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“JUDICIAL TERRORISM”? ANALYSIS OF THE EXXON/VENEZUELA LITIGATION AND PREJUDGMENT ATTACHMENT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

Matthew Nickles

I. INTRODUCTION

In the 1990s, Venezuela began encouraging foreign oil companies to invest in its oil-rich Orinoco region.¹ To attract investment, Venezuela offered incentives to foreign companies, including Exxon Mobil (Exxon), ConocoPhillips, Chevron, Total, BP, and Statoil.² Among the incentives were attractive tax rates; minority shares in Venezuela’s state-owned oil company, Petroleos de Venezuela S.A. (PDVSA); and contracts providing for arbitration of disputes in New York.³ After the election of Hugo Chavez as president in 1998, Venezuela sought to change the terms of its bargain with the foreign oil companies.⁴ A series of newly enacted laws, including tax and royalty hikes, reversed the financial incentives that had initially attracted foreign investment.⁵

This trend culminated in the Venezuelan Government’s 2006 demand that its state-owned company, PDVSA, assume majority control over all Orinoco projects.⁶ Instead of complying with Venezuela’s demands, Exxon decided to walk away from its investments in the Orinoco and negotiate compensation from the Venezuelan Government.⁷ Disputes over the value of Exxon’s assets caused the company to file a request for arbitration with the International Centre for Settlement of Investment Disputes in September 2007.⁸ After filing this request, Exxon obtained court

¹ Emily A. Witten, *Arbitration of Venezuelan Oil Contracts: A Losing Strategy?*, 4 TEX. J. OIL, GAS, & ENERGY L. 55, 56 (2008).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 56-57.

⁶ *Id.* at 57.

⁷ Witten, *supra* note 1, at 58.

⁸ *Id.* at 59.

orders in the United Kingdom, the Netherlands, and Netherlands Antilles freezing approximately \$12 billion of PDVSA's assets.⁹ Furthermore, Exxon obtained a court order from the United States District Court for the Southern District of New York attaching "\$300 million in cash belonging to the Exxon/PDVSA joint venture."¹⁰

Although Exxon appeared to have a strong claim under its contract with Venezuela, the freezing of a foreign country's assets has unavoidable political implications. Venezuela's oil minister, Rafael Ramirez, responded to Exxon's legal action by exclaiming that Exxon "aims to subject [Venezuela] to a situation of judicial terrorism, of legal terrorism."¹¹ The oil minister accused the American company of attempting to "destabilize the government of anti-U.S. President Hugo Chavez by using the legal battle over the nationalization of an Exxon project to create panic about the . . . nation's finances."¹² While Venezuela might not be a sympathetic party, the Venezuelan minister's strong reaction to the prejudgment attachment of assets is not surprising and reflects the sensitive issues that arise when one nation's courts exercise control over the assets of another nation.

In the United States, the law governing a court's ability to exercise jurisdiction over foreign sovereigns and their assets is the Foreign Sovereign Immunities Act (FSIA).¹³ This article will examine the extent to which the FSIA accords due weight to interests of sovereignty—strongly expressed by Mr. Ramirez—while reconciling those interests with the reasonable expectations of modern international business. Venezuela, as a general rule, should enjoy its sovereignty as do other nations. A contracting party such as Exxon, however, also deserves to enjoy the benefit of its bargain. Indeed, recognizing and honoring the binding nature of Venezuela's agreements would also serve its own long-term interests.

This article proceeds as follows. Part II outlines the history and purpose of the FSIA. It specifically focuses on prejudgment attachment

⁹ *Id.*; see also Brian Ellsworth, *Venezuela Slams Exxon Over Asset Freeze*, GLOBE & MAIL, Feb. 9, 2008, at B6 (quoting the amount of assets frozen).

¹⁰ Witten, *supra* note 1, at 59; see also Order Confirming Attachment, Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A., No. 07 Civ. 11590 (DAB) (S.D.N.Y. Jan. 3, 2008).

¹¹ Ellsworth, *supra* note 9, at B6.

¹² *Id.*

¹³ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1441, 1602-1611 (2006).

of assets and which parties' courts should properly consider "foreign states" or "instrumentalities of a foreign state" under the Act.

Part III analyzes two articles criticizing the FSIA and reviews their respective proposals for reforming the statute.

Finally, Part IV makes three suggestions for improving the Act. First, Congress should expand the definition of "foreign state" to include a broader range of state-managed corporations.¹⁴ Second, this expansion in scope should be counterbalanced by relaxing the protections afforded to "foreign states." Thus, the United States should remove the waiver requirement for the prejudgment attachment of assets.¹⁵ Not only does this change amount merely to the alteration of one default contractual term, but it also more properly represents the expectations of the parties. Third, the Act should explicitly include a legal standard to be applied in prejudgment attachment cases.

Though important, these three changes would not affect the outcome of the Exxon/Venezuela litigation. They would, however, better accomplish the purposes of the FSIA. These changes strike the proper balance between the respect owed to foreign nations and the legitimate expectations of private parties contracting with foreign states in business relationships.

II. BACKGROUND OF THE FSIA

Subpart II(A) provides a brief history of the FSIA and the reasons for its enactment. Subpart II(B) then provides a brief overview of how the statute currently operates. Finally, subpart II(C) explains the method for obtaining prejudgment attachment under the FSIA by reviewing the relevant sections of the Act and analyzing case law.

A. HISTORY AND PURPOSE OF THE FSIA

Sovereign immunity has long been a staple of American jurisprudence. "Historically, sovereigns and their property enjoyed absolute immunity from suit, attachment, and execution in most countries, absent their consent. In the United States, this 'absolute theory' of immunity was established in *Schooner Exchange v.*

¹⁴ See 28 U.S.C. § 1602.

¹⁵ See *id.* § 1610(d).

McFadden . . .”¹⁶ *Schooner Exchange*, an opinion authored by Chief Justice Marshall in 1812, held that a foreign public ship is immune from attachment in the ports of a friendly state.¹⁷ A contrary ruling, he determined, “(in the absence of consent by the affected state) would impugn the dignity of foreign sovereigns and discourage ‘mutual intercourse’ and ‘interchange of good offices’ among States.”¹⁸

The policy of absolute immunity continued into the twentieth century but became increasingly problematic as private parties contracted with foreign states in commercial enterprises and were left without recourse when disputes arose.¹⁹ This situation led to the issuance of the “Tate Letter” in 1952.²⁰ Issued by a State Department legal advisor, “[t]he Tate Letter asserted that sovereigns should enjoy immunity for sovereign or public acts (*jure imperii*), but not for commercial or private ones (*juri gestionis*).”²¹ U.S. courts followed this approach, “but only with respect to immunity from *suit*; they continued to afford sovereigns absolute immunity from *attachment and execution*, absent their consent.”²² The FSIA, enacted by Congress in 1976, established for the first time “certain limitations on sovereign immunity from attachment and execution.”²³ Some slight amendments have been made to the statute since its creation, such as the terrorist state provision, but the basic framework of the statute has remained largely unchanged.²⁴

A basic notion of fairness is the policy rationale behind the FSIA. In an age where citizens and sovereigns often engage in contractual business relationships, absolutely denying citizens recourse for the wrongs of foreign states is unfair.²⁵ However, the Act recognizes the special position of foreign sovereigns by allowing suits to proceed only

¹⁶ George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT’L & COMP. L. 665, 717 (2008).

