

## NOTES

# RESOLVING OUTSTANDING JUDGMENTS UNDER THE TERRORISM EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

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*While the Foreign Sovereign Immunities Act generally prevents foreign states from being the subject of lawsuits in U.S. courts, countries that have been designated as state sponsors of terrorism by the Secretary of State are exempted from this protection. Judgments entered under this "terrorism exception" already total more than three billion dollars, with a number of suits still pending. These judgments may pose difficulties for future attempts to normalize relations with the defendant countries. In this Note, Daveed Gartenstein-Ross argues that the best method for resolving these outstanding judgments is to terminate them and resubmit the claims to ad hoc international tribunals. Although successful plaintiffs whose judgments are abrogated can bring takings claims against the government, he argues that those claims should be surmountable through a sensible application of takings jurisprudence.*

### INTRODUCTION

The world watched in shock on September 11, 2001, as two hijacked airplanes toppled the World Trade Center in New York City, and another demolished a large section of the Pentagon in Washington, D.C.<sup>1</sup> In the wake of these attacks, President Bush dedicated his

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\* I would like to thank Professor David Golove for assistance in shaping this Note and formulating my arguments and Professors Vicki Been and Howard Venable for providing advice and feedback on the Takings Clause section. I would also like to thank the *New York University Law Review's* excellent editorial staff, especially David Alonzo-Maizlish, Howard Anglin, David Carpenter, David Karp, Shawn Larsen-Bright, and Gabe Ross for their insightful comments and hard work. Finally, I would like to thank my wife, Amy Powell, for her love and encouragement.

<sup>1</sup> For descriptions of the events of September 11, see generally Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, Wash. Post, Sept. 12, 2001, at A1; N.R. Kleinfeld, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. Times, Sept. 12, 2001, at A1.

The damage would have been even worse were a fourth hijacked plane, United Flight 93, able to reach its intended target. Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* 25 (2001). Although the target that the terrorists intended may never be known, there is speculation that they planned to crash it into a nuclear facility. Peter Grier, *Loose Nukes*, Christian Sci. Monitor, Dec. 5, 2001, at 1. However, after a

presidency to the war against terrorism<sup>2</sup> and made clear that other nations' policies regarding terrorism will define, at least in part, their relations with the United States.<sup>3</sup>

The war against terrorism promises to be long and difficult, and it may produce strange bedfellows. In order to build the necessary political and strategic support for its campaign, the United States will need to form new alliances, often with nations with whom relations previously have been hostile.<sup>4</sup> Ensuring that this international coalition remains stable and cohesive may require the United States to use a variety of diplomatic tactics, including easing sanctions aimed at foreign states<sup>5</sup> and offering the prospect of normalizing diplomatic relations.<sup>6</sup>

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struggle between its passengers and the hijackers, the plane crashed near Pittsburgh, Pennsylvania, killing all on board. Bergen, *supra*, at 25.

<sup>2</sup> See Frank Bruni, *For President, a Mission and a Role in History*, N.Y. Times, Sept. 22, 2001, at A1 (describing cabinet meeting in which "Mr. Bush made it clear that all [of the administration's previous initiatives] paled beside the war on terrorism that he planned to wage").

<sup>3</sup> R.W. Apple Jr., *No Middle Ground*, N.Y. Times, Sept. 14, 2001, at A1 ("Sketching in the outline of an aggressive new American foreign policy, the Bush administration today gave the nations of the world a stark choice: stand with us against terrorism, deny safe havens to terrorists or face the certain prospect of death and destruction.").

<sup>4</sup> The United States desires broad support for the war on terrorism in part because the primary target of the campaign, the al-Qaeda terrorist network, may reach into fifty or sixty countries. See Michael R. Gordon et al., *Scarcity of Afghanistan Targets Prompts U.S. To Change Strategy*, N.Y. Times, Sept. 19, 2001, at A1 (describing al-Qaeda's vast international network).

<sup>5</sup> In response to Pakistan's cooperation with American military operations in Afghanistan, the United States lifted sanctions and rescheduled loans. *Pakistanis Taste Economic Rewards of US Support*, Agence Fr. Presse, Oct. 1, 2001, LEXIS, News Library, News Group File. The United States also lifted sanctions against India as part of its "carrot-and-stick policy" to ensure support from crucial allies. *Sharon Behn, US Strikes Back at Terrorists with Economic Punch*, Agence Fr. Presse, Sept. 27, 2001, LEXIS, News Library, News Group File. As part of the U.S. policy "to help countries that help it" in the war against terror, the United States also backed a U.N. decision to lift sanctions against Sudan. *David Jackson, Help Us, We'll Help You: Bush Builds on Coalition*, Dallas Morning News, Sept. 29, 2001, at A1.

<sup>6</sup> Normalization entails the restoration of regular diplomatic relations between two countries and generally includes commercial relations. For example, the normalization of relations between the United States and Vietnam in 1995 was followed by a bilateral trade agreement in 2000. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 Am. J. Int'l L. 677, 700-01 (2000).

A number of the states currently designated by the United States as sponsors of terrorism, see *infra* note 7, seem to be seeking normalization with the United States. For example, analysts believe that Sudan is "anxious to normalize its relations with the United States and [view Sudan's] response to the [antiterror] coalition . . . as one key test" for whether normalization is feasible. *All Sub-Saharan Africa Said Supporting Anti-Terror Coalition*, Africa News, Sept. 18, 2001, LEXIS, News Library, News Group File. Additionally, a senior Arab diplomatic source stated that Iran is "pretty desperate" to normalize relations with the United States and sees the war against terrorism as an opportunity to do

Before the United States can use normalization as a coalition-building tool, it must confront the fact that several of its potential new allies have been designated by the Secretary of State as state sponsors of terrorism.<sup>7</sup> Although nation-states generally are immune from suit in U.S. courts,<sup>8</sup> designation as a state sponsor of terrorism abrogates this immunity, allowing civil suits under the “terrorism exception” to the Foreign Sovereign Immunities Act (FSIA) for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabo-

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so. Douglas Davis, *British FM to Iran for Historical Visit*, *Jerusalem Post*, Sept. 23, 2001, at 1. As a writer for the *New York Times* explained recently:

For the first time since the United States severed relations with Iran in 1980, officials here are openly pushing for a resumption of dialogue. For now, they say, it should be over Afghanistan, but they also describe Afghanistan as only a means to the end of eventually resuming relations. In the press and on the street, there is an increasing boldness about arguing the merits—seen as primarily economic—of talking. Members of Parliament openly discuss their desire for a dialogue, and have established a parli[a]mentary committee to push for one.

Amy Waldman, *In Louder Voices, Iranians Talk of Dialogue with U.S.*, *N.Y. Times*, Dec. 10, 2001, at A12. Serious difficulties remain, however, as Iran’s constitutional structure provides clerics, who generally oppose relations with the United States, more power than elected representatives. *Id.* President Bush’s inclusion of Iran in the “axis of evil” in his January 2002 State of the Union address is likely to present additional difficulties. See *infra* note 104.

<sup>7</sup> See 22 C.F.R. § 126.1(d) (1999) (designating Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism). The seven designated states did not change with the recent release of the U.S. State Department’s report on global terrorism. U.S. Dep’t of State, *Patterns of Global Terrorism: 2000*, at 31 (2001). However, the United States has been involved in negotiations with North Korea and Sudan regarding their removal from the list and has notified Lebanon and Pakistan that they could be added. Lauren Gelfand, *U.S. Cites Decline in State Sponsored Terrorism*, *Agence Fr. Presse*, May 1, 2001, LEXIS, News Library, News Group File. Serious pressure on Pakistan now seems unlikely, however, given Pakistan’s post-September 11 status as a “partner in the war on terrorism.” Jane Perlez, *U.S. Sanctions on Islamabad Will Be Lifted*, *N.Y. Times*, Sept. 22, 2001, at A1.

Despite evidence that linked the Taliban’s Afghanistan to numerous major terrorist acts, it was never “listed among state sponsors of terrorism” because the United States refused to recognize the Taliban as Afghanistan’s legitimate government. Ben Barber, *Iran Tops U.S. List of Active Terrorists*, *Wash. Times*, May 1, 2001, at A13; see also Thomas H. Henriksen, *The Rise and Decline of Rogue States*, 54 *J. Int’l Aff.* 349, 366 (2001) (noting that U.S. State Department avoided listing Afghanistan as state sponsor of terrorism although it “has become a breeding ground for extremists and terrorist groups”). The fact that Afghanistan never was designated as a state sponsor of terrorism does not preclude lawsuits against the Taliban: Because the Taliban never was recognized as the government of Afghanistan, it does not enjoy the protection of the Foreign Sovereign Immunities Act (FSIA). See *infra* note 8 and accompanying text (discussing FSIA); see also Mark Hamblett, *World Trade Center Victim’s Wife Sues bin Laden; Afghan Islamic Emirate, Taliban Named in Case Filed by Local Lawyer*, *Legal Intelligencer*, Oct. 15, 2001, at 5, LEXIS, News Library, News Group File.

<sup>8</sup> See 28 U.S.C. § 1604 (1994) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States . . .”).

tage, or hostage taking.<sup>9</sup> Over three billion dollars in judgments already have been entered against the seven designated states under the terrorism exception.<sup>10</sup>

While judgments entered under the terrorism exception uniformly have gone unpaid by the defendant states,<sup>11</sup> the judgments may pose problems for future attempts by the United States to normalize relations with a defendant state. Because of the potentially serious adverse economic consequences, designated state sponsors of terrorism may be hesitant to reach agreements regarding large outstanding judgments.<sup>12</sup> Furthermore, successful plaintiffs may execute their

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<sup>9</sup> 28 U.S.C. § 1605(a)(7) (Supp. V 2000) provides that a foreign state is not immune from jurisdiction in the U.S. in a case

in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . . .

This provision only applies if the foreign state is designated as a state sponsor of terrorism either at the time the act occurred or as a result of the act. § 1605(a)(7)(A). For a description of the requirements of a suit under this provision, see *infra* notes 28-32 and accompanying text.

Commentators have noted that the language of § 1605(a)(7) leaves unclear “whether the foreign state itself is subject to liability.” Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 *Geo. L.J.* 675, 676 n.5 (1999). Regardless, courts consistently have found states liable under respondeat superior. E.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 26-27 (D.D.C. 1998) (holding Iran may be liable under respondeat superior); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997) (“[I]f [p]laintiffs prove an agent’s liability under this Act, the foreign state employing the agent would also incur liability under the theory of respondeat superior.”). This Note thus assumes that the states themselves will be liable for terrorism exception judgments.

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> See, e.g., Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 *DePaul Bus. L.J.* 169, 239 (1999-2000) (describing difficulty of enforcing judgments because United States is not party to any treaties pertaining to judgment enforcement); Editorial, *Lawsuits and Terrorism*, *Wash. Post*, Dec. 26, 1999, at B6 (concluding that 1996 amendments were “in large measure, a lie,” due to difficulty of executing judgments); see also Recent Case, *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), 113 *Harv. L. Rev.* 615, 616-18 (1999) (explaining difficulties plaintiffs experienced in executing judgment against Cuba); *infra* note 94 (describing relevant cases involving Cuba and Iran). But see *infra* notes 95-102 and accompanying text (describing how Justice for Victims of Terrorism Act allowed plaintiffs to receive compensation for judgments against Cuba and Iran).

<sup>12</sup> Many of the designated state sponsors of terrorism face severe fiscal and economic problems such that payment of massive judgments would be difficult at best. See, e.g., Cent. Intelligence Agency, *The World Factbook: Iran* (estimating that fifty-three percent of Iranian population falls below poverty line), <http://www.odci.gov/cia/publications/factbook/geos/ir.html> (last visited Feb. 14, 2002); Roger Riddell & David Bryer, *Plea for Help to School Young Sudan in Peace*, *Guardian* (London), Oct. 16, 2000, at 20 (explaining

judgments against defendant states' commercial property located in the United States, even if the property is unrelated to the terrorist act.<sup>13</sup> Thus, absent a method of resolving judgments entered under the terrorism exception, economic considerations may strain attempts to normalize relations with designated state sponsors of terrorism.

This Note argues that efforts to normalize relations may be facilitated if the outstanding judgments and pending suits under the terrorism exception are terminated and remitted to ad hoc international tribunals.<sup>14</sup> This approach could be modeled after the Iran-United States Claims Tribunal, which was created after apparent infringements on American property in the wake of the Iranian Revolution of 1978-1979.<sup>15</sup> Since then, the tribunal generally has re-

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that "[p]overty is extensive, deep and growing" in Sudan); Kang Seok-jae, *Korea's Worst-Ever Drought Enters Crisis Stage*, *Korea Herald*, June 11, 2001, LEXIS, News Library, News Group File (noting poverty in North Korea).

The United Nations Development Program's (UNDP) Human Development Report for 2001 classified Libya, Iran, and Syria as countries of "medium human development"; out of 162 countries ranked in order of human development, Libya was ranked fifty-ninth, Iran ninetieth, and Syria ninety-seventh. United Nations Dev. Program, *Human Development Report 2001: Making Technologies Work for Human Development* 141-44 (2001). Sudan was classified as a country of "low human development," and was ranked one hundred and thirtieth. *Id.* UNDP lacked sufficient data to rank Iraq and Cuba, but it estimated that Cuba would have been ranked between fiftieth and fifty-first, making it a country of "medium human development," while Iraq would have been ranked between one hundred and sixteenth and one hundred and seventeenth, making it a country of "low human development." *Id.* at Addendum, tbl.A, <http://www.undp.org/hdr2001/Addendum4.pdf> (last visited Feb. 17, 2002).

<sup>13</sup> See 28 U.S.C. §§ 1610(a), (a)(7), (b), (b)(2) (Supp. V 2000).

<sup>14</sup> Ad hoc international tribunals are created to resolve international controversies and are distinguished from permanent tribunals by their limited scope: The parties that establish an ad hoc tribunal do not anticipate that it will last in perpetuity, but rather believe that the tribunal will cease functioning after handling the specific set of disputes that it was designed to adjudicate. See, e.g., 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 117-18 (1998) (discussing jurisdictional scope of International Criminal Tribunal for Rwanda); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 *Am. J. Int'l L.* 639 (1993) (discussing International Criminal Tribunal for Yugoslavia); see also *infra* Part II.B.2 (explaining proposal for creating ad hoc international tribunals to resolve terrorism exception judgments).

