COLLATERAL ORDER OR NOT? APPEALABILITY OF POST-JUDGMENT ATTACHMENT PROCEEDINGS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

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I. INTRODUCTION

The year is 1997. You travel to Jerusalem with your family to tour the country and learn the history. On your trip, you and your family go to a local outdoor mall with beautiful boutiques, shops, and restaurants. Then a bomb goes off, and your lives are changed forever. This bomb kills those bystanders located too close to the explosion, and permanently injures you and your family members. You later learn that this was an act of terrorism. Specifically, that Iran provided suicide bombers with the necessary materials to carry out this vicious attack. With all of your pain and suffering, you need the court system to provide remedies and justice for the blood, life, and love you lost after that tragic day. Thankfully, you win your suit regarding Iran's fault and the court enters a judgment in your favor awarding $71.5 million. However, even twenty-one years later in 2018 after endless litigation, you still cannot collect monetary damages for your suffering from Iran because they have been deemed immune from United

States courts' power to attach Iran's assets. This is how Jenny and Deborah Rubin, along with many other Americans, spent over two decades of their lives.[1]

Scenarios like this occur frequently in a world where international travel, communication, and business are common.[2] United States citizens or entities somehow get harmed, physically, or financially, by a foreign citizen or entity, and wish to remedy their injuries in court. However, it appears that the United States government's interest in maintaining good relations with foreign nations sometimes creates tension with the need to get these remedies.[3] When Congress passed the Foreign Sovereign Immunities Act (FSIA) in 1976, it removed United States citizens' abilities to bring foreign entities to justice by granting them immunity from suit or attachment in United States courts, subject to some exceptions.[4]

Procedurally, when a United States citizen or entity sues a foreign sovereign, the foreign sovereign can then raise immunity as a defense.[5] The court will then grant or deny their immunity.[6] The issue that arises is whether a foreign sovereign can appeal when a court denies a foreign sovereign's immunity from attachment.[7]

Whether or not the foreign sovereign can immediately appeal that denial determines how much more litigation the parties must go through and if the wronged American citizen can actually collect their damage awards at the end of that litigation. The issue ultimately challenges both parties' rights—the aggrieved party's right to its damages award and the foreign sovereign party's right to avoid certain litigation and procedure.[8]

This note will explore whether a denial of immunity resulting from an attachment order in a post-judgment attachment enforcement proceeding is immediately appealable, and what are the effects on both sides of the argument.

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1. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 820 (2018). *See generally* Serge Schmemann, *3 Bombers in Suicide Attack Kill 4 on Jerusalem Street in Another Blow to Peace*, N.Y. TIMES (Sept. 5, 1997), https://www.nytimes.com/1997/09/05/world/3-bombers-in-suicide-attack-kill-4-on-jerusalem-street-in-another-blow-to-peace.html.

2. *See* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1054 (2019) (Where victims of USS Cole bombing sought to enforce a $314 million judgment against Sudan); *see also* OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 29 (2015) (A California resident traveling in Europe fell from a train platform while boarding a train to Prague, resulting in amputation of her leg. The resident filed suit against the train company but was barred by sovereign immunity).

3. H.R. 11315, 94th Cong. (1975-1976).

4. *Id*.

5. DAVID P. STEWART, FED. JUD. CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 2 (2d ed. 2018).

6. *Id*.

7. Adam Hayes, *Writ of Attachment*, INVESTOPEDIA, https://www.investopedia.com/terms/w/writ-of-attachment.asp (Jan. 10, 2021) (attachment is a process where a court orders the collection of property to satisfy a debt usually arising from a judgment entry).

8. David Zaslowsky & Grant Hanessian, *Foreign Sovereign Immunities Act. Subject Matter Jurisdiction. Supreme Court Unanimously Holds That Litigants Seeking To Sue Foreign Governments in U.S. Courts Must Provide More Than a Nonfrivolous Argument That an Exception Applies to the Foreign Sovereign Immunities Act's General Presumption of Immunity*, LEXOLOGY (July 28, 2017), https://www.lexology.com/library/detail.aspx?g=61b46809-c966-4c13-b0dc-e1da7dffdf60 (explaining the Supreme Court's holding in Venezuela v. Helmerich & Payne International, including its conflicting rights between debt collection and immunity).