¹⁷ *Schooner Exch. v. McFadden*, 11 U.S. 116 (1812).

¹⁸ Foster, *supra* note 16, at 717 (quoting *Schooner Exch.*, 11 U.S. at 137 (1812)).

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.* at 718.

²² *Id.* (citing *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)).

²³ *Id.*

²⁴ Foster, *supra* note 16, at 718. *See* 28 U.S.C. § 1605(7).

²⁵ Foster, *supra* note 16, at 718.

on the basis of certain exceptions to the general rule of immunity.²⁶ Congress designed the limited exceptions to avoid or minimize the problems that can arise from suits against foreign sovereigns. Such suits “have the potential to interfere with . . . governmental functions, unsettle diplomatic relations, and trigger retaliatory seizures.”²⁷ Indeed, the words of Venezuela’s oil minister, Raphael Ramirez, illustrate how real these problems can be.²⁸

B. OPERATION OF THE FSIA

“The FSIA is the mechanism for gaining jurisdiction over a foreign sovereign, its officials and agents, its political subdivisions and government offices, and its agencies and instrumentalities.”²⁹ Indeed, it is the sole mechanism for gaining “jurisdiction over a foreign sovereign entity in a United States court (whether federal or state).”³⁰ Thus, attachment of foreign state assets is exclusively a question of federal law.

The threshold question in any FSIA case is whether a given entity is a “foreign state” under the statute. This question has given the courts considerable difficulty.³¹ 28 U.S.C. §1603 provides the definition of “foreign state”:

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

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

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Ellsworth, *supra* note 9, at B6.

²⁹ DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 199 (2d ed. 2006).

³⁰ *Id.* at 200.

³¹ See Working Group of the American Bar Association, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 493 (2002) [hereinafter *ABA Report*].

shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.³²

The defendant, or purported foreign sovereign entity, bears the burden of proving it is a "foreign state."³³ This threshold determination is important because "[t]he FSIA provides that, subject to certain exceptions, foreign states are immune from suit in U.S. courts."³⁴ The plaintiff in foreign sovereign immunity cases bears the burden of showing that one of the exceptions applies. Absent such a showing, the defendant is immune from suit because U.S. courts cannot claim jurisdiction.³⁵ The general exceptions to immunity are laid out in section 1605 of the statute. "In rough order of importance they are: the commercial activity exception (section 1605(a)(2)), waivers of immunity (section 1605(a)(1)), tortious acts (section 1605(a)(5)), and the newly-legislated terrorist States exception (section 1605(a)(7))."³⁶ The commercial activity exception reads:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

...

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]³⁷

³² 28 U.S.C. § 1603. This article will pay particular attention to § 1603(b)(2), which defines how the courts determine whether a given corporation is an "instrumentality of a foreign state."

³³ BEDERMAN, *supra* note 29, at 200.

³⁴ *ABA Report*, *supra* note 31, at 500; *see* 28 U.S.C. § 1604.

³⁵ BEDERMAN, *supra* note 29, at 200.

³⁶ *Id.*; *see also* 28 U.S.C. § 1605.

³⁷ 28 U.S.C. § 1605. "Commercial activity," and "commercial activity carried on in the United States by a foreign state" are both defined in the definitional section of the statute, § 1603. "A 'commercial activity' means

Thus, in any foreign sovereign immunity case, a defendant must first prove its status as a “foreign state.” If a defendant is able to prove its status as a “foreign state,” then it is presumptively immune from suit. A plaintiff then bears the burden of showing that one of the exceptions to immunity applies to the defendant. Only upon a successful showing by the plaintiff may a court claim jurisdiction over the defendant.

C. PREJUDGMENT ATTACHMENT IN THE FSIA

Once a court establishes jurisdiction over a defendant state, it may then determine whether it can properly attach the state’s assets before a judgment has been entered. Generally, subject to treaties and agreements to which the U.S. is a party, the property of a foreign state located in the U.S. is immune from attachment.³⁸ The FSIA, however, authorizes prejudgment attachment under one narrow exception. Subsection 1610(d) explains when a court may attach a foreign state’s assets prior to judgment:

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the

either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.* § 1603(d). “A ‘commercial activity carried on in the United States by a foreign state’ means a commercial activity carried on by such state and having substantial contact with the United States.” *Id.* § 1603(e).

³⁸ 28 U.S.C. § 1609. The section reads: “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest, and execution except as provided in sections 1610 and 1611 of this chapter.” *Id.*

foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.³⁹

"The grounds for obtaining a pre-judgment attachment are . . . more limited than those for executing a judgment or attaching in aid of execution."⁴⁰ Prejudgment attachment "requires an unequivocal waiver In contrast, with respect to the waiver of post-judgment attachment as well as execution upon a judgment, the FSIA permits the waiver to be either express or implied."⁴¹

In 1981, the United States District Court for the Central District of California in *Security Pacific National Bank v. Government and State of Iran* explained how prejudgment attachment operates under the FSIA.⁴² The court observed that "this subsection provides, in cases (of) . . . explicit waiver, a provisional remedy . . . to prevent assets from being dissipated or removed from the jurisdiction"⁴³ "Thus," the court explained, "for the plaintiffs to maintain valid attachments pursuant to the FSIA, Iran must have explicitly waived its immunity from such attachments."⁴⁴ The court noted that the FSIA "creates a strong presumption against pre-judgment attachments" and concluded that although Iran did waive its immunity from execution of judgment, it did not explicitly waive its immunity from prejudgment attachment.⁴⁵

The *Security Pacific* court's strict reading of the "explicit waiver" requirement is the prevailing view. For example, in 1979, the United States District Court for the District of New Jersey stressed that while "the explicit waiver required by section 1610(d) could be satisfied by the provisions of the contract between the parties, or even by their conduct during the course of their commercial dealings," the

³⁹ 28 U.S.C. § 1610(d).

