents on the dollar. . . . " *Id.*

171. In *Dames & Moore*, however, the Solicitor General argued that the American claimants had an enhanced opportunity to recover because the creation of an international tribunal meant that Iran could not raise sovereignty defenses. *Dames & Moore*, 101 S. Ct. at 2990. This is probably relevant to some of the claims, assuming Iran honors its agreement to abide by the decisions of the tribunal. It is interesting to note, however, that the Tribunal was still encumbered by procedural problems and had not yet heard its first case over a year after the Iran Accords were signed. N.Y. Times, March 8, 1982, at 7, col. 1 (midwest ed.).

172. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

173. This appeared to be Justice Rehnquist's argument in *Dames & Moore*. He stated: "crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." 101 S. Ct. at 2987.

174. In reaction to a particularly unsatisfactory lump sum agreement, Congress passed the Gavel Amendment to the Trade Reform Act of 1974, 19 U.S.C. § 2438 (1976). According to the Act, "[t]he United States shall not release any gold belonging to Czechoslovakia . . . until [such] release has been approved by the Congress." *Id. See* Note, *The Gavel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT'L

FSIA, IEEPA, and NEA—acts which "occup[y] the field" of possible presidential involvement with foreign economic controversies—have noticeably failed to grant presidential authority to suspend claims.[175] Even if implicit congressional acquiescence could authorize presidential claim settlement authority, such implicit acquiescence is not apparent in these cases. As one commentator has argued, it would have been impossible for Congress to have implicitly approved of presidential actions like the Iran Accords because previous instances of presidential claim settlements are so different that they are simply not precedent.[176]

The *Dames & Moore* Court also relied upon the IEEPA and the Hostage Act of 1868 to uphold the President's cancellation of claims. Although Justice Rehnquist admitted that neither the IEEPA nor the Hostage Act was a direct authorization for usurpation of jurisdiction, he nonetheless believed they were relevant expressions of a willingness by Congress to grant the President a free hand in dealing with crises of the Iran variety.[177] These statutes, however, provide only weak support for that argument. In fact, the IEEPA was meant to limit the President's power to interfere in non-war crises.[178] Additionally, the Hostage Act, which provides: "The president shall use such means not amounting to acts of war" to effectuate the release of hostages,[179] was merely a demonstration of congressional indignation over

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L. 837 (1975) [hereinafter cited as *The Gavel Amendment*]. The conclusion of the note is that the Gavel Amendment indicates that the executive should return to the practice of using treaties rather than executive agreements to provide for the settlement of claims. *Id.* at 844-47.

175. *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 191, 196 (1981).

176. *Id.* at 196-98. The settlements cited as precedent were either executed by formal treaties, compensated claims which could not have been heard by United States courts, or were concurrent with the recognition of another government, *Id.*

177. *Dames & Moore*, 101 S. Ct. at 2986.

178. *See* notes 89-96 and accompanying text *supra*. To support his contrary statements Justice Rehnquist quoted from the legislative history of IEEPA, out of its proper context. According to the Justice, "Congress stressed that 'nothing in this Act is intended to interfere with the authority of the President to [block assets] or to impede the settlement of claims of United States citizens against foreign countries.' " *Dames & Moore*, 101 S. Ct. at 2988. In its proper context, however, this sentence refers to section 207 of the Act which is a "grandfather clause" for "emergencies" currently in progress. *See* S. REP. No. 466, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4540, 4544. Thus, the IEEPA was intended to give the President a free hand with regard to assets already under government control. If the quoted phrase was intended to apply to the entire Act, it would have been put under the "Purpose of the Bill" section. This opening section states: "The purpose of the bill is to revise and delimit the President's authority to regulate international economic transactions . . . " S. REP. No. 466, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4540, 4541.

Any general congressional intent implied from IEEPA must be measured against the specific FSIA authorization to the courts to hear claims by the American claimants. *See* notes 182-86 and accompanying text *infra*. Whereas the IEEPA was practically a reenactment of the TWEA, the FSIA was a bold new measure enacted to reallocate power from the President to the courts. Insofar as the two statutes conflict, more weight must be given to the specific over the general statute. *See* Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944); Missouri v. Ross, 299 U.S. 72, 76 (1936).

179. 22 U.S.C. § 1732 (1976).

the forced repatriation of naturalized American citizens travelling abroad—a situation far different than the freezing of assets.[180] In effect, Justice Rehnquist reasoned that the President may mortgage the country to do the Ayatollah's bidding. A more judicious approach would view such vague legislation of centuries past merely as permission for the President to act in ways that are otherwise specifically authorized by Congress or the Constitution.[181]

Finally, the President's broad discretion in foreign affairs, together with any remaining precedential value of prior claim settlements, must be tempered by a consideration of the FSIA's restrictions on executive branch involvement in suits against foreign countries. Since the FSIA forbids the State Department from deciding whether a foreign sovereign is subject to American courts,[182] it is no longer possible for the executive to remove cases from those courts after the decision to hear a claim has been made.[183] Any authority derived from previous claim settlements has been diminished by Congress' decision to have these claims heard by the courts.[184]

The case law and statutes by which the President attempted to justify intervention in the Iran cases are of limited value. If the President's actions

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180. *Dames & Moore*, 101 S. Ct. at 2985.