Part II will discuss the extensive background and history of the FSIA, including how the Supreme Court's silence on the appealability attachment proceedings has caused some disarray in complex doctrine with the lower courts. In doing so, it will analyze the underlying purpose for the FSIA and its high importance in fostering good foreign relations. Part III will review the appealability of pre-judgment proceedings and how the courts have come to a sound conclusion on that issue over time. Part IV will first describe what post-judgment appeals generally are and their applicability. Then, it will compare and contrast multiple circuit courts' takes on appealability of attachment enforcement.[9] With this, I have named the two most common approaches in the circuit courts, the "Element" and the "Easy" approaches based on their existing applications in case law. In Part V, the conclusion will restate precisely why denials of foreign sovereign immunity in an attachment proceeding should not be immediately appealable, predict how the Supreme Court would decide this issue, and advise how courts should proceed in the future.

II. APPEALS AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

The problem surrounding immunity is one of jurisdiction; in order for a court to hear a case and enforce a judgment, it must have authority over the person or entity being sued. Without that authority, the court has no power, and thus, the wronged party has no remedy. Jurisdiction generally for parties from the United States is simpler than when one or more of the parties is a foreign entity. In the United States, personal jurisdiction, for example, exists where the parties live in the state where the case is to be heard.[10] However, with debts and damages involving foreign entities, the United States has had to make special rules regarding jurisdiction to maintain a stable state of foreign affairs.

The Foreign Sovereign Immunities Act of 1976 (FSIA) aimed to address this conundrum, and at its core says "tough beans, buddy" to United States parties when seeking relief from the foreign party's breach in many circumstances.[11] The FSIA established that foreign entities and their instrumentalities are immune from suit in United States courts, subject to certain exceptions.[12] The exceptions provide for quite a bit of flexibility so that if there truly was a wrongdoing to an United States entity by a foreign entity, in the most common circumstances, there is likely to be some sort of remedy available.[13]

A common example of this is when a United States petroleum corporation that does business with a foreign entity may not be able to collect on a judgment, or even file suit at all, against that foreign entity in a United States court. This

9. Crystallex Int'l Corp. v. Bolvarian Republic of Venez (In re Petroleos de Venezuela, S.A.), 932 F.3d 126, 136 (3d Cir. 2019).

10. Jean Murray, *How Jurisdiction is Determined in Lawsuits*, THE BALANCE SMALL BUSINESS, https://www.thebalancesmb.com/what-is-jurisdiction-in-lawsuits-398309 (Oct. 8, 2019).

11. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d),1602-11 (2000)); BREAKFAST AT TIFFANY'S (Paramount Pictures 1961).

12. 28 U.S.C. § 1604 (2020).

13. *Id.*

presents a big concern for these large corporations who are consistently dealing in billions of dollars with business overseas. A billion-dollar judgment against a foreign entity whose country is facing economic instability could bring total disaster.[14] Venezuela, for example, owes more than $100 billion to foreign creditors amidst its massive economic crisis.[15] The FSIA is vital not only to the strength of the United States economy, but also to the survival of foreign economies in some extreme circumstances.

For these reasons, courts have taken grants or denials of immunity extremely seriously and apply the FSIA narrowly and specifically.[16] Under existing law, foreign entities include the foreign state and its instrumentalities.[17] Under the FSIA, instrumentalities are considered a "foreign state" for purposes of immunity, and are defined in § 1603 as any entity—

(1) which is a separate legal person, corporate or otherwise and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of [the United States] . . . nor created under the laws of any third country.[18]

Instrumentalities are then, in essence, any entity controlled by a foreign state and not associated with the United States, thus giving the benefit of solidarity with the United States to foreign corporations, political subdivisions, or other entities. However, the statute does not extend to heads of state, diplomats, or other foreign officials.[19]

Historically, foreign states and their instrumentalities enjoyed absolute immunity from all litigation in the United States as a means of maintaining solidarity amongst international relations, and in the hope that foreign states would give United States entities the same benefit.[20] It has also been considered that the United States may require protection from foreign sovereigns taking advantage of the lengthy delays associated with arguing for or against immunity, and that the FSIA has played a role in that aspect of the litigation.[21] The FSIA took the designation of immunity for these foreign states and their instrumentalities out of the Executive's hands. It provided a comprehensible set of guidelines, recognizing that there still exist certain circumstances where a foreign government's

14. Valentina Sanchez, *Venezuela Hyperinflation Hits 10 Million Percent. 'Shock therapy' may be Only Chance to Undo the Economic Damage*, CNBC (Aug. 3, 2019, 7:00 AM), https://www.cnbc.com/2019/08/02/venezuela-inflation-at-10-million-percent-its-time-for-shock-therapy.html.