⁴⁰ *ABA Report*, *supra* note 31, at 584.

⁴¹ *New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 126 (S.D.N.Y. 1980).

⁴² *See Sec. Pac. Nat'l Bank v. Gov't & State of Iran*, 513 F. Supp. 864 (C.D. Cal. 1981).

⁴³ *Id.* at 879.

⁴⁴ *Id.*

⁴⁵ *Id.* at 880.

exception remains a narrow one.⁴⁶ Although the exception is narrow, in *Kensington International Limited v. Republic of the Congo*, the United States Court of Appeals for the Second Circuit held that a recitation of the precise words "prejudgment attachment" is not necessary to waive immunity under the Act.⁴⁷ Instead, the *Kensington* court explained, "'a waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: 'the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country.''"⁴⁸ In short, although the verbatim use of the words "prejudgment attachment" is not necessary to find an explicit waiver, the exception is narrow and must be made unambiguously and unequivocally.

Mr. Ramirez's statements highlight the policy reasons for making prejudgment attachment of assets in FSIA cases particularly difficult. Courts use prejudgment attachment of a defendant state's resources to ensure the plaintiff's collection on a future judgment. In FSIA cases, however, tensions arising from sovereignty and diplomatic relations often accompany such an attachment. Such tensions likely caused Mr. Ramirez to accuse Exxon of subjecting Venezuela to "judicial terrorism." Venezuela took the position that the attachment was an overreaching effort by the U.S. company to interfere with the internal policy decisions of Venezuela and, therefore, its national sovereignty. Prejudgment attachment is an extraordinary remedy, even in purely domestic situations, because it deprives parties of the free use of their assets before a final determination on the merits of a case is even rendered.⁴⁹ In FSIA cases, diplomatic tensions and potential foreign policy consequences exacerbate these concerns. Thus, prejudgment attachment requires an *express* waiver while an *implied* waiver is sufficient for executing a judgment or attaching in aid of execution.

⁴⁶ *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 394 (D.N.J. 1979).

⁴⁷ *Kensington Int'l Ltd. v. Congo*, 461 F.3d 238 (2d Cir. 2006) (quoting *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003)).

⁴⁸ *Id.*

⁴⁹ *See In re Megan-Racing Associates, Inc.*, 192 B.R. 321, 325 (N.D.N.Y. 1995).

III. PROPOSED CHANGES TO THE FSIA

This part summarizes two articles' recommendations for reforming the FSIA. Although both articles agree that Congress should relax the Act to enable easier attachment of assets in aid of execution, neither article addresses the important issues raised by prejudgment attachment.

*A. THE WORKING GROUP FOR THE AMERICAN BAR
ASSOCIATION*

In 1998 the American Bar Association formed a working group with the mission "to evaluate the operation and application of the [FSIA] and consider whether any legislative improvements or clarifications should be recommended."⁵⁰ The ABA created the group because of the many unanswered questions raised by the statute, some of which resulted in conflicting court opinions. Such questions included the following: "[D]oes the definition of 'foreign state' apply to second and third-tier subsidiaries . . . ? Can and should the provisions on executing judgments be improved and strengthened?"⁵¹

The working group published its finished product in 2002 and proposed answers to both of these questions. It concluded that the foreign state definition should apply to corporate subsidiaries, but that those subsidiaries should presumptively be subject to the commercial activity exception and therefore amenable to suit. The working group also recommended that attached property need not relate to the commercial dispute at issue, a change that would increase the ability of a party to execute a judgment.

1. FOREIGN STATE SUBSIDIARIES

The group examined the corporate subsidiary question, or the "tiering" issue, in Part III of its report.⁵² A "tiered" entity is a corporation not directly majority owned by a foreign state but rather majority-owned by another corporation that is directly owned by a foreign state.⁵³ The question of "whether such tiered . . . entities fit

⁵⁰ *ABA Report*, *supra* note 31, at 494.

⁵¹ *Id.* at 493.

⁵² *Id.* at 497.

⁵³ *Id.* at 517.

within the FSIA’s definition of a corporation majority owned by a foreign state and thus whether such entities enjoy the many protections that the FSIA affords” had produced conflicting results among the courts.⁵⁴

A majority of courts, as of 2002, held that corporations “indirectly owned by a foreign state through intermediary parent corporations fall within the FSIA.”⁵⁵ Most of these courts did not analyze the tiering issue but instead relied on the general language of section 1603(a), which “defines the term ‘foreign state’ broadly to include a political subdivision of a foreign state and an ‘agency or instrumentality’ of a foreign state.”⁵⁶ The section also “provides that th[e] broad definition . . . applies to all sections in the FSIA except section 1608.”⁵⁷ These courts reasoned that “section 1603(b)(2), which defines an ‘agency or instrumentality’ as entities majority owned by a ‘foreign state,’ includes entities majority owned by an ‘agency or instrumentality.’”⁵⁸ Thus, “a corporation majority owned by another corporation falls within the FSIA as long as an ultimate parent corporation is itself majority owned by a foreign state.”⁵⁹

A minority of courts reached the opposite conclusion and held that corporations indirectly owned by a foreign state do not fall under the FSIA.⁶⁰ These courts relied on a different statutory construction of

⁵⁴ *Id.*

⁵⁵ *Id.* at 519 (citing, e.g., *Delgado v. Shell Oil Co.*, 251 F.3d 795 (5th Cir. 2001); *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932, 939-41 (7th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982); *Trump Taj Mahal Assocs. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143, 1148-50 (D.N.J. 1991), *aff’d without opinion*, 958 F.2d 365 (3d Cir. 1992)).

⁵⁶ *ABA Report, supra* note 31, at 519 (citing *In re Air Crash Disaster*, 96 F.3d at 940).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (citing *In re Air Crash Disaster*, 96 F.3d at 939).