181. American Int'l Group v. Islamic Republic of Iran, 657 F.2d 430, 453 (D.C. Cir. 1981) (Mikva, J., separate statement). *See Also Hostage Agreement*, *supra* note 122, at 850, which states that the Act intends that the "President . . . do all that he can within his already-existing powers." *Id.*

182. The purpose of FSIA was to de-politicize grants of immunity and allow courts to make the immunity determination. HOUSE REPORT ON FSIA, *supra* note 1, at 7. *Cf.* S. REP. No. 1310, 94th Cong., 2d Sess. 9 (1976) (State Department's involvement created uncertainty for private parties dealing with foreign governments), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604.

183. *See* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 S.W.L.J. 1009, 1063 (1979) (in the hypothetical situation that American hostages are being held by a foreign state that wishes to trade them for the dismissal of pending litigation in the United States against that state, the Executive would be prohibited under the FSIA from accepting the bargain). Dellapenna, *Suing Foreign Governments and their Corporations: Sovereign Immunity: Part V*, 85 COLUM. L.J. 497, 502 (1980) (a literal reading of FSIA prohibited the state Department from dismissing Iranian claims to settle the hostage crisis).

In another analysis of the Iran Accords, it was stated that "[c]ontrol over the domestic disposition of a claim is a necessary corollary to an ability to settle it exclusively within the international realm; if the President could not protect foreign nations from suit in American courts, his claims to control through [his claim settlement authority] would be largely empty." *Hostage Agreement*, *supra* note 122, at 863. It is probable that the FSIA would still allow the President to settle claims in "truly extraordinary situations. . . ." *Id.* at 869. War would constitute such a situation; paying ransom, however, would not. This author went on to conclude, however, that the President was within his authority in settling claims against Iran.

184. Earlier versions of FSIA would have made it possible for executive authority to alter the FSIA. The rejection of these versions suggest that Congress meant to limit presidential intervention. *Hostage Agreement*, *supra* note 122, at 867 n.306 (citing *Jurisdiction of United States*

are to be upheld, it must be by virtue of his vast power to single-handedly manipulate the foreign affairs of the United States. This undefined authority is constrained by the FSIA as well as article III of the Constitution which vests the judicial power in the courts.[185] The Supreme Court has concluded that even though the consequences of the Iran Accords extend far into the domestic sphere, it is a legitimate flexing of the President's foreign policy muscle.[186]

CONCLUSION

Since the enactment of the FSIA, American businesses dealing with foreign governments are to be afforded judicial treatment guided by this statute rather than by the political whims of the State Department. American nationals are able to determine whether they should risk doing business with a foreign sovereign based on such factors as whether a treaty exists between the United States and the sovereign that waives immunity, and whether the intended business would be of a commercial nature. The outcome is not as predictable, however, in instances involving massive repudiation of contracts by a hostile foreign government. The scope of presidential power in foreign affairs buttressed by the IEEPA exceeds, in most instances, the rights of individual creditors based on the FSIA.[187] American creditors in such situations must rely on the possibility of obtaining prejudgment attachments. The effectiveness of this approach is diminished, however, by the courts' hesitancy towards issuing writs of attachment and the difficulty of sustaining these writs against the power of the President in conducting foreign affairs. Creditors are forced, therefore, to rely on the ability of the Executive to work out equitable alternatives to those provided by the FSIA.

The distinctions between the TWEA and its successor the IEEPA exemplify the inability of Congress to curtail the power of the President effectively, while still allowing him sufficient flexibility to address unforeseen contingencies. If the President's authority is to be subject to reasonable limitations, the courts must exercise their judicial review power. Alternatively, the Congress should define, more precisely, the President's role in disputes between American concerns and foreign states. The nullification of prejudgment attachments and the cancellation of federal court jurisdiction in the Iran cases has resulted in an amplification of the President's authority. If this extension of executive power is justified as a requirement of the moment,

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Courts in Suits Against Foreign States: Hearings Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 52 (1976)).

185. U.S. CONST. art. III, §§ 1, 2.

186. *Dames & Moore*, 101 S. Ct. at 2972.

187. With the increasing importance of international trade and multi-national corporations that are able to fend for themselves, there is hope that unwarranted governmental intervention could be curbed. *See Iran Symposium*, *supra* note 122, at *iv* (foreward by A. Swan) (the

there is an inherent danger that, under a similar rationale, even more adventurous presidential initiatives might follow.[188] The increasing importance of international trade demands a predictable and, therefore, more principled approach by the United States.

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government's interference in the Iran cases indicated a return to the time when only nations, not individuals, were a proper party for international law). *Cf.* Higgins, *Conceptual Thinking About the Individual In International Law*, 24 N.Y.L.S. REV. 11 (1978). According to this author, the rights of individuals in the international forum are often different from the interests of nations and the individual's "aspirations, problems, anxieties and feelings" demand increasing respect. *Id.* at 29.

188. President Ronald Reagan has recently invoked the TWEA to block the distribution in the United States of newspapers from Cuba. This is the first time the TWEA has been used to block the flow of printed information. N.Y. Times, Nov. 25, 1981, at 9, col. 3 (midwest ed.).