15. *Id*.

16. § 1604.

17. 28 U.S.C. § 1603(b) (2020).

18. *Id*.

19. STEWART, *supra* note 5, at 95.

20. *See* Nat'l City Bank v. China, 348 U.S. 356, 362 (1955).

21. *See* Victoria A. Valentine, Shelli Barish Feinberg & Simone R. Fabiilli, *The Foreign Sovereign Immunities Act's Crippling Effect on United States Businesses*, 24 MICH. ST. INT'L L. REV. 625 (2016).

wrongdoing must be redressed in court to provide relief to the United States entity wronged.[22]

The FSIA provides that foreign states and governments are immune from suit, and from execution and attachment in United States courts[23]. This means that United States federal or state courts do not have jurisdiction to decide cases where a foreign government is a defendant. When a foreign government is denied immunity, that means, procedurally, the foreign state moved for motion to dismiss for lack of personal and subject-matter jurisdiction, and that the motion was denied.[24] This happens as the litigation is ongoing, meaning that the immunity must be decided before the over-arching issue in the case in finalized.

The most common suits dealing with the FSIA are usually claims against foreign entities for breach of commercial contracts, but also include international arbitration disputes, injury resulting from state-sponsored terrorism, and more.[25] This happens when a party seeks to enforce an existing judgment against a foreign nation or its instrumentalities in a United States court. Also, a FSIA issue can arise after a party has obtained a judgment in arbitration, or it could happen if the court entered a default judgment against the foreign party.

To enforce the judgment, courts will have what is called an enforcement proceeding after the judgment has been entered. The creditor-party will obtain a Writ of Execution, which is a court order to enforce and satisfy a judgment or payment of money.[26] To enforce this Writ of Execution, the creditor-party has the option to "attach" the debtor-party's assets to ensure payment.[27] Under the FSIA, a foreign entity, or its instrumentalities, is immune from this type of proceeding, subject to some exceptions as mentioned above.[28] Again, this immunity must be decided by the court before addressing the merits of the proceeding.[29]

Because of the exceptions in the FSIA, courts have routinely denied immunity to foreign sovereigns in certain scenarios.[30] Sometimes, these denials are in fact erroneous and require redress for the foreign party.[31] Courts generally have

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22. Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004); *See* Craig J. Hanson, *The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 NW. J. INT'L L. & BUS. 517 (1980).

23. Molly Steele & Michael Heinlen, *Challenges to Enforcing Arbitral Awards Against Foreign States in the United States*, 42 INT'L LAW. 87, 88 (2008).

24. Hayes, *supra* note 7, at 31.

25. STEWART, *supra* note 5, at 2.

26. Fed. R. Civ. P. 69; *Service of Process*, U.S. MARSHALS SERVICE, https://www.usmarshals.gov/process/execution-writ.htm (last visited Feb. 26, 2021).

27. Nichole D. Flippen, *Post-Judgment Debt Collection Techniques*, LAW FIRMS, https://www.lawfirms.com/resources/dealing-with-bad-debt/post-judgment-debt-collection-techniques.htm (last visited Feb. 26, 2021).

28. 28 U.S.C. § 1609 (2020).

29. Saucier v. Kats, 533 U.S. 194 (2001) (holding that the ruling on an immunity defense must be made early in the court's proceeding).

30. Wolf v. F.R.G., 95 F.3d 536 (7th Cir. 1996), *reh'g denied en banc*, 1996 U.S. App. LEXIS 26097 (7th Cir. 1996), *cert. denied*, 520 U.S. 1106 (1997).

31. Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2d Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) (holding that the district court wrongfully found subject-matter jurisdiction over the defendant under the commercial activity exception).

followed the guiding principle that foreign governments and their instrumentalities are "'presumptively immune…" from jurisdiction in the United States.[32] This includes personal and subject-matter jurisdiction.[33] Yet the question that arises under the Federal Rules of Civil Procedure, backed by extensive common-law doctrine, asks when exactly in the litigation is that redress appropriate, which would be either before or after the "final judgment."