⁶⁰ *Id.* (citing *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-63 (9th Cir. 1995); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 685-90 (S.D.N.Y. 1996); *Martinez v. Dow Chem. Co.*, Nos. 95-3212, 95-3214, 1996 WL 502461, at *2 (E.D. La. Sept. 4, 1996); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 CIV. 6124(JGK), 1999 WL 307666, at *5 (S.D.N.Y. Dec. 9, 1999);

section 1603.⁶¹ The minority position “noted that section 1603(b)(2) defines an ‘agency or instrumentality’ as an entity majority owned by a ‘foreign state or a political subdivision thereof.’”⁶² Thus, “if the term ‘foreign state’ in section 1603(b)(2) means the same thing as in section 1603(a), that is, as including a ‘political subdivision of a foreign state or an agency or instrumentality of a foreign state’ then the phrase ‘or a political subdivision’ in section 1603(b)(2) would be superfluous.”⁶³ Aside from statutory construction, the courts in the minority relied on the legislative history of the FSIA to support their position.⁶⁴ They pointed out that “[i]n the House Report accompanying the FISA . . . Congress explained that, to fall within section 1603(b)’s majority-ownership provision, ‘a majority of the entity’s shares or other ownership interest [must] be owned by a foreign state (or by a foreign state’s political subdivision).’”⁶⁵ Furthermore, the minority courts pointed to practical considerations to justify their holdings.⁶⁶ These courts were worried that a contrary holding would vastly expand the immunity granted by the Act. One court explained this concern, stating,

To add to the list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.⁶⁷

This court concluded that it “would not ‘assume that Congress intended such a result.’”⁶⁸ Finally, the minority also determined that the need to treat a corporation as a sovereign entity lessens as the

Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125, 130-31 (S.D.N.Y. 1995)).

⁶¹ *Id.*

⁶² *ABA Report*, *supra* note 31, at 519-20 (citing *Fed. Ins. Co.*, 12 F.3d at 1285 n.12).

⁶³ *Id.* at 520.

⁶⁴ *Id.* (citing *Gates*, 54 F.3d at 1462).

⁶⁵ *Id.* (quoting Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 1976 U.S.C.A.N. (90 Stat. 2891)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 520-21 (quoting *Gates*, 54 F.3d at 1462).

⁶⁸ *ABA Report*, *supra* note 31, at 521 (quoting *Gates*, 54 F.3d at 1462).

corporations become more separated and removed from the sovereign.⁶⁹

The working group sided with the majority. It concluded that “[t]o achieve consistency and promote the other purposes of the FSIA, Congress should amend the Act to clarify that . . . it does not require direct majority ownership by a foreign state for an instrumentality to qualify for presumptive immunity and the procedural protections of the act.”⁷⁰ The group’s main reason for this recommendation was that “some states utilize a tiered corporate structure to manage and control important areas of national interest, such as natural resources.”⁷¹ The group recognized that “the strength of a foreign sovereign does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses.”⁷² Recognizing the merit of the minority’s concern about increasing the scope of presumptive immunity, the working group also recommended a presumption that such subsidiary companies are “engaged in a commercial activity.”⁷³ So, while the working group’s recommendation may at first appear to expand the immunity granted by FSIA, it largely would not because “in the vast majority of cases a lower tier corporation will be involved in a commercial activity.”⁷⁴ Thus, according to the working group a “tiered” corporation should qualify as a “foreign state” but also should usually be subject to the “commercial activity” exception and therefore amenable to suit.

⁶⁹ *Id.* (citing *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 689 (S.D.N.Y. 1996)).

⁷⁰ *Id.* at 517.

⁷¹ *Id.* at 523. The group provides Mexico as an example. Mexico, the sole owner of the nation’s petroleum, established a holding company in 1992 with four operating subsidiaries. *Id.* Similarly, Venezuela has a number of subsidiaries of PDVSA, the oil company wholly owned by the Government of Venezuela, with which it controls the nation’s petroleum interests. See Plaintiff’s Memorandum of Law in Support of Motion For an Order of Attachment Without Notice, *Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.*, No. 07 Civ. 11590 (DAB), at 1 n.2 (S.D.N.Y. Jan. 3, 2008) [hereinafter *Plaintiff’s Memorandum of Law*].

⁷² *ABA Report*, *supra* note 31, at 523.

⁷³ *Id.*

⁷⁴ *Id.* The working group proposed one additional caveat: courts shall not presume a foreign central bank that otherwise qualifies as an instrumentality is engaged in commercial activity. *Id.*

2. IMPROVING THE EXECUTION OF JUDGMENTS

The working group's answer to the second question, whether the provisions on executing judgments should be improved, is more complex because the FSIA has three sections dealing with execution: 1609, 1610, and 1611. The working group pays section 1610 particular attention in its report, noting that "in a statute of substantial complexity, section 1610 is among the most confusing sections."⁷⁵ One reason for the confusion is the distinction "between attachment in aid of execution or execution in subsections (a) and (b) and pre-judgment attachments in subsection (d). The grounds for obtaining a pre-judgment attachment are even more limited than those for executing a judgment or attaching in aid of execution."⁷⁶ The working group's main focus in the report is making subsection 1610(a), which "creates various exceptions from execution immunity for foreign states and instrumentalities," less restrictive.⁷⁷

Subsection 1610(a) requires that the property to be attached for purposes of execution be "used for a commercial activity in the United States."⁷⁸ The working group disagreed with the language of 1610(a)(2), which demands that "execution in a commercial activity case be limited to property related to the same commercial activity"⁷⁹ The working group would solve this problem by making clear that "there is no requirement of a nexus between the property being attached or executed against and the underlying dispute."⁸⁰

B. THE "SOVEREIGN ACTIVITY" APPROACH

One commentator, George K. Foster, recently published an article outlining alternative proposals for reform of the FSIA.⁸¹ His "sovereign activity" approach rejects a general rule of immunity with an exception for commercial activity and advocates a general rule of jurisdiction with an exception for sovereign activity:

⁷⁵ *Id.* at 583.

⁷⁶ *Id.* at 583-84.

⁷⁷ *Id.* at 581.

⁷⁸ *ABA Report*, *supra* note 31, at 584 (quoting 28 U.S.C. § 1610(a)).

⁷⁹ *Id.* at 586. *See* 28 U.S.C. § 1610(a)(2).

⁸⁰ *Id.* at 588.

⁸¹ Foster, *supra* note 16, at 723-30.

The current focus on whether or not property is in use for a commercial activity is not optimal. Rather than having an *exception* that denies immunity to property if it is in use for a commercial activity, there would be advantages to having a *general rule* that makes property of sovereigns available to its creditors, subject to an exception that confers immunity on property in use for a sovereign activity.⁸²

This shift would have important implications. Although the FSIA currently allows the attachment of assets used in a commercial activity in many cases, the “court still has to make some additional finding, such as that the debtor State has made a waiver of immunity, or that the property to be seized has a nexus to the underlying claim.”⁸³ If, however, “there were a general rule that automatically made property of a sovereign available unless it was in use for a sovereign activity, no such additional finding would be required”⁸⁴ because the “property of a

⁸² *Id.* at 719-22. A “sovereign activity” is one in which only a sovereign can engage. *Id.* at 720 n.251 (citing *Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (“[A] foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a ‘commercial’ activity, because private companies can similarly use sales contracts to acquire goods.”)); *see also* *Tex. Trading & Milling Corp. v. Fed. Rep. of Nig.*, 647 F.2d 300, 309 (2d Cir. 1981) (“[I]f the activity is one in which a private person could engage, it is not entitled to immunity.”)). Examples of a “sovereign activity” and thus not a “commercial activity” include:

a State’s repayment of a loan to the IMF, a provincial government’s expropriation of a finance company’s stake in a local company, a State’s expropriation of property of Jewish refugees in the wake of World War II, a Ministry of Agriculture’s issuance of a license for the export of rhesus monkeys to a U.S. company, and a State’s imposition of taxes on an airline.