<sup>15</sup> Iran's "nationalization of banks and the insurance industry" and "de facto nationalization of the oil and gas industry," following the Iranian Revolution, had a serious negative impact on American property interests in the region. George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 *Am. J. Int'l L.* 585, 587 (1994). Additionally, in November 1979, militant Iranian students seized the U.S. embassy and took its staff hostage after President Carter allowed the deposed Shah to enter the United States for medical treatment. H. Lee Hetherington, *Negotiating Lessons from Iran: Synthesizing Langdell & MacCrate*, 44 *Cath. U. L. Rev.* 675, 687-89 (1995). Subsequently, on the last day of Jimmy Carter's presidency, Iran and the United States concluded the Algiers Accords, creating the Iran-United States Claims Tribunal. Andreas F. Lowenfeld, *Book Review*, 92 *Am. J. Int'l L.* 149, 149

solved disputes between private parties and Iran arising from those events.<sup>16</sup>

The primary legal hurdle to this proposal is the potential for takings claims brought by plaintiffs who previously have won judgments under the terrorism exception.<sup>17</sup> While no precedent directly resolves the merits of such suits, this Note argues that the termination and remittal of terrorism exception suits would not effect a compensable taking. Absent establishment of an international tribunal, plaintiffs are unlikely to recover on their judgments; the tribunal, therefore, in fact, will facilitate recovery.<sup>18</sup> Moreover, this Note proposes that even if a court finds a taking, the amount of the judgment should be discounted by the likelihood of recovery. Such a calculation of damages will keep the takings judgments small and thus minimize the impediment to the establishment of the tribunals.

Part I examines the formal character of suits under the terrorism exception, provides an overview of the history of litigation under the exception, and describes the uniform refusal of defendant countries to satisfy terrorism exception judgments. Part II then analyzes alternatives for resolving these judgments in order to facilitate potential normalization discussions with defendant countries, and it argues that the best alternative is to remit the claims to ad hoc international tribunals. Finally, Part III responds to the Takings Clause challenges that could hinder such a solution.<sup>19</sup>

## I

### LITIGATION UNDER THE TERRORISM EXCEPTION

This Part describes the history and mechanics of terrorism exception suits, which to date have resulted in judgments totaling over three billion dollars. Part I.A discusses the elements of a suit under the terrorism exception and briefly reviews the history of its enactment. Part I.B describes the judgments entered under the provision, as well as pending litigation. Part I.C discusses the unsuccessful challenges by defendant states to the assertion of personal jurisdiction under the ter-

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(1998) (reviewing George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996)).

<sup>16</sup> Lowenfeld, *supra* note 15, at 149.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *id.*

<sup>19</sup> Although the events of September 11 have clarified the importance of the United States's ability to resolve judgments under the terrorism exception, the arguments advanced in this Note could be utilized whenever normalization seems both realistic and desirable. Effective normalization with states currently designated as state sponsors of terrorism may be a desirable goal wholly apart from the exigencies of the war against terrorism.

rorism exception, and explains why such arguments are similarly unlikely to succeed in the future. Finally, Part I.D examines the problems that prevailing plaintiffs have encountered when attempting to execute their judgments.

### A. *Establishing Jurisdiction*

In 1976, Congress enacted the FSIA, the statutory framework governing the conditions under which foreign sovereigns enjoy immunity from suit in U.S. courts.<sup>20</sup> As originally implemented, the legislation provided foreign states with immunity<sup>21</sup> unless the suit fell into one of the FSIA's narrow exceptions.<sup>22</sup> There was no exception al-

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<sup>20</sup> 28 U.S.C. §§ 1602-1611 (1994 & Supp. V 2000). For a description of the motivations behind Congress's enactment of the FSIA, see generally Adam C. Belsky et al., Comment, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 Cal. L. Rev. 365, 369-70 (1989); Lawrence Allan Nathanson, Note, "Imperatives of Events and Contemporary Imponderables": The Effect of the Foreign Sovereign Immunities Act on Presidential Power, 62 B.U. L. Rev. 1275, 1282 (1982).

<sup>21</sup> The original "FSIA reflected the state of the common law [of sovereign immunity] at the time of its enactment." David MacKusick, Comment, Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act, 10 Emory Int'l L. Rev. 741, 753 (1996).

The seminal case in the development of that common law is *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), in which the Supreme Court denied two U.S. citizens' claim to a French warship seized in U.S. waters. *Id.* at 117, 147. Chief Justice Marshall explained that absolute foreign sovereign immunity is based in the "perfect equality and absolute independence of sovereigns, and [a] common interest impelling them to mutual intercourse, and an interchange of good offices with each other." *Id.* at 137. Turning to the case before him, Justice Marshall concluded that

the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

*Id.* at 147; see also *Republic of Mex. v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is . . . not for the courts to deny [foreign sovereign] immunity which our government has seen fit to allow, or to allow immunity on new grounds which the government has not seen fit to recognize."); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (holding that recommendation of immunity by executive branch "must be accepted by the courts as a conclusive determination by the political arm of the Government" that jurisdiction would "interfere[] with the proper conduct of our foreign relations"); *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926) (affirming broad articulation of immunity principles in *Schooner Exchange*). For more on the development of the law of sovereign immunity, see generally Joseph M. Sweeney, U.S. Dep't of State, *The International Law of Sovereign Immunity* 20-23 (1964) (surveying developments in international law of sovereign immunity).

<sup>22</sup> 28 U.S.C. § 1604 (1994) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in . . . this chapter."). The exceptions include waivers of immunity, commercial activity that takes place within and directly affects the United States, expropriation, property claims, certain noncommer-

lowing suit against nation-states for acts of terrorism or other human rights violations committed against U.S. nationals overseas,<sup>23</sup> and U.S. citizens failed in their attempts to bring such claims.<sup>24</sup>

This changed in 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>25</sup> which included the terrorism exception to the FSIA.<sup>26</sup> The exception was enacted primarily as a response to a federal court's dismissal of a case against Libya for the bombing of Pan Am Flight 103, recent terrorist acts such as the Oklahoma City bombing (which suggested the possibility of a successful act of state-sponsored terrorism on U.S. soil), and intensive lobbying efforts after Alisa Flatow, a student at Brandeis University, was killed by a suicide bomber in Israel.<sup>27</sup>

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cial claims based on the tortious acts of the employees of foreign states, international agreements, certain admiralty claims, and certain counterclaims. § 1605 (enumerating general sovereign immunity exceptions); § 1607 (detailing exceptions for counterclaims). The exception for commercial activity was the "most important." E.g., Sarah Light, Note, *The Human Rights Injunction: Equitable Remedies Under the Alien Tort Claims Act*, 9 *Transnat'l L. & Contemp. Probs.* 653, 658 n.21 (1999); Benjamin Eric Lovell, Note, *Export Group v. Reef Industries, Inc.: The Reconciliation of the Foreign Sovereign Immunities Act of 1976*, 21 *N.C. J. Int'l L. & Com. Reg.* 443, 453-54 (1996) (describing commercial activity exception as "most important and widely used").

<sup>23</sup> Warren D. Zaffuto, Comment, A "Pirate's Victory": President Clinton's Approach to the New FSIA Exception Leaves the Victors Empty-Handed, 74 *Tul. L. Rev.* 685, 697 (1999) ("[F]oreign nations were virtually immune from possible civil liability for violations of the law of nations (i.e., terrorist acts) against U.S. nationals overseas."); see also S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 *U. Pa. L. Rev.* 1247, 1258-60 (2000) (describing U.S. citizens' inability to sue for acts of terrorism occurring outside of United States under noncommercial tort exception); Richard T. Micco, Note, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Powers*, 14 *Temp. Int'l & Comp. L.J.* 109, 128 (2000) (same).

<sup>24</sup> See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (holding that allegations of "unlawful detention and torture by the Saudi Government [were] not based upon a commercial activity," and thus FSIA did not confer jurisdiction over suit (internal quotation marks omitted)); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d Cir. 1996) (holding that FSIA did not confer jurisdiction over Libya for claims concerning bombing of Pan Am Flight 103); *Princz v. F.R.G.*, 26 F.3d 1166, 1168 (D.C. Cir. 1994) (holding that FSIA did not confer jurisdiction for injuries and indignities suffered in concentration camps during Holocaust).

<sup>25</sup> Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>26</sup> AEDPA § 221, 110 Stat. at 1241 (codified at 28 U.S.C. § 1605(a)(7) (Supp. V 2000)).

<sup>27</sup> Baletsa, *supra* note 23, at 1261 (listing factors leading to FSIA amendments); see also H.R. Rep. No. 105-48, at 2 (1997) (noting that terrorism exception was direct result of FSIA's failure to provide redress for bombing of Pan Am Flight 103); William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 *Pub. Papers* 630 (1997) (describing Oklahoma City bombing as prompting FSIA amendments); 60 *Minutes: In Memory of Alisa* (CBS television broadcast, Oct. 4, 1998) (describing lobbying efforts following Alisa Flatow's death), LEXIS, News Library, Transcripts File.

There are five requirements for jurisdiction under the terrorism exception. First, the claim must involve torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts.<sup>28</sup> Second, the act or provision of material support must be engaged in by an official, employee, or agent of the foreign state acting within the scope of his or her duty.<sup>29</sup> Third, the U.S. Secretary of State must have designated the defendant state as a state sponsor of terrorism.<sup>30</sup> Fourth, either the claimant or victim must have been a U.S. national at the time of the act.<sup>31</sup> Finally, if the act occurred in the foreign state against which the claim is brought, the claimant must have “afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.”<sup>32</sup>

If all five requirements are met, the defendant state loses its immunity and courts may exercise jurisdiction to hear suits relating to terrorism exception claims under another FSIA amendment, the Civil Liability for Acts of State Sponsored Terrorism Act.<sup>33</sup> This provision, commonly known as the Flatow Amendment,<sup>34</sup> provides a private cause of action for any act covered by the terrorism exception.<sup>35</sup> The Flatow Amendment raises the possibility of enormous judgments by allowing for recovery of both noneconomic harms, such as pain and suffering, and punitive damages.<sup>36</sup>

### B. *Litigation History*

This Section summarizes the cases that have arisen under the terrorism exception, illustrating the potential complications that terrorism exception suits could pose for attempts to normalize relations with previously designated state sponsors of terrorism.

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<sup>28</sup> 28 U.S.C. § 1605(a)(7) (Supp. V 2000).

<sup>29</sup> *Id.*

<sup>30</sup> § 1605(a)(7)(A).

<sup>31</sup> § 1605(a)(7)(B)(ii).

<sup>32</sup> § 1605(a)(7)(B)(i). Two other sections limit application of the terrorism exception: Section 1605(f) provides that the action must be brought within ten years of the wrongful act, and § 1605(g) provides that the Attorney General can stay any discovery that “significantly interfere[s]” with a national security operation or ongoing criminal investigation or prosecution related to the incident that gave rise to the claim.

<sup>33</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1997) (codified at 28 U.S.C. § 1605 note (Supp. V 2000)).

<sup>34</sup> E.g., Dellapenna, *supra* note 11, at 256 n.439; Oren Eisner, Note, Extending *Chevron* Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President, 86 Cornell L. Rev. 411, 416 (2000).

<sup>35</sup> See 28 U.S.C. § 1605 note (Supp. V 2000).

<sup>36</sup> *Id.*; see also Baletsa, *supra* note 23, at 1263 (noting that potential recovery for noneconomic harms poses “the possibility of massive civil liability”).

The first case tried under the terrorism exception is also the only judgment entered thus far against Cuba. *Alejandro v. Republic of Cuba*<sup>37</sup> arose after the Cuban Air Force shot down two U.S. civilian aircraft over international waters.<sup>38</sup> In response, the personal representatives of the deceased filed suit under the terrorism exception.<sup>39</sup> Cuba did not defend the suit, instead merely “asserting through a diplomatic note that [the court] had no jurisdiction over Cuba or its political subdivisions.”<sup>40</sup> The court rejected this contention, finding that the terrorism exception barred Cuba from asserting foreign sovereign immunity because the plaintiff sued for an extrajudicial killing that occurred outside Cuba’s borders.<sup>41</sup> As Cuba mounted no defense beyond its diplomatic note, the plaintiff needed only to demonstrate facts sufficient to support the complaint,<sup>42</sup> and the court ultimately awarded over \$187 million in compensatory and punitive damages.<sup>43</sup>

To date, nine multi-million-dollar judgments have been entered against Iran under the terrorism exception. The best known case is *Flatow v. Islamic Republic of Iran*,<sup>44</sup> in which the Flatow family sued Iran for the 1995 death of Alisa Flatow, a twenty-year-old Brandeis University student who was killed by a suicide bomber while traveling in Israel.<sup>45</sup> The Shaqaqi faction of the Palestine Islamic Jihad, whose sole source of funding was Iran, claimed responsibility for the bombing.<sup>46</sup> The District Court found that Iran’s support for this terrorist organization exposed it to suit under the terrorism exception, and it awarded \$247.5 million to the plaintiffs, including \$225 million in punitive damages.<sup>47</sup>

In the eight other suits against Iran, courts have awarded a total of over \$2.3 billion to plaintiffs, including over \$2.1 billion in punitive damages.<sup>48</sup> In each case, Iran failed to make a court appearance, leav-

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<sup>37</sup> 996 F. Supp. 1239 (S.D. Fla. 1997).

<sup>38</sup> *Id.* at 1242.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1247-48.

<sup>42</sup> In lawsuits directed against foreign states, courts may not enter a judgment when the defendant state defaults pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. Rather, the court first must ascertain whether the claimants have established their “claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e) (1994); see also *Alejandro*, 996 F. Supp. at 1242 (reviewing these rules).

<sup>43</sup> *Alejandro*, 996 F. Supp. at 1253.

<sup>44</sup> 999 F. Supp. 1 (D.D.C. 1998).

<sup>45</sup> *Id.* at 6-9.