In total, there are nine exceptions, six of which can be found in 28 U.S.C. § 1605(a), which include: "(1) waiver, (2) commercial activity, (3) expropriations, (4) rights in certain kinds of property in the United States, (5) noncommercial torts, and (6) enforcement of arbitral agreements and awards."[34] Sections 1605(A) and (b) give us the seventh and eighth exceptions, which are the state-sponsored terrorism exception, and maritime liens and preferred mortgages exception.[35] Lastly, section 1607 is the counterclaims exception.[36] These exceptions give United States courts jurisdiction to hear suits involving foreign entities as defendants.

A. Interlocutory Orders and the Collateral Order Doctrine

An order denying a foreign state's immunity without disposing of all other claims of the case is an interlocutory order (generally there is no right of immediate appeal from interlocutory orders).[37] This is due to 28 U.S.C. § 1291, also known as the "Final-Judgment Rule", which states that "courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts. . . ."[38] Section 1291 is meant to bar appeals from tentative decisions and promote judicial efficiency.[39]

An exception to this rule is the "collateral order doctrine", which is more like a "practical construction" of the Final-Judgment Rule.[40] The phrase "practical construction" is appropriate because the collateral order doctrine should be seen not as an exception to the final decision rule in § 1291, but rather as an advancement or addition to that rule.[41] This doctrine originated from the Supreme Court decision, *Cohen v. Beneficial Industrial Loan Corp.*[42] The collateral order doctrine applies to district court decisions which conclusively resolve issues that

32. OBB Personverkehr AG v. Sachs, 577 U.S. 27, 31 394 (2015) (quoting Saudi Arabia v. Nelson, 507 US 349, 355 (1993)).

33. STEWART, *supra* note 5, at 40.

34. *Id*. at 47.

35. *Id*.

36. *Id*.

37. App RULES COMM., GUIDE TO APPEALABILITY OF INTERLOCUTORY ORD 1 (N.C. Bar Ass'n 2019).

38. 28 U.S.C. § 1291 (2020) (emphasis added).

39. David Urban, *Appellate Law—The Final Judgment Rule and its Exceptions*, CAL. PUB. AGENCY LABOR & EMP'T BLOG (March 3, 2015), https://www.calpublicagencylaboremploymentblog.com/litigation/appellate-law-the-final-judgment-rule-and-its-exceptions/.

40. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 866 (1994).

41. *Id*.

42. *See generally* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

are important and completely separate from the merits, and that would be effectively unreviewable on appeal.[43] Therefore, collateral orders are final under § 1291.[44] Decisions on immunity fall under this doctrine because they are within the "'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action."[45]

The Supreme Court is strict on its definition and application of "small class" and historically has been fearful that the collateral order doctrine has already been expanded beyond its logical limits and criteria.[46] For an order denying immunity to fall within the "small class" allowing immediate appeal, the Court has devised a three-- arguably four-- prong test.[47] Under this test, the order must: (1) "'conclusively determine the disputed question'"; (2) "'resolve an important issue completely separate from the merits of the action'; and" (3) "'be effectively unreviewable on appeal from a final judgment.'" [48] The potential fourth prong comes from *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949), which discusses that an essential consideration is that the order be "'too *important* to be denied review.'"[49] The Supreme Court, along with some circuit courts, have continued to use this factor like an essential element, even though that element can be a bit unclear as to its meaning and applicability.[50]

To satisfy the first element, and conclusively determine the disputed question, an order must "finally determine" the disputed issue, so that the order is in no way "open, unfinished, or inconclusive."[51] The Supreme Court has declared that an order is not collaterally appealable if it is "'tentative, informal, or incomplete.'"[52] Courts have recognized specific scenarios where this exception applies, including remand orders or stay pending litigation,[53] denials of qualified immunity,[54] and others.[55]

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43. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review,* 93 WASH. L. REV. 1809, 1817 (2018).

44. *Id*. at 1842.

45. Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting Behrens v. Pelletier, 516 U.S. 299, 305 (1996)).

46. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009).

47. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

48. Kensington Int'l Ltd. v. Rep. of Congo, 461 F.3d 238, 240 (2d Cir. 2006) (quoting Coopers & Lybrand, 437 U.S. at 468).