Foster, *supra* note 16, at 675 (citations omitted, citing *EM Ltd. v. Rep. of Arg.*, 473 F.3d 463, 482 (2d Cir. 2007); *Yang Rong v. Liaoning Provincial Gov’t*, 452 F.3d 883, 890 (D.C. Cir. 2006); *Garb v. Rep. of Pol.*, 440 F.3d 579, 586-87 (2d Cir. 2006); *MOL, Inc. v. P.R. of Bangl.*, 736 F.2d 1326, 1329 (9th Cir. 1984); *LNC Invs., Inc. v. Rep. of Nicar.*, 96 Civ. 6360 (JFK), 2000 U.S. Dist. LEXIS 7814, at *16-17 (S.D.N.Y. June 8, 2000), *aff’d*, 228 F.3d 423 (2d Cir. 2000)).

⁸³ *Id.* at 721 (citing FSIA, 28 U.S.C. §§ 1610(a)(1)-(2) (2006)).

⁸⁴ *Id.* at 720.

State would *automatically* be available if it is not in use for a sovereign activity, whether or not a waiver has been made.”⁸⁵ So, under Foster’s reforms, “the legal framework for enforcing awards and judgments against sovereigns [would] be simplified . . . such . . . that property of a sovereign would be automatically available to its creditors to satisfy valid debts, unless the property is in use for a sovereign activity.”⁸⁶ Thus, “[i]f a debtor state could not establish that a local asset was in use for a sovereign activity . . . it would be reachable.”⁸⁷

Foster’s sovereign activity approach is therefore more favorable to those seeking to attach the assets of a foreign state than the ABA Working Group’s approach. In contrast, the ABA Working Group would retain the current burdens of proof but would adjust how the plaintiff may prove the defendant is excepted from immunity:

The [ABA] Report would leave in place threshold commercial activity requirement, as well as the waiver exception, but would eliminate all of the other exceptions of the present § 1610(a) and replace them with a broad exception denying immunity to property of a foreign state where “[t]he judgment relates to a claim for which the foreign state is not immune under section 1605.”⁸⁸

So, under the Working Group’s recommendation, “once a creditor has succeeded in obtaining jurisdiction against the sovereign, and the creditor has obtained a judgment in its favor, it could reach any property of the foreign State that was used for a commercial activity in the United States, unless it was protected by § 1611.”⁸⁹ Although Foster believes that the ABA reforms are a step in the right direction, they do not “go far enough . . . because they retain [both] the requirement that the property be ‘in use for a commercial activity in the

⁸⁵ *Id.* at 722.

⁸⁶ *Id.* at 723. Foster’s proposed scheme presumes sovereign property is available to creditors. See *id.* at 730 (“Property in the United States of a foreign state shall be immune from attachment, arrest, and execution *only* as provided in §§ 1610 and 1611.”). *Id.* (emphasis added).

⁸⁷ Foster, *supra* note 16, at 725.

⁸⁸ *Id.* at 726 (quoting *ABA Report*, *supra* note 31, at 587).

⁸⁹ *Id.* (describing the *ABA Report*, *supra* note 31). 28 U.S.C. § 1611 contains a list of property that the statute deems immune from attachment in all cases, including, for example, property connected with a military activity or the property of a foreign central bank. See 28 U.S.C. § 1611.

United States’ . . . and the general rule of immunity set forth in § 1609.”⁹⁰

Despite the liberalizing reforms proposed by both Foster and the ABA Working Group, neither proposes any change to the FSIA’s rule regarding prejudgment attachment of assets. Indeed, the working group states in its report that “no changes should be made in the pre-judgment attachment provisions”⁹¹ Although Foster recommends that the FSIA be relaxed even further, he too does not recommend any changes to the explicit waiver requirement of section 1610(d).⁹² What reforms, if any, should be made to subsection 1610(d), a subsection both Foster and the ABA Working Group left undisturbed?

IV. THE VENEZUELA/EXXON LITIGATION AND SUGGESTED CHANGES TO THE FSIA

Although largely ignored by the ABA Working Group and Foster, prejudgment attachment under the FSIA deserves attention, and Congress should reform the relevant provisions to better reflect the Act’s policy goals. Part IV discusses how this reform should take place, using the Exxon/Venezuela litigation as background. First, subpart IV(A) reviews *Dole Foods Company v. Patrickson*, in which the Supreme Court held that corporate subsidiaries are not “foreign states” under the FSIA.⁹³ Second, subpart IV(B) explains how the Supreme Court’s holding in *Dole* was central to the District Court’s decision to award prejudgment attachment in the Exxon/Venezuela case. Third, subpart IV(C) demonstrates why the Court’s decision in *Dole* was improper but why the District Court nevertheless reached the correct result. Finally, subpart IV(C) concludes by recommending how Congress should amend the FSIA to resolve the issues presented by *Dole* and prejudgment attachment under the Act.

⁹⁰ Foster, *supra* note 16, at 726.

⁹¹ ABA Report, *supra* note 31, at 588.

⁹² Foster’s proposed changes to section 1610(d) are found in his proposed section 1610(c). See Foster, *supra* note 16, at 730. Foster retains all the language contained in the original FSIA section 1610(d) but adds his “sovereign activity” requirement, which describes the type of assets that can be attached. Importantly, he retains the explicit waiver requirement found in the original statute as a necessary threshold element that must be satisfied before any prejudgment attachment is allowed in this context. See *id.*

⁹³ 538 U.S. 468 (2003).