<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> See *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 138 (D.D.C. 2001) (awarding over \$316 million, including \$300 million in punitive damages, for murder of Navy officer stationed in Beirut by Hezbollah suicide bomber); *Jenco v. Islamic Republic*

ing the courts free to enter massive default judgments based solely on the allegations in the plaintiffs' complaints.<sup>49</sup>

In the single suit against Iraq, the district court denied Iraq's motion to dismiss and entered judgment for the plaintiffs.<sup>50</sup>

Finally, a number of suits are pending against Libya. Although no final judgments have been entered to date, Libya has tried unsuccessfully to have the pending suits dismissed. For example, in *Rein v. Socialist People's Libyan Arab Jamahiriya*,<sup>51</sup> the survivors and representatives of persons killed aboard Pan Am Flight 103 sued Libya for

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of Iran, 154 F. Supp. 2d 27, 29-30, 40 (D.D.C. 2001) (awarding estate and family of Catholic priest over \$314 million, including \$300 million in punitive damages, for his kidnapping, detention and torture by Hezbollah); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 30-31, 53 (D.D.C. 2001) (awarding over \$353 million, including \$300 million in punitive damages, for American academic's kidnapping and torture by Hezbollah); *Polhill v. Islamic Republic of Iran*, No. 00-1798 (TPJ), 2001 U.S. Dist. LEXIS 15322, at \*2-\*3, \*17-\*18 (D.D.C. Aug. 23, 2001) (awarding over \$331 million, including \$300 million in punitive damages, for kidnapping, detention and torture of teacher at Beirut University College); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99, 115 (D.D.C. 2000) (awarding over \$311 million, including \$300 million in punitive damages, to brother of dissident university professor assassinated by Iranian government); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 108-09, 114 (D.D.C. 2000) (awarding journalist Terry Anderson over \$341 million, including \$300 million in punitive damages, for his kidnapping and six years of imprisonment by Hezbollah); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 4 (D.D.C. 2000) (awarding over \$327 million, including \$300 million in punitive damages, to families of two students in Israel killed by Hamas suicide bombing); *Ciccipio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64, 70 (D.D.C. 1998) (awarding plaintiffs \$65 million for their kidnapping, imprisonment, and torture by Hezbollah).

The recurrent punitive damage award of \$300 million reflects the expert testimony of Dr. Patrick Clawson of the Washington Institute for Near East Policy. Dr. Clawson routinely testifies that most of Iran's terrorist funding, near \$100 million annually, is channeled through its Ministry of Information and Security, and he recommends punitive damages of three times that amount. E.g., *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*16-\*17 ("[T]his Court concludes, on the basis of Dr. Clawson's testimony, that an award of thrice the amount of [Iran's Ministry of Information and Security's] maximum annual budget for terrorist activities, or \$300 million, is the closest approximation to an appropriate [punitive damages] award."). In every case, the court has followed Dr. Clawson's recommendation. See *Jenco*, 154 F. Supp. 2d at 38-40; *Sutherland*, 151 F. Supp. 2d at 53; *Wagner*, 2001 U.S. Dist. LEXIS 18424, at \*24-\*25; *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*16-\*17; *Elahi*, 124 F. Supp. 2d at 114; *Anderson*, 90 F. Supp. 2d at 114; *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at \*18-\*19.

<sup>49</sup> See *Jenco*, 154 F. Supp. 2d at 29 (awarding default judgment after Iran failed to answer plaintiff's complaint); *Sutherland*, 151 F. Supp. 2d at 30 (same); *Wagner*, 2001 U.S. Dist. LEXIS 18424, at \*2 (same); *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*1 n.1 (same); *Elahi*, 124 F. Supp. 2d at 99-100 (same); *Anderson*, 90 F. Supp. 2d at 109 n.1 (same); *Eisenfeld*, 2000 U.S. Dist. LEXIS 9545, at \*1 (same); *Ciccipio*, 18 F. Supp. 2d at 64 (same).

<sup>50</sup> In *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), four plaintiffs brought suit against Iraq after being taken hostage and tortured in Kuwait. *Id.* at 21. Finding that the plaintiffs' claims fell within the terrorism exception, the court entered a damage award of \$18 million. *Id.* at 27.

<sup>51</sup> 162 F.3d 748 (2d Cir. 1998).

“wrongful death, pain and suffering, and a variety of other injuries.”<sup>52</sup> Libya argued that the court was without subject matter jurisdiction because the terrorism exception unconstitutionally delegated legislative power by “allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the State Department’s determinations of whether particular foreign states are sponsors of terrorism.”<sup>53</sup> Writing for the Second Circuit panel, Judge Calabresi found that there was no unconstitutional delegation because there was no delegation at all; Libya was designated a state sponsor of terrorism at the time that Congress enacted the terrorism exception, and thus Congress manifestly intended the exception to apply to Libya.<sup>54</sup>

Libya’s motions to dismiss in three other suits also have been denied.<sup>55</sup> More suits may be filed following the conviction of a Libyan suspect for the bombing of Pan Am Flight 103.<sup>56</sup>

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<sup>52</sup> *Id.* at 753.

<sup>53</sup> *Id.* at 762. Although Libya advanced a number of arguments in its motion to dismiss, Judge Calabresi found that the Second Circuit had jurisdiction on the interlocutory appeal to review only Libya’s challenge to subject matter jurisdiction. *Id.* at 755.

<sup>54</sup> *Id.* at 764. Judge Calabresi suggested, however, that the issue of delegation might be presented properly by a foreign sovereign who was added recently to the list of state sponsors of terrorism. *Id.*

<sup>55</sup> In *Hartford Fire Ins. Co. v. Socialist People’s Libyan Arab Jamahiriya*, No. 98-3096, 1999 U.S. Dist. LEXIS 15035 (D.D.C. Sept. 22, 1999), the district court denied Libya’s motion to dismiss after the insurers and reinsurers of Pan American World Airways sued Libya for the bombing of Pan Am Flight 103. *Id.* at \*17.

In *Price v. Socialist People’s Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000), two U.S. citizens sued Libya for being taken hostage and tortured. *Id.* at 11. The district court again invoked the terrorism exception to deny Libya’s motion to dismiss; the court found that the grant of subject matter jurisdiction under the terrorism exception was valid, and the exercise of personal jurisdiction constitutional. *Id.* at 16.

In *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, No. Civ.A.00-1722(RMU), 2001 WL 1704149 (D.D.C. Oct. 31, 2001), the plaintiff sued Libya on the grounds that she and her late husband were taken hostage and tortured when inclement weather forced their cruise ship to use the Port of Benghazi as a “safe harbor” in February 1987. *Id.* at \*1. The court denied Libya’s motion to dismiss, finding that the terrorism exception’s jurisdictional elements were satisfied when the plaintiff provided Libya with an opportunity to arbitrate the claims. *Id.* at \*4-\*5. The court also found the terrorism exception provisions lifting immunity for lawsuits involving death or injury to U.S. nationals from state-sponsored acts of terrorism to be constitutional. *Id.* at \*6.

<sup>56</sup> Libyan leader Col. Muammar el-Qaddafi agreed in 1999 to hand over two Pan Am Flight 103 bombing suspects to stand trial under Scottish law in a neutral country. Kevin Cullen, *Libyan Guilty in Lockerbie Trial*, *Boston Globe*, Feb. 1, 2001, at A1. The suspects were tried by three Scottish judges sitting without a jury in a high-security special court. *Id.* While one suspect was acquitted, the other was convicted and sentenced to life in prison with the possibility of parole after twenty years. *Id.* After the verdict was announced, many of the victims’ relatives who believed that culpability for the bombing ultimately lay with Qaddafi “vowed to pursue the truth in a civil trial in the United States.” Bill Glauber, *Libyan Guilty in Lockerbie Crash*, *Balt. Sun*, Feb. 1, 2001, at 1A.

The cases against Libya exemplify how the results of suits brought under the terrorism exception for past acts may not reflect defendant states’ current practices, as there is evi-

### C. Challenges to Personal Jurisdiction

One issue prompted by this litigation history is whether U.S. courts even have jurisdiction over these defendant countries. Indeed, Libya has persistently, though unsuccessfully, argued that it is not subject to U.S. court jurisdiction in terrorism exception suits because it lacks sufficient minimum contacts to satisfy modern due process requirements.<sup>57</sup>

Although commentators have been mixed in their evaluation of whether U.S. courts should have jurisdiction in terrorism exception suits,<sup>58</sup> no court yet has found that it lacked jurisdiction in a terrorism exception suit,<sup>59</sup> and there is persuasive support for that position.

The FSIA provides that personal jurisdiction exists over foreign states for every claim that fits within one of the FSIA exceptions, in-

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dence that Libya “has started to meet international demands and redress its past crimes.” Ray Takeyh, *The Rogue Who Came in from the Cold*, *Foreign Aff.*, May/June 2001, at 62.

<sup>57</sup> See Rein, 162 F.3d at 761 (holding that court lacked authority to decide issue of personal jurisdiction on interlocutory appeal); *Price*, 110 F. Supp. 2d at 14 (holding that terrorism exception reflects congressional intent that sufficient nexus for personal jurisdiction always exists when defendant country is accused of torturing American citizens abroad); *Hartford Fire*, 1999 U.S. Dist. LEXIS 15035, at \*12-\*13 (holding that act of terrorism directed at United States provides “fair warning” to defendant state that it may be subject to jurisdiction of U.S. courts (quoting Rein v. Socialist People’s Libyan Arab Jamahirya, 995 F. Supp. 325, 330 (E.D.N.Y.), aff’d in part, 162 F.3d 748 (2d Cir. 1998))).

The minimum contacts test on which Libya relied first was developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The test’s underlying concern was due process rights of the defendant. *Id.* at 316. The Supreme Court most recently re-articulated the minimum contacts test in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). In *Asahi*, the Court laid out a two-pronged test: The defendant must have purposefully directed its activity toward the forum state, *id.* at 112, and jurisdiction must not offend “traditional notions of fair play and substantial justice.” *Id.* at 113 (quoting *Int’l Shoe*, 326 U.S. at 316).

<sup>58</sup> Compare Glannon & Atik, *supra* note 9 (arguing that Due Process Clause poses no impediment to exercise of jurisdiction contemplated by terrorism exception), with Keith E. Sealing, “State Sponsors of Terrorism” Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act is Unconstitutional, 15 *Am. U. Int’l L. Rev.* 395, 397-98 (2000) (arguing that jurisdiction in terrorism exception cases “would violate the Due Process Clause of the Fifth Amendment absent the performance of traditional ‘minimum contacts’ analysis”), and Kevin Todd Shook, Note, *State Sponsors of Terrorism Are Persons Too: The Flatow Mistake*, 61 *Ohio St. L.J.* 1301, 1322 (2000) (arguing for due process framework that allows jurisdiction over foreign sovereigns with systematic and continuous contacts with United States, even if unrelated to claim).

<sup>59</sup> Even though arguments that U.S. courts do not have jurisdiction in these contexts uniformly have failed, the issue remains relevant. Not only could states raise jurisdictional challenges in the future, but some also could bring collateral challenges to the courts’ jurisdiction after they defaulted. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (holding that defendant either may challenge court’s jurisdiction in initial proceeding or ignore judicial proceeding and bring collateral challenge to default judgment on jurisdictional grounds); see also *Maritime Int’l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1099 n.9 (D.C. Cir. 1982) (stating, in dicta, that defendant subjected to arbitration by default could attack jurisdiction collaterally).

cluding the terrorism exception;<sup>60</sup> personal jurisdiction thus turns on application of the FSIA's substantive provisions.<sup>61</sup> A defendant state challenging personal jurisdiction when the court properly has subject matter jurisdiction would have to argue that it is a "person" under the Due Process Clause, and thus that minimum contacts must exist for the assertion of jurisdiction.<sup>62</sup>

Admittedly, there is case law supporting the proposition that the assertion of jurisdiction over nation-states is subject to the minimum contacts test. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,<sup>63</sup> the Second Circuit held that the exercise of jurisdiction under the FSIA is constrained by the Due Process Clause.<sup>64</sup> *Texas Trading* has since become the "standard authority"<sup>65</sup> for that proposition, and it frequently has been relied upon by other courts.<sup>66</sup>

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<sup>60</sup> See 28 U.S.C. § 1330(a), (b) (1994).

<sup>61</sup> *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 485 n.5 (1983).

<sup>62</sup> The constraints on the exercise of jurisdiction imposed by the Due Process Clause apply only to "persons." See, e.g., U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .") (emphasis added); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (holding that Due Process Clause constraints on jurisdiction do not apply to U.S. states, which are not considered "persons" under Due Process Clause of Fifth Amendment); *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 313 (2d Cir. 1981) (stating that question of whether due process constraints apply to exercise of jurisdiction over foreign state turns on whether foreign states are considered "persons" within meaning of Due Process Clause). For an explanation of the minimum contacts test and its foundation in the Due Process Clause, see *supra* note 57.

<sup>63</sup> 647 F.2d 300 (2d Cir. 1981).

<sup>64</sup> *Id.* at 308. The Second Circuit explained that the FSIA "cannot create personal jurisdiction where the Constitution forbids it." *Id.*

<sup>65</sup> *Glannon & Atik*, *supra* note 9, at 684.

<sup>66</sup> Cases that rely on *Texas Trading* in applying minimum contacts analysis to the assertion of jurisdiction under the FSIA include *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari*, 810 F. Supp. 1375, 1388-90 (S.D.N.Y.), *rev'd* on other grounds, 12 F.3d 317 (2d Cir. 1993); and *Obenchain Corp. v. Corp. Nacional de Inversiones*, 656 F. Supp. 435, 440 (W.D. Pa. 1987), *rev'd* in part, 898 F.2d 142 (3d Cir. 1990).

If courts adjudicating terrorism exception disputes were to apply minimum contacts analysis routinely to the exercise of personal jurisdiction, they would probably find it lacking in a number of cases. Courts would have difficulty, for instance, finding minimum contacts in *Alejandre*, in which "Cuban planes shot down private aircraft over the open sea." *Glannon & Atik*, *supra* note 9, at 689. Similarly, minimum contacts probably did not exist in *Flatow*, where the bombing of an Israeli bus in the Gaza strip "was presumably not aimed at the United States; it was purely fortuitous that a U.S. citizen was killed as a result." *Id.*

Minimum contacts analysis would, however, likely support *Rein's* exercise of jurisdiction. *Pan Am Flight 103* was an American flag carrier bound for the United States with 189 U.S. nationals aboard, and the bombing specifically was designed to "harm the interests of the United States." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y.), *aff'd* in part, 162 F.3d 748 (2d Cir. 1998).