49. Henry v. Lake Charles Am. Press LLC, 566 F.3d 164 (5th Cir. 2009) (quoting Cohen, 337 U.S. at 546) (emphasis added).

50. United Sates v. MacDonald, 435 U.S. 850, 860 n.7 (1978); *but see* Digital Equip. Corp.,, 511 U.S. at 878 (mentioning that the Court has never decided that unimportance is the sole factor barring appealability when all other *Cohen* factors are met).

51. Rebecca E. Hatch, Annotation, *Construction and Application of Collateral-Order Doctrine*, 54 A.L.R. Fed. 2d 107, 110 (2011).

52. Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 42 (1995) (quoting Cohen, 337 U.S. at 546).

53. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

54. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) ("[I]n such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune.").

55. *See* Abney v. United States, 431 U.S. 651 (1997).

The second element requires that the order "resolve an important issue completely separate from the merits of the action."[56] In other words, the order needs to involve a claim of right "separable from, and collateral to, rights asserted in the action."[57] The court has formulated this element to mean that when such an order is reviewed on appeal, the appellate court need not consider the correctness of the plaintiff's facts or if they state a claim, only the question of law regarding defendant's issues on appeal.[58] It must not simply be a step towards final disposition of the merits of the case that would ultimately be included in the final judgment.[59]

Under the third element, to be "'effectively' unreviewable" on appeal means that without the collateral-order appeal, there are interests that would be lost completely lost through strict application of the final judgment rule.[60] This must rise to something more than merely avoiding the burdens of trial.[61] This right that would be irretrievably lost if review was forced to wait until after final judgment also requires an evaluation of its importance.[62] For example, denials of immunity rise to the requisite level of importance because the whole purpose of immunity is for foreign parties to have the right to avoid litigation in United States courts.[63]

All of these elements taken together, along with "importance" of the legal issue in the order, give appellate courts jurisdiction to hear appeals from interlocutory orders that qualify, which in many cases, include orders regarding immunity.[64]

III. PRE-JUDGMENT ORDERS AND APPEALABILITY

It is well-settled that denials of immunity from suit under FSIA are pre-judgment orders that can be immediately appealed under the collateral order doctrine.[65] Immunity is not merely a defense to liability, it is a right to be free from the burdens of trial and litigation.[66] Should that right be denied by a pre-judgment order, the remedy is entirely lost if the defendant is required to go all the way through litigation before appealing.[67] It is for this reason that, even where a foreign

56. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949).

57. Mitchell, 472 U.S. at 524.

58. *Id.* (describing how an appeal from the denial of defendant's immunity meets the second element of the Cohen test).

59. Abney, 431 U.S. at 658.

60. Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

61. *Will*, 546 U.S. at 353.

62. *Cohen*, 337 U.S. at 547.

63. Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 43 (1995).

64. Hatch, *supra* note 54, at 129.

65. Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 116 (2d Cir. 2016); Bryan Lammon, *The Week in Federal Appellate Jurisdiction: July 28-August 3, 2019*, FINAL DECISIONS (August 5, 2019), https://finaldecisions.org/the-week-in-federal-appellate-jurisdiction-july-28-august-3-2019/.

66. Qualified Immunity, *Legal Information Institute*, https://www.law.cornell.edu/wex/qualifiedimmunity.

67. Henry v. Lake Charles Am. Press LLC, 566 F.3d 164, 171 (5th Cir. 2009).

state does not assert immunity, a court must still decide on immunity under the FSIA at the outset of litigation.[68] Subsequently, it follows that should immunity be denied, a foreign state must have a path to appeal in order to avoid the litigation.[69]

There are four elements to be satisfied in this inquiry, also known as the *Cohen* test. The first of these elements is that a pre-judgment order must conclusively determine a disputed question.[70] This requirement determines if a court has said its last word on a given subject.[71] A common and simple example is when a court makes a final judgment on a party's fault or liability. With that, tentative rulings will not meet the first element of the *Cohen* test, because it could easily fluctuate after further proceedings.[72]

In the FSIA context, the Supreme Court has held that denials of immunity are appealable because they are entirely separate from the merits and turn on their own question of law.[73] The fact that a denial "conclusively determines the defendant's claim of right not to *stand trial*" and that "there are simply no further steps [to take]", the first element is fully satisfied in an FSIA immunity denial.[74] This element can also be met in the context of a United States court recognizing a foreign government's final judgment.[75]