*A. BACKGROUND: THE SUPREME COURT'S NARROW
DEFINITION OF INSTRUMENTALITY*

The comments made by Venezuelan oil minister Raphael Ramirez were in response to Exxon's legal actions resulting in the freezing of billions of dollars in assets, including \$300 million in cash located in the United States.⁹⁴ To understand why the United States District Court for the Southern District of New York allowed this attachment, one must first understand *Dole Food Company v. Patrickson*, a case decided by the United States Supreme Court in April 2003.⁹⁵

In 1997, a group of farm workers hailing from Costa Rica, Ecuador, Guatemala, and Panama filed an action against Dole Food Company in Hawaii state court.⁹⁶ In their complaint, the workers alleged that Dole injured them through exposure to the chemical pesticide dibromochloropropane.⁹⁷ Dole Food Company then impleaded Dead Sea Bromine Co., Ltd., and Bromine Compounds, Ltd. (the Dead Sea Companies),⁹⁸ which had been connected to the State of Israel through corporate tiers at various times.⁹⁹ As illustrated by the period of "1984-1985, Israel wholly owned a company called Israeli Chemicals, Ltd.; which owned a majority of shares in another company called Dead Sea Works, Ltd.; which owned a majority of shares in Dead Sea Bromine Co., Ltd.; which owned a majority of shares in Bromine Compounds, Ltd."¹⁰⁰

The Dead Sea Companies moved for removal on the grounds that they were "instrumentalities of a foreign state as defined by the FSIA, entitling them to removal under § 1441(d)."¹⁰¹ The District Court denied the motion.¹⁰² The Court of Appeals for the Ninth Circuit affirmed this ruling, holding that "a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government."¹⁰³ The United States Supreme Court then granted

⁹⁴ See Witten, *supra* note 1.

⁹⁵ *Dole*, 538 U.S. 468 (2003).

⁹⁶ *Id.* at 471.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 473.

¹⁰⁰ *Id.*

¹⁰¹ *Dole*, 538 U.S. at 472 (citing Civ. No. 97-01516HG (D. Haw. Sept. 9, 1998), App. to Pet. For Cert. in No. 01-594, p. 79).

¹⁰² *Id.*

¹⁰³ *Patrickson v. Dole Food Co.*, 251 F.3d 795, 806 (9th Cir. 2001) (relying on *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995)).

certiorari to answer, *inter alia*, the question "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary."¹⁰⁴

The Supreme Court affirmed the Ninth Circuit holding, stating that "a foreign state itself must own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA"¹⁰⁵ The Dead Sea Companies were not directly owned by Israel during any time relevant to the suit.¹⁰⁶ The Supreme Court decided that such companies did not fall within the statutory language of section 1603(b)(2), which "grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.'"¹⁰⁷

The Supreme Court adopted a formalistic approach in construing the statute. The Court noted that Congress adopted terms of art used in corporate law and legislated in this context.¹⁰⁸ "The language of § 1603(b)(2) refers to ownership of 'shares,' showing that Congress intended statutory coverage to turn on formal corporate ownership."¹⁰⁹ Thus, the Court decided that the question turned on whether "Israel owned shares in the Dead Sea Companies as a matter of corporate law," not whether Israel would be considered the "owner" of the companies in some common-sense use of the term.¹¹⁰ The Court then noted that, under corporate law, "[a]n individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own the subsidiary corporations in which the corporation holds an interest."¹¹¹ Because Israel did not directly own any shares of the Dead Sea Companies during any time relevant to the case, the Dead Sea Companies did not qualify as instrumentalities of a foreign state under section 1603(b)(2).¹¹²

¹⁰⁴ *Dole*, 538 U.S. at 471.

¹⁰⁵ *Id.* at 480.

¹⁰⁶ *Id.* at 473.

¹⁰⁷ *Id.* (quoting 28 U.S.C. § 1603(b)(2) (2000)).

¹⁰⁸ *Id.* at 474.

¹⁰⁹ *Id.*

¹¹⁰ *Dole*, 538 U.S. at 474.

¹¹¹ *Id.* at 475.

¹¹² *Id.* at 477.

The Dead Sea Companies argued that the words “other ownership interest” in subsection 1603(b)(2) should “include a state’s ‘interest’ in its instrumentality’s subsidiary.”¹¹³ The Court disagreed with this reading of the statute. The Court reasoned that this language referred to an ownership interest similar to stock: “The statute had to be written for the contingency of ownership forms in other countries . . . that depart from the conventional corporate structures.”¹¹⁴ According to the Court, “[r]eading the term to refer to a state’s interest in entities lower on the corporate ladder would make the specific reference to ‘shares’ redundant.”¹¹⁵ In other words, Congress used “shares” and “other ownership interest” as referring to interests by direct ownership, whether under the American corporate scheme or otherwise. It did not list “shares” as one example of a catalogue of applicable ownership interests that also included indirect interests in tiered entities. The Dead Sea Companies also argued that even if they were not “owned” by Israel, they should still qualify as instrumentalities under the statute because Israel substantially controlled them.¹¹⁶ The Supreme Court summarily rejected this argument, stating that “control and ownership . . . are distinct concepts,” and one cannot be substituted for the other.¹¹⁷ The Court relied on its strict, formalistic interpretation of the statute and concluded that “[e]ven if Israel exerted the control the Dead Sea Companies describe, that would not give Israel a ‘majority of [the companies’] shares or other ownership interest.’”¹¹⁸ Thus, the Court maintained its bright-line rule: “A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation’s shares.”¹¹⁹

Justice Breyer, joined by Justice O’Conner, wrote a dissenting opinion in which he disagreed with the Court’s holding on this issue. Justice Breyer concluded that “the statutory phrase ‘other ownership interest . . . owned by a foreign state’ . . . covers a Foreign Nation’s legal interest in a Corporate Subsidiary, where that interest consists of the Foreign Nation’s ownership of a Corporate Parent that owns the shares of the Subsidiary.”¹²⁰ Justice Breyer rejected the formalistic and narrow interpretation of the word “ownership” subscribed to by the

¹¹³ *Id.* at 476.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Dole*, 538 U.S. at 477.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 480.

majority. He noted that the Court had previously “held that ‘shipowne[r]’ can include a corporate shareholder even though, technically speaking, the corporation, not the shareholder, owns the ship.”¹²¹ Furthermore, the Court had also “held that a trademark can be ‘owned by’ a parent corporation even though, technically speaking, a subsidiary corporation, not a parent, registered and thus owned the mark.”¹²² Based on these prior holdings, Justice Breyer decided that the majority’s conclusion that “ownership” means only direct ownership was ill-founded.¹²³

Justice Breyer also relied on a policy argument. The FSIA provides numerous procedural protections desirable because of the “potential sensitivity of actions against foreign states.”¹²⁴ Justice Breyer argued that no meaningful distinction, in light of these policy goals, can be drawn between a state acting through a corporation it owns directly and one that the state owns as a subsidiary:

Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary? The answer to this question is: In terms of the statute’s purposes, *nothing at all* would lead Congress to make such a distinction.¹²⁵

Justice Breyer therefore contended that the need for the procedural protections of the statute is “no less compelling” for subsidiaries because “[t]he risk of adverse foreign policy consequences is no less great.”¹²⁶

B. THE EXXON/VENEZUELA LITIGATION

The Supreme Court’s holding in *Dole* was central to the trial court’s handling of the Exxon/Venezuela litigation. On January 3,

¹²¹ *Id.* at 482 (quoting *Flink v. Paladini*, 279 U.S. 59, 62-63 (1929) (emphasis added)).