Recently, however, the Supreme Court cast doubt on the validity of these decisions. In *Republic of Argentina v. Weltover, Inc.*,<sup>67</sup> the Court “[a]ssum[ed], without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause.”<sup>68</sup> Alone that assumption seems uninteresting, but immediately following it, the Court cited to *South Carolina v. Katzenbach*,<sup>69</sup> which held that U.S. states are not “persons” under the Due Process Clause.<sup>70</sup> This citation seems to be “a subtle invitation to reexamine the applicability of the Due Process Clause to foreign sovereigns.”<sup>71</sup>

Accepting this invitation, the district court in *Flatow* found that due process constraints on jurisdiction do not apply to foreign states.<sup>72</sup> After stating that the Supreme Court only has addressed personal jurisdiction twice in the context of the FSIA, both times in dicta,<sup>73</sup> the court determined that the Due Process Clause represents a restriction on judicial power “‘not as a matter of sovereignty, but as a matter of individual liberty.’”<sup>74</sup> The court argued that it would be “illogical” to grant to foreign states a personal liberty interest that has not been provided to federal, state, or local governments.<sup>75</sup>

Professors Glannon and Atik have provided three additional reasons why the Due Process Clause should not protect foreign sovereigns. First, the *Texas Trading* line of cases lacks a “convincing rationale.”<sup>76</sup> None of the cases on which the *Texas Trading* holding is based provide a satisfactory explanation for why a foreign sovereign should be considered a “person” under the Due Process Clause.<sup>77</sup> Cases that have relied on *Texas Trading* similarly have failed to advance a substantive analysis beyond that put forward in *Texas Trading*

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Because of the difficulties courts would have in finding minimum contacts in cases like *Alejandre* and *Flatow*, the line of cases holding that foreign sovereigns may only be sued in the United States if they are subject to personal jurisdiction in accordance with the Fifth Amendment’s due process requirements is on a “collision course” with the terrorism exception’s broad extraterritorial reach. Glannon & Atik, *supra* note 9, at 679.

<sup>67</sup> 504 U.S. 607 (1992).

<sup>68</sup> *Id.* at 619.

<sup>69</sup> 383 U.S. 301 (1966).

<sup>70</sup> *Id.* at 323-24.

<sup>71</sup> Glannon & Atik, *supra* note 9, at 680.

<sup>72</sup> *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 19-21 (D.D.C. 1998).

<sup>73</sup> *Id.* at 19 (citing *Weltover*, 504 U.S. at 619-20; *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 485 n.5 (1983)).

<sup>74</sup> *Id.* at 21 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

<sup>75</sup> *Id.*; cf. *Katzenbach*, 383 U.S. 301 at 323-24 (holding that U.S. states are not persons under Due Process Clause).

<sup>76</sup> Glannon & Atik, *supra* note 9, at 691.

<sup>77</sup> *Id.* at 683.

itself.<sup>78</sup> Professors Glannon and Atik describe *Texas Trading's* extension of due process jurisdictional protections to nation-states as “a startling proposition,” in that the case holds that “an entity entirely exempt from the constraints of the Constitution enjoys enforceable protections under it.”<sup>79</sup> As such, the view must overcome a burden of explanation not yet satisfied.<sup>80</sup>

Second, it seems highly unlikely that the Framers of the Bill of Rights viewed foreign sovereigns as “persons.”<sup>81</sup> At the time of enactment, “international law embraced a theory of complete foreign sovereign immunity.”<sup>82</sup> Thus, a historical inquiry casts doubt on the imposition of constitutional limitations to jurisdiction over foreign states.<sup>83</sup>

Finally, the extension of Due Process Clause protection to foreign states may be problematic doctrinally under a “plain meaning” approach. The meaning of personal jurisdiction may be “radically different when applied to a sovereign state—if the phrase has any meaning at all.”<sup>84</sup> Not only is there “nothing ‘personal’ about one sovereign’s contacts with another,”<sup>85</sup> but also the “concept of inconvenience”<sup>86</sup> is not readily applicable to “the interactions of nations.”<sup>87</sup>

Even if nation-states were considered “persons” under the Due Process Clause, courts still may find personal jurisdiction in cases like *Flatow* and *Alejandre* where traditional minimum contacts might ap-

<sup>78</sup> Id. at 691 (“Even in cases in which the defendant squarely challenged this proposition based on the *Weltover* dictum, the court responded with a *pro forma* citation to *Texas Trading* and little else.”).

<sup>79</sup> Id.

<sup>80</sup> Id. In fact, the Second Circuit has recently stated that, in light of *Weltover*, the court is uncertain whether its *Texas Trading* decision remains good law. *Hamil Bank v. Pt. Bank Negara Indon.*, 148 F.3d 127, 134 (2d Cir. 1998).

<sup>81</sup> Glannon & Atik, *supra* note 9, at 691.

<sup>82</sup> Id.; see also, e.g., Ethan J. Early, Note, *Flatow v. Islamic Republic of Iran and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 Conn. J. Int'l L. 203, 205 (1999) (noting that foreign states had absolute immunity from suit in U.S. courts until beginning of twentieth century); Maria Ermolaeva, Case Note, *Crimes Without Punishment: Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 279 (2d Cir. 1996), 23 S. Ill. U. L.J. 755, 758 (1999) (stating that “the United States afforded foreign sovereigns ‘absolute’ immunity from suits in domestic courts” from 1812 to 1952); *supra* note 21 (describing theory of absolute immunity).

<sup>83</sup> Glannon & Atik, *supra* note 9, at 691-92.

<sup>84</sup> Id. at 693.

<sup>85</sup> Id.

<sup>86</sup> The constitutionality of assertions of jurisdiction is partially dependent upon the degree of inconvenience to the defendant. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987) (“[T]he determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors [including] the burden on the defendant . . .”); see also *supra* note 57 (explaining minimum contacts test).

<sup>87</sup> Glannon & Atik, *supra* note 9, at 693.

pear to be lacking.<sup>88</sup> Although the *Flatow* court held that nation-states are not considered “persons” under the Due Process Clause, it also found that it still would possess jurisdiction under minimum contacts analysis:

Even in the absence of diplomatic relations, state[ ] actors, as a matter of necessity, have substantial sovereign contact with each other. They inherently interact as state actors in the international community and as members of the United Nations . . . . This Court concludes that even if a foreign state is accorded the status of a “person” for the purposes of Constitutional Due Process analysis, a foreign state that sponsors terrorist activities[,] which causes the death or personal injury of a United States national will invariably have sufficient contacts with the United States to satisfy Due Process.<sup>89</sup>

Thus, there are strong arguments for the conclusion that due process does not limit the exercise of jurisdiction over foreign states in terrorism exception suits.

#### *D. Difficulties in Enforcing Judgments*

Despite a legal right to damages, no plaintiffs have recovered on judgments entered under the terrorism exception.<sup>90</sup> One reason is that countries that have been designated as state sponsors of terrorism unsurprisingly tend to have hostile relations with the United States.<sup>91</sup> The United States already has imposed sanctions upon states designated as terrorism sponsors,<sup>92</sup> and thus defendant states generally view the prospect of civil liability for state-sponsored terrorism as an extension of an already-hostile U.S. foreign policy.<sup>93</sup> Consequently,

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<sup>88</sup> But see *supra* note 66 (suggesting that contacts in *Flatow* and *Alejandre* are not sufficient to sustain assertions of jurisdiction under traditional due process analysis).

<sup>89</sup> *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.D.C. 1998).

<sup>90</sup> Molora Vadnais, Comment, The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?, 5 *UCLA J. Int'l L. & Foreign Aff.* 199, 217 (2000) (“No state sponsor has yet [paid] recompense to a victim and only Libya has paid legal fees to defend itself.”).

<sup>91</sup> See, e.g., K.L. Afrasiabi, A New Iran, but Not Overnight, *N.Y. Times*, Feb. 24, 2000, at A27 (arguing that improvement of relations between Iran and United States will be slow); Jane Perlez, Unpersuaded by Verdict, Bush Backs Sanctions, *N.Y. Times*, Feb. 1, 2001, at A12 (explaining Bush’s decision to maintain sanctions against Libya); *Pyongyang is Game*, *Straits Times* (Sing.), May 9, 2001, at 20 (noting prickly relations between United States and North Korea), LEXIS, News Library, Major World Newspapers File.

<sup>92</sup> See U.S. Dep’t of State, *Patterns of Global Terrorism: 1989*, at iii (1990) (describing U.S. counterterrorism policy).

<sup>93</sup> Molora Vadnais provides four reasons why states likely would view the terrorism exception as simply an extension of a hostile U.S. foreign policy, rather than as a legitimate deterrent to the sponsorship of terrorism. First, civil suits seem less likely to deter terrorism than more traditional “strategies of economic sanctions, military air strikes, and diplomatic isolation.” Vадnais, *supra* note 90, at 217. Second, the fact that the terrorism

almost all defendant states refuse to make a court appearance,<sup>94</sup> let alone satisfy a judgment.

To address the inability of plaintiffs to collect on their judgments, Congress amended the FSIA in 2000 to provide an alternative means of compensation for a small class of plaintiffs. The Justice for Victims of Terrorism Act (JVTA)<sup>95</sup> authorized the payment of qualified judgments, including six against Iran and Cuba.<sup>96</sup> These claimants may elect to collect compensatory damages and interest from the U.S. gov-

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exception only allows suits against states designated as state sponsors of terrorism suggests that the suits are at least in part politically motivated, because the state sponsor label reflects "political considerations." *Id.* at 223. Third, countries that believe punitive damages are penal sanctions inappropriate in civil suits are likely to view such awards as "vindictive." *Id.* Finally, "other states are likely to resent the U.S.'s assumption of unlimited extraterritorial jurisdiction." *Id.*

Although it is likely true that other states will resent the terrorism exception's assumption of extraterritorial jurisdiction, see Daveed Gartenstein-Ross, Note, A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act, 34 *N.Y.U. J. Int'l L. & Pol.* (forthcoming Summer 2002) (manuscript at 34-38, on file with the *New York University Law Review*), the jurisdiction assumed under the exception is not unlimited. The terrorism exception's extraterritorial reach is rooted in the passive personality principle, which provides jurisdiction based on the nationality of the victim. See *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10, 12 (D.D.C. 2000) ("The passive personality principle forms the underpinnings of Congress's grant of subject matter jurisdiction under the FSIA . . ."); Restatement (Third) of Foreign Relations Law § 402 cmt. g (1986) (explaining that passive personality principle "asserts that a state may apply law . . . to an act committed outside its territory by a person not its national where the victim of the act was its national"). In contrast, universal jurisdiction is essentially an unlimited extraterritorial application of jurisdiction. See § 404 (explaining that states have jurisdiction to prescribe punishment for certain offenses, "perhaps [including] certain acts of terrorism, even where none of the [other] bases of jurisdiction . . . [are] present").

<sup>94</sup> See, e.g., *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997) ("Neither Cuba nor the Cuban Air Force has defended this suit . . ."); supra note 49 and accompanying text (explaining that Iran did not appear to defend suits against it).

<sup>95</sup> The Justice for Victims of Terrorism Act (JVTA) is codified as part of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 2002, 2003, 114 Stat. 1541, 1541-43. See H.R. Conf. Rep. No. 106-939, at 116 (2000) (stating that "[s]ections 2002 and 2003 [of the Victims of Trafficking and Violence Protection Act of 2000] . . . may be referred to as the Justice for Victims of Terrorism Act"), reprinted in 2000 U.S.C.C.A.N. 1380, 1407.

<sup>96</sup> Victims of Trafficking and Violence Protection Act of 2000 § 2002(a)(2)(A)(i)-(ii), 114 Stat. at 1542 (stating that provisions apply to persons who held final judgment against Iran or Cuba as of July 20, 2000, or to those who filed suit under terrorism exception on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000). The five suits against Iran covered by the JVTA are those reported in *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 4 (D.D.C. 2000); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); as well as that of Robin Higgins. Higgins's husband, Marine Lieutenant Colonel William R. Higgins, had been kidnapped and murdered by Hezbollah while on duty in Lebanon in 1988. E.g., 4 *Decades of World Terrorism*, Air Force Mag., Feb. 2002, at 70; James Risén, U.S. Traces Iran's Ties to Terror Through a Lebanese, *N.Y. Times*, Jan. 17, 2002, at A17. The *Alejandro* plaintiffs are also covered by the JVTA.

ernment<sup>97</sup> in exchange for their right to any further payment of their outstanding judgments, including payment of the punitive damage awards.<sup>98</sup>

Payment under the JVTA differs depending upon whether the original judgment was entered against Iran or Cuba. Claimants against Iran have \$400 million available, the amount of Iranian assets the Pentagon has held frozen for more than twenty years.<sup>99</sup> After payments are made from these assets, the United States will assume the position of judgment creditor against Iran.<sup>100</sup>

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The JVTA also removes the language of the 1998 amendments that allowed punitive damage assessments against state sponsors of terrorism. Victims of Trafficking and Violence Protection Act of 2000 § 2002(f)(2), 114 Stat. at 1543. However, the JVTA only prevents punitive damages from being assessed against the state itself; it is still possible for courts to award punitive damages against a ministry of the government. See *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 113-14 (D.D.C. 2000) (awarding punitive damages against Ministry of Information and Security, but not Iran itself). This may be a distinction without a difference, as it seems that the practical effect is the same.

Prior to the JVTA's passage, there had been several unsuccessful attempts by plaintiffs to execute judgments entered in their favor under the terrorism exception. For example, the Eleventh Circuit held that the *Alejandre* plaintiffs could not recover against debts owed to Cuba by telecommunications companies because the debts were owed to Empresa de Telecomunicaciones de Cuba, which is a separate juridical entity from the Cuban government. *Alejandre v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1288 (11th Cir. 1999).