The second element, that the issue be one of importance separate from the merits of the action, has been interpreted to mean that the order addresses a serious and unsettled question which would be irreparably lost without immediate appeal.[76] This element is met when the appellate court must consider the original factual allegations against the defendant to resolve the immunity question.[77] However, Justice Brennan, in *Mitchell v. Forsyth*, notably disputed that holding, arguing the overlap between a collateral matter and the factual allegations do not render the merits to be actually separate from the decision of immunity.[78]

In *Mitchell*, an anti-war protestor sued a former Attorney General of the United States for damages arising out of a warrantless wiretap.[79] The Attorney General claimed immunity from suit as a matter of national security.[80] It was argued that the Attorney General's role is so "vital" to protecting our country, that imposing personal liability could impinge on the constitutional rights of citizens.[81] The majority ultimately prevails against the dissent by the logic that *were* they to interpret the necessity to review the plaintiff's factual allegations in an immunity

68. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493-94 n.20 (1983).

69. *Id.*

70. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

71. Rosenstein v. Merrell Dow Pharm., Inc., 769 F.2d 352, 354 (6th Cir. 1985).

72. Al Shimari v. CACI Int'l, Inc., 679 F.3d 205, 220 (4th Cir. 2012).

73. Mitchell v. Forsyth, 472 U.S. 511, 528-29 (1985).

74. *Id.* at 527 (quoting Abney v. United States, 431 U.S. 651, 659 (1977)).

75. Kensington Int'l, Ltd. v. Itoua, 505 F.3d 147, 149 (2d Cir. 2007).

76. 19 George C. Pratt, MOORE'S FED. PRAC. § 202.07 (2021); Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982).

77. Mitchell, 472 U.S. at 529.

78. *Id.* at 544-45 (Brennan, J., dissenting).

79. *Id.* at 513.

80. *Id.*

81. *Id.* at 520.

denial, none of these denials could be appealed—all defendants who could have potentially prevailed on appeal would suffer an irreparable injury of being forced to undergo trial if the Court were to follow Justice Brennan's logic.[82] Therefore, it is essential that for an FSIA claim, the merits and the immunity issue are considered separately.

The third element of effective inability to review on appeal looks to whether there is an irreparable harm that has already taken place prior to appeal. The Court in *Harlow v. Fitzgerald*, set forth the precedent that, in regards to qualified immunity, a defendant is entitled to dismissal before even beginning discovery in order to truly grant the defendant their right not to withstand trial.[83] In *Harlow*, a civilian Air Force employee sued advisors of the President of the United States for conspiracy to violate his constitutional and statutory rights by wrongful termination.[84] Similar to the facts in *Mitchell*, the advisors to the President claimed that they were immune from suit but were denied that immunity.[85] A few years later, the Court applied the same legal analysis to the concept of immunity from suit as with an FSIA claim.[86] They held that immunity from suit is distinguishable from a mere defense to liability in that the immunity "is effectively lost if a case is erroneously permitted to go to trial."[87]

In light of the application given by the courts mentioned above, in nearly any case involving a pre-judgment order denying immunity from suit, appeals must meet the *Cohen* elements under the collateral order doctrine in order to provide adequate relief to an immune defendant. Furthermore, this same line of reasoning falls under the umbrella of the fourth element, in that the appeal is too important to be denied review because of the ramifications if it were denied.

Immunity *from suit* and immunity *from attachment* have different meanings and applications.[88] For this reason, pre-judgment attachments have a different function than post-judgment attachments.[89] These differences make it imperative that they receive different treatment in the courts. Immunity from suit is the right to avoid trial. Immunity from attachment is the right to not have one's property seized as a means of enforcing an order or establishing jurisdiction.[90]

The difference between pre-judgment attachment and post-judgment attachment is one of timing as the names suggest—attachment pre-judgment is ordered before a final judgment whereas post-judgment means attachment after a final judgment. This difference in timing generates much concern over which should be immediately appealable, and which should not. The courts should approach these timing issues differently in regard to redressability on appeal.