¹²² *Dole*, 538 U.S. at 482 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988) (opinion of Kennedy, J.) (emphasis added)).

¹²³ *Id.* at 483.

¹²⁴ *Id.* at 484 (quoting H.R. REP. NO. 94-1487, at 32 (1976)).

¹²⁵ *Id.* at 485.

¹²⁶ *Id.* (citing the *ABA Report*, *supra* note 31, at 523).

2008, Mobil Cerro Negro, Ltd., a corporate subsidiary of Exxon, filed for an “*ex parte* Order of Attachment pursuant to Rule 64 of the Federal Rules of Civil Procedure” in the United States District Court for the Southern District of New York.¹²⁷ Mobil Cerro Negro, Ltd. filed the motion against PDVSA Cerro Negro S.A. (PDVSA CN), the company with which it was engaged in a joint venture to extract oil from the Orinoco region of Venezuela.¹²⁸ PDVSA CN was itself a third-tier corporate subsidiary of Venezuela’s state-owned oil company PDVSA.¹²⁹ Following the *Dole* decision, the court concluded that PDVSA CN did not qualify as an “instrumentality” of the state of Venezuela and therefore did not fall under the FSIA.¹³⁰ Without any of the procedural protections offered by the FSIA, the trial court needed only to determine whether New York law would permit the prejudgment attachment requested by the plaintiffs.¹³¹ The District Court was ultimately satisfied with the plaintiff’s showing regarding the need for attachment and ordered the attachment of \$3 million.

C. REACTION TO THE EXXON CASE AND A PROPOSAL FOR CHANGE

Should the decision in *Dole* and, consequently, the Exxon/Venezuela litigation rest on the Court’s “unnecessarily technical reading” of the FSIA?¹³² If not, was the correct result reached regardless of this mistake? What, if any, changes should Congress make to the Act to correct the misapplication?

¹²⁷ *Plaintiff’s Memorandum of Law*, *supra* note 71, at 1. The “Introduction” of the *Plaintiff’s Memorandum of Law* also discusses the background of the Exxon/Venezuela litigation arising from the expropriation of assets in the Orinoco Region of Venezuela. *Id.*

¹²⁸ *Id.* at 1.

¹²⁹ *Id.* at 1 n.2 (“Defendant PDVSA CN is a wholly-owned subsidiary of PDVSA Petroleo, S.A., which in turn is a wholly-owned subsidiary of PDVSA, which itself is wholly-owned by the Government of Venezuela. . . . PDVSA CN thus is a third tier, indirectly owned subsidiary of the Government of Venezuela.”).

¹³⁰ Order of Attachment, *Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.*, CA No. 07 Civ. 11590 (DAB) (S.D.N.Y. Dec. 27, 2007).

¹³¹ *Id.* at 17 (“At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.”) (quoting FED. R. CIV. P. 64(a)).

¹³² *Dole Food Co. v. Patrickson*, 538 U.S. 468, 486 (2003) (Breyer, J., dissenting).

First, Justice Breyer was correct in his criticism of the Court's overly formalistic understanding of "ownership" in the *Dole* decision. The Court would have been better served to follow Justice Breyer's reasoning and the suggestions of the ABA Working Group. Corporate subsidiaries should indeed be treated as "instrumentalities" under the statute. As the ABA Working Group acknowledged, some nations use tiered corporate structures to manage and control resources with important national interests.¹³³ The ABA Working Group Report provides the examples of Mexico and Honduras.¹³⁴ Both countries use corporate structures comprised of several layers to control natural resources, such as oil and lumber.¹³⁵

Venezuela employs a similar corporate structure for purposes of managing its natural resources. Venezuela employs a "third-tier" corporation, PDVSA CN, to manage and control one of its most valuable natural resources, petroleum.¹³⁶ Certainly, "the strength of a foreign state's sovereign interests in an area do not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses."¹³⁷ Mr. Ramirez's vehement comments, although likely attributable in part to nationalistic posturing, add real-world credibility to this claim. Indeed, as Justice Breyer elucidated, "decisions about how to incorporate, how to structure corporate entities, or whether to act through a single corporate layer or through several corporate layers are purely matters of form, not substance."¹³⁸

That is not to say that the United States District Court for the Southern District of New York reached the wrong result. Indeed, prejudgment attachment should have been available to the plaintiff and should have been applied. The court, however, should have reached this outcome via a more carefully planned route, one involving some slight changes to the FSIA.

The first change requires the alteration of subsection 1603(b) regarding jurisdiction over foreign nations and related entities generally. Congress should amend this subsection to overrule the Court's decision in *Dole* and to include in the definition of

¹³³ ABA Report, *supra* note 31, at 523.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Plaintiff's Memorandum of Law, *supra* note 71, at 1 n.2.

¹³⁷ ABA Report, *supra* note 31, at 523.

¹³⁸ *Dole*, 538 U.S. at 485.

"instrumentality" a corporate subsidiary of an instrumentality of a foreign state, such as PDVSA CN. This change would make the FSIA more consistent with its purposes of maintaining international comity and fairness as outlined by the convincing arguments presented by the ABA Working Group and Justice Breyer in his *Dole* dissent. This reform would reduce the frictions in a case like the Exxon/Venezuela case by precluding a US court's *absolute* denial of immunity for a corporate entity with which a foreign nation closely identifies. Although Venezuela would be pleased with the proposed reform of section 1603(b), the prejudgment attachment applied in the Exxon/Venezuela litigation was nevertheless reasonable.

While prejudgment attachment was the most fair and reasonable outcome of the issue, the court nevertheless could not have reached it under the Act had it identified the subsidiary as an instrumentality of Venezuela. The failure would have occurred because the subsidiary would have shouldered its burden to show the immunity defense; the plaintiffs would have shouldered the burden to show the commercial activity exception applied; but the plaintiffs would have no recourse under § 1610(d) for prejudgment attachment because Venezuela issued no unequivocal waiver. To remedy this insufficiency, Congress should also reform subsection 1610(d) and remove the explicit waiver requirement.¹³⁹ This reform is consistent with the purposes of Mr. Foster's suggestions but goes further in liberalizing the availability of prejudgment attachment. Similar to Mr. Foster's suggestions, without the waiver requirement present in section 1610(d), any assets of the defendant "foreign state" in the United States used for a commercial activity would be subject to attachment.¹⁴⁰ Thus, applied to the Exxon case, the District Court would reach the same result:¹⁴¹ the court would consider PDVSA CN an instrumentality and therefore within the scope of the FSIA, and the reformed subsection 1610(d) would not require any waiver, explicit or otherwise, in order to attach the assets of the company.