Similarly, the Fourth Circuit prevented Stephen Flatow, Alisa Flatow's father, from attaching property belonging to the nonprofit Alavi Foundation, which Flatow argued was an instrumentality of Iran due to Iran's extensive control. *Flatow v. Alavi Found.*, No. 99-2409, 2000 WL 1012956 (4th Cir. July 24, 2000). The court found that the Alavi Foundation could not be an agency or instrumentality of Iran because it was a citizen of a U.S. state, and thus did not satisfy the FSLIA criteria that define agencies and instrumentalities of foreign states. *Id.* at \*4-\*5 (citing 28 U.S.C.A. § 1603(b) (West 1994)). The court also declined to find the Foundation's property "subject to levy by virtue of equitable principles" because Iran did not have the requisite day-to-day control of its operations. *Id.* at \*5-\*6.

Flatow sought attachment of \$5,420,481.65 in a Treasury Judgment Fund, awarded to Iran by the Iran-U.S. claims tribunal. *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 20 (D.D.C. 1999). The D.C. Circuit also denied his effort to levy a writ of attachment against property owned by Iran, holding that the property was part of the former Iranian Embassy and thus was sovereign, and not commercial, in nature. *Id.* at 22-23. This record of unsuccessful attempts prompted a sympathetic district court judge to note that "it appears that plaintiff Flatow's original judgment against Iran has come to epitomize the phrase 'Pyrrhic victory.'" *Id.* at 25-26.

<sup>97</sup> Victims of Trafficking and Violence Protection Act of 2000 § 2002(a)(1)(A), 114 Stat. at 1541-42. Additionally, claimants against Cuba can collect "amounts awarded as sanctions by judicial order on April 18, 2000." *Id.*

<sup>98</sup> § 2002(a)(2)(B)-(C).

<sup>99</sup> Bill Miller, *Terrorism Victims Set Precedent*, Wash. Post, Oct. 22, 2000, at A1; see also Victims of Trafficking and Violence Protection Act § 2002(b)(2) (detailing source of payments for judgments against Iran).

<sup>100</sup> Victims of Trafficking and Violence Protection Act of 2000 § 2002(c), 114 Stat. at 1543 ("[T]he United States shall be fully subrogated . . . against the debtor foreign state."). Considering that Iran has a breach-of-contract claim for \$400 million in the Iran-United

For judgments against Cuba, payments under the JVTA will be made from blocked assets of the Cuban government located in the United States.<sup>101</sup> The U.S. government recently approved the transfer of nearly \$97 million of these assets to the *Alejandro* plaintiffs.<sup>102</sup>

## II

### RESOLVING JUDGMENTS ENTERED UNDER THE TERRORISM EXCEPTION

In order to pave the way to normalized relations, the United States and the defendant countries must be prepared to resolve the judgments that have been entered under the terrorism exception. Part II.A examines the diplomatic reasons for resolving the manner of dealing with these judgments at the outset of negotiations. Part II.B then explores potential alternative methods for the resolution of these judgments and advocates remitting them to ad hoc international tribunals.

#### A. *Diplomatic Interests in Resolving the Judgments*

Judgments entered under the terrorism exception were unlikely to be paid when normalization seemed like a distant possibility.<sup>103</sup> Over the last two years, however, several state sponsors of terrorism have been moving publicly toward rapprochement with the United States,<sup>104</sup> and the chance of serious normalization talks with previ-

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States Claims Tribunal, this provision may be intended to allow the United States to avoid making payments to Iran if the United States loses in The Hague. See Neely Tucker, In Lawsuit Against Iran, Former Hostages Fight U.S.; Government Calls Frozen Assets Untouchable, Wash. Post, Dec. 13, 2001, at A1 (noting that most seized Iranian assets are tied up in litigation at Iran-United States Claims Tribunal, and that "Iran had [\$400 million] in a U.S. bank account for military sales when the hostages were seized").

<sup>101</sup> Victims of Trafficking and Violence Protection Act of 2000 § 2002(b)(1), 114 Stat. at 1542.

<sup>102</sup> E.g., Christopher Marquis, Families Win Cuban Money in Pilots' Case, N.Y. Times, Feb. 14, 2001, at A18. The money was taken from "long-distance telephone fees AT&T paid to the Cuban telephone carrier to access its system from the mid-1960s to 1994." David Cazares, Families of Fliers Get Award; \$97 Million Compensation Draws Criticism, Sun-Sentinel (Ft. Lauderdale), Feb. 16, 2001, at 1B, LEXIS, News Library, News Group File. Other U.S. citizens with claims against Cuba have denounced this development strongly because they feel that it unfairly reduces the pool of available assets. *Id.*

<sup>103</sup> See Part I.D (explaining difficulties of executing judgments).

<sup>104</sup> For example, Colonel Muammar el-Qaddafi's decision in 1999 to extradite two Pan Am Flight 103 bombing suspects for trial has allowed Libya to normalize relations with Britain. See, e.g., Kevin Cullen, After Lockerbie, A British-U.S. Wedge, Boston Globe, Feb. 4, 2001, at A12 (explaining that Britain and Libya have restored diplomatic relations); Perlez, *supra* note 91 (same). That decision also has fueled speculation of a possible opening with the United States. See Takeyh, *supra* note 56, at 62-63 (suggesting that President Bush now must reevaluate longstanding U.S. policy toward Libya); Neil MacFarquhar, Homeland Sees Political Motive in Guilty Verdict, N.Y. Times, Feb. 1, 2001, at A13 (quot-

ously designated state sponsors of terrorism seems increasingly likely in the strategic world that has developed after the September 11 attacks on the United States. Both the reorientation of America's foreign relations around other countries' official policies on terrorism<sup>105</sup> and the likelihood that the United States will utilize the prospect of normalization as a diplomatic tool in assembling and maintaining an antiterrorism coalition<sup>106</sup> greatly increase the chances of normalization negotiations between the United States and states currently designated as sponsors of terrorism.

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ing Libyan official as saying, "We believe President Bush now has an opportunity to reassess relations . . .").

The historic handshake in June 2000 between Kim Jong-il and Kim Dae-jung, the respective leaders of North and South Korea, marked a turning point in the relations between those nations. E.g., John Burton, *Last Cold War Rivals Offer Warm Handshake*, *Fin. Times* (London), June 14, 2000, at 13 (reporting summit in Pyongyang); Michael A. Lev, *A Historic Handshake and Glimmer of Hope for Koreas*, *Chi. Trib.*, June 13, 2000, at 1 (same). Since then, North Korea has moved toward normalizing relations with Western nations. E.g., *Netherlands Celebrates Queen's Day; Dutch Envoy To Be Accredited in Two Koreas Simultaneously*, *Korea Herald*, Apr. 30, 2001 (noting that North Korea entered into diplomatic relations with Netherlands in January of 2001), LEXIS, News Library, News Group File; Shin Yong-bae, *N.K. Likely to Seek Entry into Lending Agencies; Pyongyang's 2001 Diplomacy Goals May Include Admission to ADB*, *World Bank, Korea Herald*, Dec. 27, 2000 (noting North Korea's desire to normalize relations with Canada, Germany, Spain, and Belgium in 2001), LEXIS, News Library, News Group File. However, President Bush's inclusion of North Korea as part of the "axis of evil" in his January 2002 State of the Union address diminishes the chances of normalization, as Pyongyang viewed Bush's comments as "little short" of a declaration of war." Bay Fang, *The Axis of Evil*, *Asian Division, U.S. News & World Rep.*, Feb. 18, 2002, at 27.

Finally, the rise to power of reformers in Iran has prompted that country's greater acceptance in the world community, particularly by the West. Britain and Iran normalized relations in 1998, after Iran announced that it would not seek to enforce Ayatollah Khomeini's 1989 fatwa condemning British writer Salman Rushdie to death for allegedly blaspheming Islam. *Writer Salman Rushdie Meets with Czech President*, *Agence Fr. Presse*, Apr. 3, 2001, LEXIS, News Library, News Group File. Since then, officials from both countries have expressed a mutual desire to strengthen British-Iranian ties. *Iranian, British Officials Discuss "Growing Relations," BBC Worldwide Monitoring*, Apr. 18, 2001 (describing successful meeting between British and Iranian officials), LEXIS, News Library, News Group File. In 2000, reformist president Muhammad Khatami became the first Iranian leader since the deposed Shah to visit Germany, in hopes that "rapprochement with Germany and the EU will lead to better relations with the United States." *Yojana Sharma, Germany-Iran: Berlin Gives Khatami a Warm Welcome*, *Inter Press Service*, July 12, 2000, LEXIS, News Library, News Group File. Even a former Israeli government official has advocated normalizing relations with Iran following an overwhelming reformist victory in Iran's parliamentary elections. *Former Israeli Secret-Service Chief: Make Overture to Iran*, *Deutsche Presse-Agentur*, Feb. 21, 2000, LEXIS, News Library, News Group File. As with North Korea, President Bush's inclusion of Iran as part of the "axis of evil" dampens the prospects of normalization. See Neil MacFarquhar, *Iranians Protest "Axis" Charge*, *Chi. Trib.*, Feb. 12, 2002, at N6 (explaining that President Bush's State of the Union address has buoyed conservatives and "made it difficult for Khatami to preserve his reformist agenda of promoting democracy and rooting out corruption").

<sup>105</sup> See *supra* note 3 and accompanying text.

<sup>106</sup> See *supra* note 6 and accompanying text.

Before normalization may proceed effectively, however, the United States and the defendant state must agree on a feasible method for resolving outstanding terrorism exception judgments. Given the often-precarious economic conditions in defendant countries and the extraordinary size of judgments,<sup>107</sup> having the defendant state simply pay the judgments is not a realistic option. For a country in, for example, Iran's position—with a struggling economy,<sup>108</sup> over \$2 billion in judgments entered against it,<sup>109</sup> and a strong possibility that paying the judgments would trigger domestic anti-United States sentiment<sup>110</sup>—payment of the judgments does not seem feasible.<sup>111</sup>

Assuming that simply paying the judgments is not a realistic option, terrorism exception judgments may pose two significant problems. First, successful plaintiffs can attach property in the United States that is owned by the defendant state and used for commercial purposes, regardless of whether the property can be connected to the terrorist act.<sup>112</sup> Consequently, a country facing massive terrorism exception judgments may be hesitant to conduct commercial activities in the United States out of concern that its property could be seized. Second, in the absence of a method for resolving the judgments, there may be significant political barriers to normalization within the United States.<sup>113</sup>

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<sup>107</sup> See *supra* note 12 (describing economic conditions in defendant countries); *supra* Part I.B (outlining judgments entered under exception).

<sup>108</sup> See *supra* note 12.

<sup>109</sup> See *supra* notes 44-48 and accompanying text.

<sup>110</sup> The anger aroused in Iran by the passage of the JVTA strongly suggests that payment of terrorism exception judgments would prompt significant hostility toward the United States. Shortly after the United States announced that it would distribute around \$213 million to the families of victims of Iranian-backed terrorism, Iran's proreform Parliament passed a bill to "allow lawsuits in Iranian courts by 'any victims of US [interference] since the 1953 coup d'etat.'" Iran MPs Cry "Down With America," Approve Lawsuits Against United States, *Agence Fr. Presse*, Nov. 1, 2000, LEXIS, News Library, News Group File.

<sup>111</sup> Certainly, however, the normalization problems that this Note envisions are contingent upon the countries that are successfully sued in the future and the size of the judgments.

<sup>112</sup> See 28 U.S.C. §§ 1610(a), (a)(7), (b), (b)(2) (Supp. V 2000).

<sup>113</sup> There may be pressure from, for example, victims' families to require payment of these judgments as a precondition to normalization. Stories about victims' families attempting to execute judgments for terrorist attacks are now likely to generate extensive media coverage and public sympathy. Similarly, members of Congress may believe that requiring payment prior to normalization would punish the perpetrators and send a strong antiterrorism signal.

Moreover, many members of Congress already believe that the United States has inappropriately "intervened on behalf of" terrorist states in litigation under the exception. Baletsa, *supra* note 23, at 1293. One example of this intervention occurred when Stephen Flatow, Alisa Flatow's father, attempted to execute his judgment against Iran on Iranian property in the United States, "including Iran's old embassy, ambassador's residence, and

Thus, in order to allow desired normalization negotiations to proceed smoothly, alternatives to the payment of judgments under the terrorism exception should be considered.

### *B. Alternatives for Resolving Terrorism Exception Judgments*

Several alternative solutions might be offered to resolve the outstanding judgments under the terrorism exception. This Section analyzes two such possibilities: providing governmental compensation to the victims of terrorism rather than requiring that defendant states pay the judgments, and remitting the claims to ad hoc international tribunals. The Section concludes that remitting the claims to ad hoc international tribunals is the optimal method of resolution.

#### *1. U.S. Governmental Compensation*

One potential solution would involve compensation provided by the U.S. government in exchange for the plaintiff's right to judicial enforcement of the terrorism exception judgment. This is the model of the JVTA, which provided compensation to a limited class of victims of terrorist acts sponsored by Cuba and Iran.<sup>114</sup> While compensation for victims of terrorist acts sponsored by Cuba came from a

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a building once used by Iranian diplomats." *Id.* at 1292. The United States intervened to block the attachment of these properties, claiming that they were immune from attachment under the Vienna Convention on Diplomatic Relations. *Id.* (citing Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22(3), 23 U.S.T. 3227, 3238, 500 U.N.T.S. 95, 108 ("The premises of the mission [embassy], their furnishings and other property thereon . . . shall be immune from search, requisition, attachment or execution.")); see also *supra* note 96 (describing difficulties Stephen Flatow encountered in trying to execute judgment against Iran). More recently, State and Justice Department intervention on Iran's behalf in a suit brought by former hostages taken from the American Embassy in Tehran provoked an angry op-ed piece in the *New York Times*. Barry Rosen, With Iran, Against Americans, *N.Y. Times*, Dec. 12, 2001, at A31. Congress apparently shared the hostages' anger at this intervention, as its subsequent appropriations bill for the Justice and State Departments specified that the hostages' case is valid. *Id.*

Congressional belief that the U.S. government has favored terrorist states has resulted in legislation, such as the 1998 bill that made any property, including property frozen under other U.S. laws, subject to attachment to fulfill terrorism-related judgments. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117(a), 112 Stat. 2681, 2681-491; see also Baletsa, *supra* note 23, at 1293-95 (describing legislation). The bill's practical impact is not as great as its drastic nature might suggest because it allows the President to waive the attachment requirements "in the interest of national security." § 117(d), 112 Stat. at 2681-492. President Clinton exercised his waiver authority the day he signed the bill into law, and there is no indication that this situation will change under the Bush Administration. See, e.g., White House Statement on Waiver of Provision of Omnibus Appropriations Act, U.S. Newswire, Oct. 21, 1998 (quoting Clinton administration statement that "[i]f the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk"), LEXIS, News Library, News Group File.