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82. *Id*. at 529-30, n.10.
83. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
84. *Id*. at 803-05.
85. *Id*. at 806.
86. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
87. *Id*.
88. 28 U.S.C. §§ 1604-1609 (2020).
89. 28 U.S.C. § 1605; 28 U.S.C. § 1610 (2020).
90. Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (N.Y. 1959).

For example, denial of pre-judgment immunity from suit may not be redressable on appeal because by the time the appeal happens, the damage has been done and the potentially immune party wrongfully has been forced to go to trial.[91] Meanwhile, denial of post-judgment attachment immunity may or may not be redressable; adequate relief may be available on appeal.[92] Those in the pre-judgment context are immediately appealable whereas, as explained below, those in the post-judgment context are not.

IV. POST-JUDGMENT ORDERS AND APPEALABILITY

Nearly all pre-judgment orders must be immediately appealable under the collateral order doctrine. What about post-judgment orders? This article looks specifically at post-judgment orders which grant attachment and thus deny immunity. As explained in Part II, immunity from suit and immunity from attachment are separate; a foreign defendant can be immune in one regard but not the other.[93] Therefore, in order for a plaintiff to prevail and collect against a foreign defendant, it must show the defendant is neither immune from jurisdiction nor is its property immune from attachment.[94]

A post-judgment order or appeal is one that occurs after the trial court has rendered a judgment on fault, liability, or damages. Appealability of post-judgment orders vary.[95] For example, if the post-judgment order's purpose is merely to effectuate the final judgment, the order is not appealable.[96] However, post-judgment orders where there are no other motions or orders to be entered before the court regarding the action may be appealable.[97]

These orders tend to appear in the form of collection proceedings. In some cases, the creditor party may need to obtain a writ of attachment on a piece of property which the debtor party has a substantial interest in. Even if the foreign sovereign who is in debt to a United States entity is not immune from suit, it may still be immune from attachment of its property in this post-judgment proceeding.[98] Other examples of common post-judgment orders include decisions regarding motions for judgment as a matter of law, motions to make additional findings, motions for attorney's fees, and more.[99]

In the event that the plaintiff prevails on its showing, the next natural step would be an appeal before the attachment is decided. However, there is significant recent debate amongst circuit courts over whether or not a denial of a motion to dismiss an attachment order on lack of jurisdiction grounds is immediately

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91. DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 47 (2d ed. 2018).

92. *Id*.

93. Murray, *supra* note 10.

94. *Id*.

95. *Id*.

96. *See* Blossom v. Milwaukee & Chicago R.R. Co., 68 U.S. 655, 657 (1864).

97. Mayer v. Wall St. Equity Grp., Inc., 672 F.3d 1222, 1224 (11th Cir. 2012) (citing Moore's Federal Practice).

98. 28 U.S.C. § 1609 (2021).

99. 3 *Moore's Manual Federal Practice and Procedure* § 27.02 (3d. 2018).

appealable under the collateral order doctrine like pre-judgment orders are.[100] Some circuits have held that post-judgment attachment proceedings are not immediately appealable because they do not satisfy the *Cohen* test.[101] More recently, other circuits did not even reach the collateral order doctrine or *Cohen* test, finding that collection actions such as attachments are final judgments.[102]

A. Applying the Cohen Test and the "Element Approach"

The "Element Approach" rigorously applies the elements from the *Cohen* test to post-judgment orders the same way they are applied to pre-judgment denials of immunity, thus earning its name. Courts who use this approach go through a step-by-step analysis of the collateral order doctrine to determine if the post-judgment order denying immunity falls within the "small class" of final appealable interlocutory orders. Generally, courts which have used this approach have found that post-judgment denials of immunity from attachment do not fall within that small class for the reasons set forth below. In finding this conclusion, courts have generally focused on the third prong, concluding that these orders are not effectively unreviewable on appeal nor are they important enough to warrant immediate appeal.[103]

In *Kensington*, the defendant, Republic of Congo (hereinafter "the Congo") was overdue on its debt to the plaintiff.[104] The original order to pay debt was in an English court, which the Southern District of New York later recognized was in the plaintiff's favor.[105] The district court judge also granted the plaintiff's motion to require that the Congo post security and attorney's fees.[106] The Congo appealed, arguing that it had immunity from attachment, arrest, and execution, pursuant to 28 U.S.C. § 1609.[107]

The court in *Kensington* ultimately concluded that the district court's order was not immediately appealable under the collateral order doctrine, and that the injury from effectively denying immunity can be redressed on appeal after final judgment in the attachment or collection proceeding.[108] Following the *Cohen* test, the court based much of its opinion on precedent within its circuit, especially with its decision in *Caribbean Trading*.[109]

The *Caribbean Trading* case started when a British West Indies corporation sought recognition and enforcement of an arbitration award against a Nigerian state

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100. *See* Brief of Intervenor-Appellant at 10, Crystallex Int'l Corp., v. Bolvarian Republic of Venez. (In re Petroleos de Venezuela, S.A.), 932 F.3d 126 (3d Cir. 2019).