¹³⁹ See 28 U.S.C. § 1610(d)(1).

¹⁴⁰ Foster recommends discarding the general rule of immunity from attachment. Instead, he recommends that in order for assets to be immune, the defendant state must show that assets are in the U.S. in connection with a "sovereign activity." Foster, *supra* note 16, at 724-27. This change is not necessary. Assets in the U.S. used for a "commercial activity" should be reachable. Foster merely argues that the burden should be on the defendant state; however, the current regime that places the burden on the plaintiff to show the assets' status is satisfactory.

¹⁴¹ The same result would be reached assuming that Exxon could show that assets were used for a "commercial activity."

These two reforms more properly reflect modern expectations and business realities. While corporations like PDVSA CN should be considered foreign states or instrumentalities under 1603(a)(2), they should not be given special protections that shield them from potential judgments. When sovereign nations contract with private parties in a business relationship, they should do so on relatively equal terms. Put simply, when a nation acts as a business, it should be treated as a business. "By descending to the level of a commercial actor, a foreign government divests itself of its sovereign status. In other words, when a foreign sovereign engages in commercial activity, that foreign sovereign is no longer acting in a sovereign capacity."¹⁴²

Although Congress should discard the waiver requirement of subsection 1610(d), it should incorporate into the FSIA a slightly stricter standard for the application of prejudgment attachment. As the FSIA operates now, in addition to the explicit waiver requirement, "it is generally necessary to satisfy whatever prerequisites for pre-judgment attachment exist under the law of the relevant jurisdiction."¹⁴³ That is to say, once a trial court determines that a defendant has made an explicit waiver, it applies the law of the situs state regarding prejudgment attachment.¹⁴⁴ State law, therefore, applies even in FSIA cases in federal court.¹⁴⁵ Laws regarding prejudgment attachment vary from state to state. Generally, however, "the party seeking the attachment must establish a likelihood of success on the merits of its claims, and must show that the debtor has or is likely to remove, encumber or conceal assets in order to frustrate collection."¹⁴⁶

¹⁴² Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 197 (2001).

¹⁴³ Foster, *supra* note 16, at 712 (citing FED. R. CIV P. 64(a)).

¹⁴⁴ See FED. R. CIV P. 64.

¹⁴⁵ Foster, *supra* note 16, at 712.

¹⁴⁶ *Id.* (citing, e.g., N.Y.C.P.L.R. 6201(3)). Indeed, New York law regarding prejudgment attachment was applied in the Exxon Case because the action was filed in the United States District Court for the Southern District of New York. The plaintiff, Mobil CN, in its Memorandum of Law in Support of Motion for an Order of Attachment Without Notice, stated:

Mobil CN must show that: (1) there is a cause of action; (2) it is probable that the plaintiff will succeed on the merits; (3) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff; and (4) 'the award to which the applicant may be entitled may be rendered

Congress could simply increase this burden and require the party seeking attachment to display a strong likelihood of success on the merits and a strong likelihood that the defendant state will remove assets to frustrate collection.

A meaningfully stricter standard incorporated into the FSIA would achieve two important goals. First, demanding a stronger showing by the plaintiff accounts for the larger and more consequential scale in FSIA cases. At first blush, a sovereign acting as a business should not receive special treatment. However, cases involving foreign nations present special challenges and can have substantial international consequences. Demanding a stronger showing by the plaintiff takes proper notice of the sensitivities involved in FSIA cases; that is, it incorporates the notions of sovereignty and respect owed to foreign states and their instrumentalities. Second, incorporating a stricter prejudgment attachment standard into the FSIA would help achieve uniform decision making in cases involving foreign states. As Justice Breyer recognized in his *Dole* dissent, lawmakers designed the FSIA, in part, to channel cases involving foreign states into federal court.¹⁴⁷ Funneling these cases into federal courts was meant to develop a uniform body of law in this area.¹⁴⁸ Uniformity "is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."¹⁴⁹ Incorporating the standard for prejudgment attachment into the statute would further the goal of creating a uniform body of law in cases involving foreign sovereigns because each court would apply the same standard.

V. CONCLUSION

Although Congress should expand the definitional section of the FSIA to include corporate subsidiaries, such as PDVSA CN, as instrumentalities of a foreign state, it should also limit the protections for states and their instrumentalities. While more entities should fall under the Act, they should not receive the same liberal protections – particularly regarding prejudgment attachment. These changes would accomplish two important goals while more accurately reflecting current expectations. First, the changes pay proper deference to the

ineffectual without such provisional relief.' CPLR § 6212(a); CPLR § 7502(c).

Plaintiff's Memorandum of Law, supra note 71, at 18.

¹⁴⁷ *Dole*, 538 U.S. at 484 (citing H.R. REP. NO. 94-1487, at 32).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 485.

sovereignty of foreign state defendants by requiring a more robust showing by the plaintiff when it requests prejudgment attachment. Second, incorporating an express, stricter standard for prejudgment attachment would help accomplish uniformity in decision making in FSIA cases. Increasingly, foreign states contract with private parties in business relationships. When a state acts like a business, it should be treated as one. Thus, a state acting as a business should not be afforded such strict procedural advantages that shield its assets from attachment. These two changes are constructive steps in recognizing these principles.

Ultimately, however, negotiated contracts will largely govern litigation between private actors and foreign states.¹⁵⁰ The removal of the waiver requirement, in effect, alters only one default contractual term. That is, a private party need not bargain for an explicit waiver in order for a U.S. court to apply prejudgment attachment in FSIA cases. A foreign state, however, may still include a contractual term forbidding prejudgment attachment altogether or forbidding prejudgment attachment absent a future explicit waiver. Nevertheless, removing the explicit waiver requirement is not a futile measure. By removing the explicit waiver requirement, a foreign state and a private actor are placed on more equal ground at the bargaining stage when forming a contract. Indeed, the parties should be on relatively equal ground when engaging in a business relationship because the foreign state is not acting in its sovereign capacity.¹⁵¹ Therefore, Mr. Ramirez may still curse Exxon and accuse it of "judicial terrorism," but if these proposed reforms are enacted, he would have less cause to do so.

¹⁵⁰ Foster, *supra* note 16, at 716.

¹⁵¹ See *supra* note 136 and accompanying text.