<sup>114</sup> See *supra* notes 95-102 and accompanying text.

frozen fund of Cuban assets, the U.S. government itself provided compensation for victims of Iranian terrorism, albeit acting as Iran's creditor.<sup>115</sup>

Although governmental compensation of victims of terrorism is not inherently inappropriate—indeed, there are strong arguments supporting the fund that Congress established to compensate the families of victims of the September 11 attacks<sup>116</sup>—it is problematic in this context. Here, the government already has established a cause of action against state sponsors of terrorism, and the plaintiffs have prevailed in their suits. The smallest award thus far received by a successful terrorism exception plaintiff dwarfs the largest amount of compensation likely to be provided by the September 11 compensation fund.<sup>117</sup> If the government offers successful plaintiffs compensation more akin to the amount that the families of September 11 victims received, there is a strong possibility that the plaintiffs would reject it as far too low given the multi-million-dollar awards provided under the JVTA.

A government program offering compensation more closely related to the amount of the verdicts, however, would create three distinct problems. First, plaintiffs may not feel a sense of validation or closure if, after successful litigation, their compensation comes from the American taxpayer rather than the perpetrator or sponsor of the act. As former hostage and successful plaintiff Terry Anderson testified to Congress in April 2000, “Suggestions to draw on taxpayer dollars belie the purpose of our efforts, namely to make the Iranians pay for their terrorist acts.”<sup>118</sup>

Second, there is a basic question about the fairness of expecting U.S. taxpayers to fund the provision of such large awards to the vic-

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<sup>115</sup> See *supra* notes 99-101 and accompanying text.

<sup>116</sup> See David G. Savage, U.S. Lays Out Aid for Kin of Terror Attack, *L.A. Times*, Dec. 21, 2001, at A1 (describing September 11 fund); Telephone Interview with Curtis A. Bradley, Hunton & Williams Professor of Law, University of Virginia (Feb. 8, 2002) (asserting that September 11 fund is more even handed and less costly method of compensation than litigation).

<sup>117</sup> The lowest terrorism exception judgment thus far was the \$65 million provided to the plaintiffs in *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998). In contrast, it is projected that the highest compensation that will be provided under the September 11 fund will be “\$4.3 million for a 30-year-old who was earning more than \$175,000 per year and who left a spouse and two or more children.” Savage, *supra* note 116. Kenneth R. Feinberg, the special master of the compensation fund, has stated that awards in excess of \$3 million dollars rarely will be appropriate “absent extraordinary circumstances.” *Id.* (quoting Feinberg).

<sup>118</sup> Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. 16 (2000) (statement of Terry A. Anderson, Professor, Scripps School of Journalism, University of Ohio).

tims of terrorist acts. The massive terrorism exception verdicts are directed at the responsible states, and it may be unfair for U.S. taxpayers to bear these costs.<sup>119</sup> Inherent fairness notwithstanding, Congress seems unlikely to embrace this solution because of the political unpopularity of using tax money to compensate the victims of terrorist acts when an unpopular nation-state has been found liable in a court of the United States. Although the September 11 compensation fund apparently has spurred little protest from taxpayers, the political reaction might be far different were the government to allocate billions of dollars to the compensation of victims of terrorist acts less fresh in the public's memory—especially since the families of World Trade Center victims generally are receiving less than \$3 million apiece, and the acts on which terrorism exception suits are based produced neither the vast damage nor quantity of victims caused by the events of September 11. Members of the public are likely to feel that, after the government has granted the right to sue, compensation should be provided by the country responsible for sponsoring the acts of terrorism and not by American taxpayers.<sup>120</sup>

Finally, a government program repealing the terrorism exception and compensating plaintiffs who already have sued successfully would face serious questions of equity. Some victims of terrorism and their families would receive much larger awards than others, based merely on whether they filed suit under the exception.<sup>121</sup>

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<sup>119</sup> See, e.g., Susan Cohen & Daniel Cohen, *Victims Won't Take Money from U.S. Taxpayers*, Plain Dealer (Cleveland), Oct. 26, 2000, at 11B (arguing that U.S. taxpayers should not pay for actions of terrorist states).

<sup>120</sup> See *id.* (rejecting possible payment under JVTAs because “the money is not to be paid by a country convicted of sponsoring terrorism, but by . . . the American taxpayer”). Notwithstanding this concern, the JVTAs may have been approved in part because they do not, strictly speaking, require American taxpayers to pay for the harm caused by state sponsors of terrorism. The money to pay victims of Cuba's actions came from blocked Cuban assets that were located in the United States. See *supra* notes 101-02 and accompanying text. And while the U.S. government did pay citizens with judgments against Iran, it did so as Iran's creditor. See *supra* note 100 and accompanying text. The clear intention was to make Iran repay the U.S. government.

<sup>121</sup> Alternatively, the government could implement a JVTAs-like system in which it provides victims of terrorism with a fixed amount—for example, \$50 million—in exchange for giving up their judgments. Although this option would be preferable to providing an amount that approximates the full judgments received in the terrorism exception suits, it remains subject to the criticisms offered in this Section: Victims may not feel a sense of validation when the taxpayers are providing them with compensation, and there are fairness questions both about taxpayers providing such large compensation awards to these victims (as opposed to the more modest amounts received from the September 11 fund) and about disparities in compensation received by terrorism victims.

Thus, while governmental compensation can be a wholly appropriate response to terrorism, instituting such a program in the terrorism exception context would prove particularly troublesome.

## 2. *Ad Hoc International Tribunals*

Given the problems related to the provision of governmental compensation, a better course is to remit the plaintiffs' claims to ad hoc international tribunals similar to the Iran-United States Claims Tribunal.<sup>122</sup> This Note advocates establishing the various tribunals through bilateral negotiations between the United States and the defendant state with which it is considering normalization: Since different defendant states are likely to have diverse concerns about the tribunals, both procedural and substantive, it seems best to create one tribunal for each state with outstanding terrorism exception judgments.<sup>123</sup> This alternative has the potential to solve many of the possible roadblocks to normalization posed by suits under the terrorism exception.<sup>124</sup>

The proposed tribunals would facilitate arbitration between the plaintiffs and the country accused of sponsoring the acts that gave rise to litigation.<sup>125</sup> The United States would abrogate the judgments and assist in forming the tribunals to ensure that they are both acceptable to the defendant states and fair to the plaintiffs. Because the tribunals could be designed to resolve only those suits that were brought under the terrorism exception, they need not be permanent.<sup>126</sup> The tribunals

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<sup>122</sup> Some authors previously have suggested this alternative, but it never has been treated extensively. See, e.g., Glannon & Atik, *supra* note 9, at 700. For background on the Iran-United States Claims Tribunal, see *supra* notes 15-16 and accompanying text.

<sup>123</sup> Whether the tribunals only would adjudicate outstanding judgments or also would hear pending suits is a matter that the U.S. government could consider at the time normalization becomes a possibility. This decision seems contingent upon the political situation at that time.

<sup>124</sup> Establishing these tribunals, however, will not be without cost. Their creation, for example, entails both large transaction costs and significant negotiation and diplomatic maneuvering. Gartenstein-Ross, *supra* note 93, at 44. Also, the very lengths that the U.S. government has to go to in establishing an ad hoc international tribunal prior to normalizing relations with a defendant state is testament to the limitations that the terrorism exception places on foreign policy flexibility. *Id.*

These disadvantages, however, are endemic to the terrorism exception itself. Since the fact that judgments have been entered under the terrorism exception cannot be changed, this Note is concerned with the best way of resolving them to allow desired normalization discussions.

<sup>125</sup> See MacKusick, *supra* note 21, at 774-75 (suggesting arbitration as "viable alternative" to litigation under exception).

<sup>126</sup> The tribunals need not be permanent because the terrorism exception is, of course, subject to repeal. Even if the terrorism exception remains in place, however, the U.S. government is likely to remove a country with which it has normalized relations from the list of state sponsors of terrorism—hence removing the need for a permanent tribunal.

should be designed with the goal of cost effectiveness in mind: Since there are obvious transaction costs involved in the tribunals' creation, they should be tailored to the needs of the situation. For example, if there are only a few outstanding judgments against the defendant state, using a preexisting arbitration mechanism—such as the Permanent Court of Arbitration<sup>127</sup>—may be most efficient. On the other hand, if there are a number of judgments, it may be most efficient to create a new tribunal with the capacity and expertise for multiple adjudications.

The Iran-United States Claims Tribunal has utilized, “with some modifications, [the] rules developed by the UN Commission on International Trade Law (UNCITRAL),”<sup>128</sup> and the ad hoc tribunals that this Note advocates similarly could adopt the UNCITRAL rules. The parties establishing the tribunal would have great leeway in determining the procedural rules that would govern its adjudication<sup>129</sup> and the substantive rules of law it would apply. Many countries, for example, oppose the use of punitive damages and view jury awards in the United States as frequently excessive.<sup>130</sup> If the United States and the

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Thus, this Note assumes that after the United States and a defendant state have agreed on the establishment of an ad hoc tribunal, there will be no future claims against that country.

<sup>127</sup> The Permanent Court of Arbitration (PCA) used to be the world's premier forum for interstate arbitration, but “its role as the premier international institution for resolving disputes was steadily assumed by the ICJ, the International Chamber of Commerce and the World Bank's International Centre for the Settlement of Investment Disputes.” Edwin J. Nazario, Note & Comment, *The Potential Role of Arbitration in the Nuclear Non-Proliferation Treaty Regime*, 10 *Am. Rev. Int'l Arb.* 139, 155 (1999). However, the PCA has sought advice from outside consultants on ways to improve its performance and thus revive its viability as a forum for dispute resolution. *Id.* The PCA offers several advantages that could make it an attractive forum for resolving terrorism exception judgments, by providing independent arbitrators and helping to defray arbitration costs for developing countries. *Id.* at 156.

<sup>128</sup> Jamison S. Borek, Book Review, 90 *Am. J. Int'l L.* 529, 529 (1996) (reviewing David D. Caron & Matti Pellonpaa, *The UNCITRAL Arbitration Rules as Interpreted and Applied* (1995)).

<sup>129</sup> Cf. W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *Tex. Int'l L.J.* 1, 18-19 (1995) (explaining that parties in international arbitrations have great latitude in determining tribunal procedures); MacKusick, *supra* note 21, at 774 (“Parties to arbitration are free to choose their arbitrator, procedures, and applicable law.”). Party autonomy also is provided by the UNCITRAL model arbitration rules. See *Model Law on Int'l Commercial Arbitration*, art. 19(1), U.N. Comm'n on Int'l Trade Law, U.N. GAOR, 40th Sess., Supp. No. 17, Annex 1, at 86, U.N. Doc. A/40/17 (1985), reprinted in 24 *I.L.M.* 1302, 1307 [hereinafter *UNCITRAL Model Law*] (providing that parties can choose procedure to be utilized by arbitral tribunal).

<sup>130</sup> See Jeffrey D. Kovar, *A Convention on Jurisdiction and the Enforcement of Foreign Civil Judgments?*, *Int'l L. News*, Summer 1999, at 14 (listing reasons, including excessive jury awards and punitive damages, why foreign jurisdictions refuse to enforce judgments of U.S. courts); see also *infra* notes 137-42 and accompanying text (discussing problem of punitive damages).

defendant country commit to using an ad hoc tribunal, but are unable to achieve consensus on all of the governing rules, the tribunal itself might be allowed to determine the appropriate manner in which to conduct the arbitration.<sup>131</sup>

Early consideration of the appropriate structure for the tribunal also may enable the parties to avoid judicial bias, a pervasive problem with similar tribunals. For example, both an Iranian and American judge sit on all Iran-United States Claims Tribunal decisions and, as could be expected, “the Iranian judges never vote against the Iranian party, and the American judges rarely vote against the American claimants.”<sup>132</sup> The ad hoc tribunals considered here could avoid this problem, at least in part, by only employing judges from disinterested countries.

The use of ad hoc tribunals would solve many of the dangers of trying terrorism exception cases in U.S. courts. First, claims brought by U.S. citizens in U.S. courts for injuries stemming from terrorist activities are likely to be biased in favor of plaintiffs.<sup>133</sup> This problem is exacerbated because “states [that] believe that they will not receive a fair trial . . . are likely to default.”<sup>134</sup> The failure to appear, in turn, means that “the court will be unable to examine thoroughly the evidence” as compared to a full-fledged adversarial hearing, further diminishing the likelihood of a fair trial.<sup>135</sup> An ad hoc international tribunal would solve this problem because U.S. courts no longer would be sitting in judgment of the defendant country’s actions.<sup>136</sup>

Ad hoc tribunals also could avoid the problems related to the award of punitive damages. In terrorism exception cases, federal courts have awarded punitive damages in an amount they found suffi-

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<sup>131</sup> See UNCITRAL Model Law, art. 19(2), *supra* note 129, at 86, reprinted in 24 I.L.M. 1302, 1307 (“Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.”).

<sup>132</sup> Lowenfeld, *supra* note 15, at 150.

<sup>133</sup> See, e.g., Micco, *supra* note 23, at 137 (“[T]he competence and propriety of courts in the United States sitting in judgment over foreign sovereigns for the claims of United States nationals is not widely acknowledged.”).

<sup>134</sup> Vadnais, *supra* note 90, at 209.

<sup>135</sup> *Id.* at 210.

<sup>136</sup> Professor Craig explains that “the essential driving force” behind the recent increase in arbitration is the desire of litigating parties to “avoid having [their] case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdiction’s language and procedures, preferences of the judge, and possibly even national bias.” Craig, *supra* note 129, at 2-3; see also Micco, *supra* note 23, at 118 (“The forum for adjudication of [claims against states for terrorism] should either be separate from that of either party’s nationality or be of such character and reputation as to gainsay those who would accuse it of partiality.”).

cient to deter the foreign state's actions.<sup>137</sup> The problem with such awards is that they create a situation in which the United States has "numerous mini-foreign policy initiatives ongoing at the same time," with each court awarding the amount it finds will alter the foreign state's behavior.<sup>138</sup> It seems that each court hearing a single claim under the terrorism exception determines the level of punitive damages that would be sufficient to deter *all* future acts of terrorism by that country.<sup>139</sup> Thus, the sum of all the individual awards will total *much more* than might be necessary to deter terrorism by that country, and the awards are likely to be seen as excessive.

The conditions under which punitive damages may be awarded could be determined before litigation commences in the tribunal.<sup>140</sup> If the tribunal allows punitive damages at all,<sup>141</sup> they may be determined in a different manner than in U.S. courts. If the tribunal either disallows or greatly reduces the availability of punitive damages, the victims will then receive what the tribunal views as appropriate compensatory damages.<sup>142</sup>

One commentator has argued against the creation of an international tribunal to adjudicate disputes arising from the terrorism exception, citing the "inherent difficulty" of creating such a body.<sup>143</sup> While this criticism may be compelling for permanent tribunals designed to adjudicate disputes between the United States and any country sued under the exception, the success of the Iran-United States Claims Tri-

<sup>137</sup> See, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 34 (1998) (stating that "the purpose of the [terrorism exception] is to deter acts of terrorism" against U.S. nationals and awarding punitive damages accordingly).

<sup>138</sup> *Vadnais*, supra note 90, at 210. Molora Vadnais has noted at least three problems with courts implementing their own "mini-foreign policy initiatives." *Id.* First, in determining the punitive damage award necessary to alter the state's behavior, the courts are making "the same decision that the Executive Branch makes in determining [the] appropriate sanctions [to impose] against state sponsors of terrorism." *Id.* at 210-11. Second, the "extremely high" punitive damage awards that courts have determined to be necessary to deter future acts of terrorism make the judgments (which are already judgments by default) appear even "less 'judicial' and more arbitrary." *Id.* at 211. Finally, the massive judgments make it unlikely "that a foreign state will decide it is in its best interest to attempt quietly to settle these claims." *Id.*

<sup>139</sup> E.g., *Flatow*, 999 F. Supp. at 34 (awarding punitive damages in amount designed to "ensure that the Islamic Republic of Iran will refrain from sponsoring . . . terrorist acts in the future").

<sup>140</sup> See supra notes 129-31 and accompanying text.

<sup>141</sup> Many states consider punitive damages to be "penal sanctions . . . inappropriate in civil suits." *Vadnais*, supra note 90, at 223.

<sup>142</sup> Either the parties or the tribunal may determine that punitive damages aimed at curtailing the sponsorship of terrorism are unnecessary if, for instance, the defendant state ceased its sponsorship of terrorism prior to engaging the United States in normalization talks.

<sup>143</sup> *MacKusick*, supra note 21, at 776.

bunal and other international arbitration efforts between hostile parties demonstrates the feasibility of creating ad hoc tribunals by bilateral agreement.<sup>144</sup> While a permanent tribunal established by multilateral agreement may require a broad consensus, the tribunals envisioned here require only the agreement of the two countries that will be bound by its decision.<sup>145</sup>

Thus, using ad hoc international tribunals to resolve outstanding judgments under the terrorism exception appears to be an ideal course of action. A properly designed ad hoc tribunal could eliminate many of the potential conflicts in the normalization process.

### III

#### THE TAKINGS CLAUSE CHALLENGE

The most serious roadblock to the establishment of ad hoc tribunals for the resolution of terrorism exception judgments is the potential for Takings Clause challenges.<sup>146</sup> After nullification of the judgments, formerly successful terrorism exception plaintiffs could argue that the loss of the judgment debt constitutes a taking without just compensation in violation of the Fifth Amendment.<sup>147</sup>

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<sup>144</sup> See, e.g., Nicole Harper, Book Note, 31 N.Y.U. J. Int'l L. & Pol. 203, 203 (1998) (reviewing *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Richard B. Lillich & Daniel B. Magraw eds., 1998)) (“[D]espite external pressures, as well as significant ideological, cultural, and legal differences, the Iran-United States Claims Tribunal has successfully operated to resolve disputes.”); Nazario, *supra* note 127, at 149 (citing “the Iran-United States Claims Tribunal, the 1988 resolution of a territorial dispute between Israel and Egypt, and the 1968 Rann of Kutch case involving a territorial dispute between India and Pakistan” as successful examples of arbitration resolving ongoing disputes between hostile parties).

<sup>145</sup> A related proposal found in the literature is to utilize a currently existing tribunal such as the International Court of Justice (ICJ) to hear these claims. E.g., MacKusick, *supra* note 21, at 776-77; Micco, *supra* note 23, at 118. Such an extension of the ICJ’s jurisdiction, however, would require a “meaningful consensus of the international community, which may be difficult to achieve.” MacKusick, *supra* note 21, at 777. Additionally, such a broad expansion of the ICJ’s jurisdiction must be executed carefully to ensure it did not impede states’ legitimate foreign policy. See Micco, *supra* note 23, at 118-19 (warning that U.S. acquiescence to ICJ jurisdiction “could subject the United States to a multiplicity of suits from the many states involved in economic, political and military confrontations with Americans and American interests”).

<sup>146</sup> The Takings Clause reads: “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

<sup>147</sup> While potential plaintiffs who had not filed suit yet could argue that the loss of the claim constituted a taking, their argument would be much weaker because the investment-backed expectation would be more difficult to prove. Takings are less likely to be found in situations where the “investment” (in this case, the commencement of a suit) has not been made yet. See, e.g., *Steinbergh v. City of Cambridge*, 413 Mass. 736, 741-42 (1992) (holding no taking where challenged regulation had been enacted prior to plaintiff’s purchase of property); Gregory S. Alexander, *Ten Years of Takings*, 46 J. Legal Educ. 586, 589-90 (1996) (citing cases).

Given the size of the judgments involved,<sup>148</sup> the potential for takings claims may seem a fairly daunting obstacle. This Part argues otherwise. Part III.A briefly examines *Dames & Moore v. Regan*,<sup>149</sup> the most directly relevant Supreme Court precedent on the merits of these potential suits. Part III.B then outlines the arguments that could be advanced to prevent Takings Clause challenges from serving as impediments to the establishment of ad hoc international tribunals.

### A. *Dames & Moore v. Regan*

Historically the United States has exercised broadly the power to settle the legal claims of its nationals against foreign governments in the interests of American foreign policy.<sup>150</sup> Professor Phillip Trimble notes that the U.S. government “has even bargained those claims entirely away in exchange for unrelated concessions deemed more important to the nation as a whole, leaving the claimants without any legally protected redress.”<sup>151</sup> Professor Trimble explains that this was because of an active “treaty exception” to Court of Claims jurisdiction,<sup>152</sup> which precluded jurisdiction “of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.”<sup>153</sup>

In 1981, the expansive reading that courts previously had given to the treaty exception was called into question by the Supreme Court in *Dames & Moore*. In the wake of the Iranian Revolution, the United States and Iran attempted to resolve the claims of U.S. citizens, as well as the Iranian government, through the Algiers Accords.<sup>154</sup> Under the Accords, the United States was to “terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, . . . to prohibit all

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<sup>148</sup> See *supra* Part I.B.

<sup>149</sup> 453 U.S. 654 (1981).

<sup>150</sup> Early examples include: Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. VII, 8 Stat. 116, 121-22 (remitting claims of U.S. nationals against Great Britain to panel of five commissioners in London); Exchange of Notes Regarding the “Wilmington Packet,” Dec. 7 & 12, 1799, U.S.-Neth., T.I.A.S. No. 151, at 1075 (settling claim of American citizen against Netherlands); Convention, Sept. 30, 1800, U.S.-Fr., art. II, as modified by the French ratification, accepted by the United States, 8 Stat. 178, 178 (providing for restoration to U.S. citizens of property taken by France).

<sup>151</sup> Phillip R. Trimble, Foreign Policy Frustrated—*Dames & Moore*, Claims Court Jurisdiction and a New Raid on the Treasury, 84 Colum. L. Rev. 317, 317-18 (1984).

<sup>152</sup> *Id.* at 336-62.

<sup>153</sup> 28 U.S.C. § 1502 (1994). The wording of this statutory provision has changed slightly since Professor Trimble’s article was written, to reflect the fact that the Court of Claims is now called the United States Court of Federal Claims. See 28 U.S.C. § 1502 (1976).

<sup>154</sup> For more on the Iranian Revolution and the Algiers Accords, see *supra* notes 15-16 and accompanying text.

further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.”<sup>155</sup> With some exceptions, the Accords referred claims against Iran to the Iran-United States Claims Tribunal.<sup>156</sup> To implement the Accords, President Reagan issued an Executive Order suspending all such claims and providing that they would have no legal effect in U.S. courts.<sup>157</sup>

In *Dames & Moore*, an American business whose claims against Iran were suspended<sup>158</sup> argued that President Reagan’s actions amounted to a taking of its property without just compensation in violation of the Fifth Amendment.<sup>159</sup> The Supreme Court found that the plaintiff’s claims were not ripe for review,<sup>160</sup> a conclusion that both sides conceded.<sup>161</sup>

Although the claim was not ripe, the Court addressed the question of whether the plaintiff would have a remedy at law if, after the Tribunal had finished its adjudication, there were a taking of the plaintiff’s property.<sup>162</sup> Although at one point the United States argued that there was a treaty exception to the jurisdiction of the Court of Claims<sup>163</sup> that would preclude it from exercising jurisdiction over any future takings claim that the plaintiff might bring,<sup>164</sup> the Court disposed of that argument in two brief sentences. First, the Court noted that the United States conceded at oral argument that this statute “would not act as a bar to petitioner’s action in the Court of

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<sup>155</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 9, 1981, para. B, 20 I.L.M. 224, 224 (1981).

<sup>156</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. II, para. 1, 20 I.L.M. 230, 230 (1981).

<sup>157</sup> Exec. Order No. 12,294, 3 C.F.R. 139 (1981-1982).

<sup>158</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 663-67 (1981).

<sup>159</sup> *Id.* at 674 n.6, 688.

<sup>160</sup> *Id.* at 688-89. Ripeness is a justiciability doctrine that precludes jurisdiction in cases where injury has not yet occurred. See Erwin Chemerinsky, *Federal Jurisdiction* 114-26 (3d ed. 1999) (explaining ripeness doctrine). The Supreme Court has stated that the two paramount considerations for determining whether a claim is ripe are “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

<sup>161</sup> *Dames & Moore*, 453 U.S. at 688-89. The plaintiff was willing to concede that its takings claims were not ripe for review because a number of other issues figured prominently in the case. See *id.* at 666-67. The plaintiff’s primary argument was that the President lacked the authority to issue the executive order. *Id.*

<sup>162</sup> *Id.* at 689. The Court did not specify what would constitute such a taking and stated that it “express[ed] no views on petitioner’s claims that it has suffered a taking.” *Id.* at 688 n.14.

<sup>163</sup> The Court of Claims (now called the United States Court of Federal Claims) is the only forum that can award compensation of more than ten thousand dollars against the United States in takings cases. 28 U.S.C. §§ 1346, 1491 (1994).

<sup>164</sup> *Dames & Moore*, 453 U.S. at 689.

Claims.”<sup>165</sup> Second, the Court stated simply, “We agree,”<sup>166</sup> and followed that terse statement with a string citation and no further explanation.<sup>167</sup> The Court then concluded that there was no jurisdictional obstacle “to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims.”<sup>168</sup>

### B. *The Fate of the Takings Claim*

In *Dames & Moore* the Court decided that plaintiffs could bring takings claims after the Iran-United States Claims Tribunal had completed its adjudications. Although there were outstanding judgments at the time President Reagan suspended the plaintiffs’ claims, the prospect of future takings claims did not pose a great obstacle to the Tribunal’s establishment. The claims brought to the Tribunal by American plaintiffs concerned damage to more standard property interests, and they did not involve the massive punitive damages awarded in terrorism exception judgments. It was therefore less likely in the Iran-United States Claims Tribunal context than it will be in the terrorism exception context that the tribunal’s awards would diverge

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<sup>165</sup> Id. In response to the Court’s reliance on this concession, Trimble stated: The *Dames & Moore* Court seemed to place great weight upon the executive branch’s ad hoc concession at oral argument that the treaty exception was inapplicable. Perhaps . . . the executive branch determined that the prospect of governmental liability in a subsequent proceeding was less important than assuring the immediate objective of upholding executive action. Although appropriate and even tactically sound for the executive branch to advance its own interests, the interests of Congress and the taxpayers should not have been lost in the process.

Trimble, *supra* note 151, at 324-25.

<sup>166</sup> *Dames & Moore*, 453 U.S. at 689.

<sup>167</sup> Id. (citing *United States v. Weld*, 127 U.S. 51 (1888) (noting in dictum that treaty exception was inapplicable because suit did not grow out of or depend upon treaty directly); *United States v. Old Settlers*, 148 U.S. 427 (1893); *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976) (holding treaty exception inapplicable because plaintiff’s claim did not derive “its life and existence” from treaty)).

Professor Trimble has criticized the Supreme Court’s use of all three of these cases, describing them as “Delphic” citations. Trimble, *supra* note 151, at 323. First, Trimble argued that the *Weld* dictum that the Supreme Court apparently cited was misguided: “That a claim is based on the Constitution by no means implies—as the *Weld* Court apparently believed—that the claim may not simultaneously fall within the section 1502 exception.” Id. at 328. Second, according to Trimble, *Old Settlers* “is irrelevant because it involved a different jurisdictional statute with entirely different statutory purposes.” Id. at 352-53. Finally, he argued that *Hughes Aircraft* was inapplicable because it “addressed a patent infringement challenge rather than a traditional international claim.” Id. at 353.

<sup>168</sup> *Dames & Moore*, 453 U.S. at 689-90. Although this Note assumes that *Dames & Moore* remains good law, commentators have argued that the decision was a wrongly decided departure from previous treaty exception jurisprudence. For example, Professor Trimble argues that *Dames & Moore* “recogniz[es] an unprecedented judicial remedy for those whose interests are adversely affected by United States foreign policy.” Trimble, *supra* note 151, at 318.

from the judgments entered in U.S. courts. The creation of ad hoc international tribunals designed to adjudicate terrorism exception disputes will prompt takings claims for the difference between the tribunal award and the amount of the original domestic judgment. Because the punitive damage awards entered under the terrorism exception thus make the prospect of a substantial taking much more likely, takings claims could pose more of a barrier to the establishment of tribunals designed to resolve terrorism exception judgments than they had upon the formation of the Iran-United States Claims Tribunal.<sup>169</sup>

Nevertheless, there are powerful arguments that takings claims based on the nullification of judgments under the terrorism exception should not impede normalization. This Section discusses the two primary frameworks for Takings Clause jurisprudence as formulated in *Penn Central Transportation Co. v. New York City*<sup>170</sup> and *Lucas v. South Carolina Coastal Council*.<sup>171</sup> This Section then analyzes the likely outcomes of potential takings challenges under *Penn Central* and *Lucas*.

### 1. Determining Whether a Taking Occurred

The characterization of court judgments as property may seem unconventional. However, it is well established that plaintiffs are not precluded from receiving compensation for takings simply because the property interest they claim is intangible.<sup>172</sup> Moreover, in *Dames & Moore*, the Supreme Court stated that it would be proper for plaintiffs to bring suit under the Takings Clause for the suspension of their domestic judgments after the Iran-United States Claims Tribunal had completed its adjudication.<sup>173</sup> Thus, under American property law, terrorism exception judgments are likely to be viewed as property protected by the Takings Clause.

After establishing that the relevant interests are “property” protected by the Fifth Amendment, courts must determine the appropriate jurisprudential framework through which to analyze the takings claims. The two relevant precedents are *Penn Central* and *Lucas*. *Lucas* holds that a taking has occurred when government action de-

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<sup>169</sup> See supra Part I.B (describing awards under terrorism exception).

<sup>170</sup> 438 U.S. 104 (1978).

<sup>171</sup> 505 U.S. 1003 (1992).

<sup>172</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (holding trade secrets to be property protected by Takings Clause despite intangible nature); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (holding that intangible nature of laundry's trade routes did not preclude compensation under Takings Clause).

<sup>173</sup> *Dames & Moore*, 453 U.S. at 689-90.

stroys all economic value of a piece of property. *Penn Central*, on the other hand, lays out the framework for deciding whether a taking has occurred when the government takes some, but not all, of the value of the plaintiff's property. The initial task is deciding which case applies to these claims.

In *Penn Central*, New York City ordinances required that any changes in the Grand Central Terminal's exterior architectural features had to be approved in advance by the city's Landmarks Preservation Commission.<sup>174</sup> The law also provided for transferable development rights (TDRs), by which owners who had not developed their property to the full extent permitted by zoning regulations were allowed to transfer their development rights to other parcels of land.<sup>175</sup> *Penn Central* applied to the Commission for permission to build a multistory office building above Grand Central Terminal, but both of its proposed plans were rejected.<sup>176</sup>

In response, *Penn Central* brought a takings suit, claiming that the application of the landmarks law had effected an unconstitutional taking.<sup>177</sup> To decide whether the application of the ordinance constituted a taking, the Supreme Court offered a balancing test, considering the level of interference with reasonable investment-backed expectation, the character of the government's actions, and their economic impact.<sup>178</sup> Based on this test, the Court held that the landmarks law did not interfere with the owners' present use of their property because "[i]ts designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions."<sup>179</sup> Additionally, the Court held that the landmark law did not prevent the owner from realizing a reasonable rate of return on its investment, especially since the development rights were transferable to other parcels in the vicinity.<sup>180</sup>

In *Lucas*, the plaintiff's plans to build single-family houses on his property in South Carolina were halted by the state's Beachfront Management Act,<sup>181</sup> which effectively barred the plaintiff from building any permanent habitable structures.<sup>182</sup> The Supreme Court of South Carolina found that the Beachfront Management Act did not

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<sup>174</sup> *Penn Cent.*, 438 U.S. at 112, 115.

<sup>175</sup> *Id.* at 113-14.

<sup>176</sup> *Id.* at 116-17.

<sup>177</sup> *Id.* at 119.

<sup>178</sup> *Id.* at 124.

<sup>179</sup> *Id.* at 136.

<sup>180</sup> *Id.* at 136-37.

<sup>181</sup> S.C. Code Ann. § 48-39-290 (West Supp. 2001).

<sup>182</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008-09 (1992).

constitute a taking because the regulation was designed properly to preserve the state's beaches and because building the structures essentially would have constituted a nuisance.<sup>183</sup> The Court rejected these arguments, finding that a taking of the entire value of a property constitutes a per se violation of the Takings Clause.<sup>184</sup>

The question whether to apply *Penn Central* or *Lucas* to adjudicate potential takings claims pursuant to the creation of ad hoc tribunals to resolve judgments under the terrorism exception critically depends on the outcome of the litigation in the tribunals. All plaintiffs initially would lose the value of their judgment debts, but could go to an ad hoc international tribunal to restore some of that value. As in the *Dames & Moore* litigation, takings claims brought before resolution of the underlying dispute in the tribunal would not be ripe for review. Because the distinction between the *Penn Central* and *Lucas* frameworks hinges on whether the entire value of the property was taken, courts are likely to apply *Penn Central* if plaintiffs recover in the tribunals and *Lucas* if they do not. If the tribunal finds that the plaintiff should not recover, the original judgment will have become worthless to him. If, on the other hand, the tribunal makes an award to the plaintiff, he will have retained some of the value of the original judgment.

Assuming the plaintiffs recover at least some compensation in the tribunal,<sup>185</sup> *Penn Central* would apply, and there are two persuasive arguments that such circumstances present no compensable taking. First, the plaintiffs have no reasonable investment-backed expectation in the judgment. Terrorism exception litigation thus differs from both domestic litigation and international litigation in which the defendant has agreed to litigate in U.S. courts. These defendant states had no desire, expectation, or even mere consent to litigate in American courts. Other than specific provisions made by the U.S. government under the JVTAs,<sup>186</sup> no judgments under the terrorism exception have been satisfied yet,<sup>187</sup> and there is only a minimal possibility that the judgments ever will be paid in the future.<sup>188</sup> As plaintiffs could not have reasonably expected to collect on these judgments, the abroga-

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<sup>183</sup> Id. at 1009-10, 1022.

<sup>184</sup> Id. at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

<sup>185</sup> The effect on the Takings Clause claim if the plaintiffs do not recover compensation from the tribunal is discussed in *infra* notes 201-02 and accompanying text.

<sup>186</sup> See *supra* notes 95-102 and accompanying text.

<sup>187</sup> See *supra* notes 11, 90.

<sup>188</sup> See *Early*, *supra* note 82, at 234 (“[T]he likelihood of satisfying a huge judgment under the FSIA is almost nonexistent.”).

tion of the judgments would not take from them anything that they reasonably could have expected to receive.

Second, there is a strong argument that there would be no taking when the plaintiffs receive some compensation because the establishment of an international tribunal to resolve their claims in fact confers a benefit upon them similar to the TDRs in *Penn Central*.<sup>189</sup> The possibility of recovering at the tribunal means that there is significant value left in the plaintiffs' claims against the defendant state after the abrogation of their judgments. Even if the plaintiffs recover less from the tribunal than U.S. courts originally awarded them, they will still have received far more than when the defendant refused to pay. Essentially, remitting the claims to an international tribunal likely will *facilitate* compensation for plaintiffs, because the tribunal will be created under conditions acceptable to the defendant states. Instead of large unpaid judgments, the plaintiffs will have smaller awards that actually will be paid.

This argument finds support in *Abraham-Youri v. United States*,<sup>190</sup> a case involving Iran-United States Claims Tribunal litigants with small claims against Iran.<sup>191</sup> After the United States presented these claims to the tribunal, the tribunal awarded the claimants the full amount of their principal but only 34.5% of the interest to which they were entitled.<sup>192</sup>

The *Abraham-Youri* plaintiffs alleged that by espousing and settling their claims, the United States had effected a taking without just compensation.<sup>193</sup> The Court of Federal Claims applied the analysis set

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<sup>189</sup> Under current law, transferable rights provided by the government in exchange for its taking of the plaintiff's property affects the issue of whether there was a compensable taking. However, this approach has been strongly criticized by Justice Scalia, in a concurring opinion that was joined by Justices O'Connor and Thomas. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 748 (1997) (Scalia, J., concurring) ("If money that the government regulator gives to the landowner can be counted on the question of whether there is a taking . . . rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less.").

<sup>190</sup> 139 F.3d 1462 (Fed. Cir. 1997).

<sup>191</sup> *Id.* at 1465. The Claims Settlement Declaration signed in Algeria provided that claims brought by U.S. nationals for less than \$250,000 would be presented to the Tribunal by the U.S. government. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. III, para. 3, 20 I.L.M. 230, 231.

<sup>192</sup> David J. Bederman & John W. Borchert, *Abraham-Youri v. United States*, 92 Am. J. Int'l L. 533, 534 (1998). The Foreign Claims Settlement Commission stopped the accrual of interest on June 22, 1990, the date of the settlement. *Abraham-Youri*, 139 F.3d at 1464-65.

<sup>193</sup> *Abraham-Youri*, 139 F.3d at 1465.

forth in *Penn Central*, and found that there was no taking.<sup>194</sup> The court stated that “[t]hose who engage in international commerce do so in full awareness that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships of the nations involved.”<sup>195</sup> Moreover, the court found that the character of the actions of the United States was foreseeable and that the economic impact was not extraordinary.<sup>196</sup>

On appeal, the Federal Circuit agreed with the plaintiffs that their property rights had been “extinguished when the Government espoused and settled their claims.”<sup>197</sup> While the court found that this did not amount simply to a regulation of property, the court noted that it did not follow that a *per se* taking had occurred.<sup>198</sup> In fact, the court held that there was no compensable taking,<sup>199</sup> finding that compensation is not warranted when a taking is designed to benefit specific private parties.<sup>200</sup>

Not only does *Abraham-Youri* provide support for the applicability of the *Penn Central* framework in the present context, but it suggests that even if a court finds that nullification of terrorism exception judgments constitutes a complete taking of property—as, for instance, if the plaintiffs receive *no* compensation from the tribunals—the court *still* should not find a compensable taking because the taking was effected to benefit terrorism exception claimants. Additional support for this proposition can be found in *Belk v. United States*,<sup>201</sup> where the Federal Circuit held that entering the Algiers Accords with Iran did not constitute a compensable taking of the right of hostages to sue Iran for injuries in part because “[t]he President’s action in implementing the Algiers Accords was primarily designed to benefit the hostages.”<sup>202</sup>

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<sup>194</sup> *Abraham-Youri v. United States*, 36 Fed. Cl. 482, 486-87 (1996) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

<sup>195</sup> *Id.* at 486.

<sup>196</sup> *Id.* at 487.

<sup>197</sup> *Abraham-Youri*, 139 F.3d at 1465.

<sup>198</sup> *Id.* at 1465-66.

<sup>199</sup> *Id.* at 1468 (“A compensable taking has not been established; the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.”).

<sup>200</sup> See *id.* at 1467 (finding that supposed taking was meant “to resolve what had become a problem for the . . . claimants as well as for the Government, not to harm [the claimants] or to gain a government benefit at their expense”).

<sup>201</sup> 858 F.2d 706 (Fed. Cir. 1988).

<sup>202</sup> *Id.* at 709. Additionally, the *Abraham-Youri* court suggested that the plaintiffs’ claims against Iran may not have constituted property protected by the Fifth Amendment because they were rights held subject to legitimate governmental limitation in the interest of international relations. *Abraham-Youri*, 139 F.3d at 1468. The court noted that “those who engage in international commerce must be aware that international relations some-

## 2. *Just Compensation*

Even if a court found that a taking occurred under these circumstances, similar arguments would support serious limitations on the amount of just compensation due the plaintiffs.

A court determining the appropriate level of compensation should discount the value of the initial judgment by the likelihood of payment without the establishment of the new tribunal. After this initial discount, the court can then assess an award to the plaintiff for the difference between what the plaintiff was likely to receive absent the claim being remitted to the tribunal and the amount that the plaintiff actually did receive.<sup>203</sup> This calculation is likely to result in a finding that the claimant was put in a better position by the tribunal award, and thus that no compensation is due. Only if the discounted payment is greater than the tribunal's award should the claimant legitimately be entitled to compensation. If this ever happens, the compensation award is likely to be quite small.

If courts can be persuaded either that there was no taking or that the compensation for the taking should be discounted heavily by the probability of the original judgment actually being paid, takings clause challenges should not pose a significant barrier to the creation of the tribunals that this Note advocates.

## CONCLUSION

The war against terrorism promises to be long and difficult, and the United States will need every diplomatic tool at its disposal. The prospect of normalizing relations with countries that currently are designated as state sponsors of terrorism can be used to build and maintain the antiterror coalition. It also can be used to make these countries more accountable for their actions, thus helping to ensure that they do not revert back to the sponsorship of terrorism.

While judgments entered under the terrorism exception could hamper the United States's use of normalization as a tool in the war against terrorism, this Note provides concrete alternatives to the judg-

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times become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." *Id.* This understanding would allow the United States to remit freely claims brought under the terrorism exception to international tribunals. For criticism of *Abraham-Youri*, see Bederman & Borchert, *supra* note 192, at 537-38.

<sup>203</sup> Similar discounting formulas have been utilized in land use cases. See, e.g., *Herrington v. County of Sonoma*, 790 F. Supp. 909, 914-16, 923-24 (N.D. Cal. 1991) (applying probability analysis to measure damages from taking); see also Richard J. Roddewig & Christopher J. Duerksen, *Measuring Damages in Takings Cases: The Next Frontier*, in 1993 *Zoning and Planning Law Handbook* 273, 283-87 (Kenneth H. Young ed.) (explaining and critiquing damages formula applied in *Herrington*).

ments as currently structured. By effectively implementing a system of ad hoc international tribunals, the United States can ensure that these judgments do not become too much of a hindrance to a new and flexible foreign policy.