101. Kensington Int'l Ltd. v. Congo, 461 F.3d 238, 241 (2d Cir. 2007).

102. *Crystallex*, 932 F.3d at 136.

103. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

104. *Kensington*, 461 F.3d at 239.

105. *Id.* at 240.

106. *Id.*

107. *Id.*; 28 U.S.C. § 1609 (2021).

108. *Kensington*, 461 F.3d at 240.

109. *Id.*

corporation in the Southern District of New York.[110] The court found that the issue with the post-judgment appeal was the third element of the *Cohen* test, that the order was not effectively unreviewable on appeal from a final judgment.[111] Its guiding decision in *Caribbean Trading* looked into post-judgment appeals from a grant of security and decided that, for purposes of immunity and the collateral order doctrine, orders granting security versus those that grant attachment are essentially the same—they require the defendant to pay money to satisfy a judgment.[112] The court there decided that orders granting security (or attachment) *are* reviewable from a final judgment because the injury would not be irreparable on appeal after final judgment.[113] The logic is that the party required to pay in order to enforce the judgment can simply be paid back if they win on appeal from final judgment.[114]

This logic was then applied in *Kensington*, finding the same outcome.[115] The court in that case contrasted immunity from suit (pre-judgment) and immunity from attachment (post-judgment.).

> [D]enial of a claim of FSIA immunity from attachment would "not subject a foreign state to a proceeding that could be avoided by a successful appeal." Thus, invocation of FSIA immunity from attachment is irrelevant to whether an order is appealable.[116]

In other words, from the Second Circuit's perspective, the collateral order doctrine cannot apply to post-judgment attachment proceedings because they are not effectively unreviewable; they can wait until the final judgment is concluded and the defendant can still achieve the same outcome. For further argument, the court in *Kensington* emphasizes that if attachment is granted, it can easily be paid back, however if the attachment is denied, the debtor party may lack the funds later on, and then the issue certainly would not be redressable to the creditor party on appeal.[117]

The court in *Kensington* additionally adds what can be effectively considered a fourth element to the *Cohen* test: importance.[118] By looking to precedent in the Second Circuit from 1995, which established that issues that are likely to reoccur thus require immediate action and guidance to trial courts, require a description of "importance."[119] Thus, the Second Circuit thoroughly applied the elements of the

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110. Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp., 948 F.2d 111, 112-13 (2d Cir. 1991).

111. *Id*.

112. *Id*. at 114.

113. *Id*.

114. *Id*. *But see* Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301, 305-06 n.7 (2d Cir. 1982); Williamette Transp., Inc. v. CIA Anonima Venezolana de Navegacion, 491 F. Supp. 442, 443-44 (E.D. La. 1980) (calling into question whether or not the posting of a security is actually the same as an "attachment" within the FSIA, thus redressable immediately on appeal).

115. Kensington, 461 F.3d at 241.

116. *Id*. at 240-41 (quoting *Caribbean Trading*, 948 F.2d at 115).

117. *Id*. at 242.

118. *Id*. at 241.

119. *Id*.; Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 399 (2d Cir. 1995).

Cohen test as opposed to other methods, deeming it appropriately called the "element approach."[120] The court in *Kensington* deemed the element approach necessary for the purpose of guiding the lower courts so that when an order denying attachment satisfies all three elements of the *Cohen* test, "courts have leeway to determine whether the issue on appeal is an important issue of law, the resolution of which may have relevance for future cases."[121] It is the Second Circuit's stance then, that since the party denied immunity from attachment can obtain complete relief on appeal, it is unimportant that their denial of immunity be appealed and reviewed immediately.[122]

A few years after the *Kensington* decision, the First Circuit followed this precedent, also emphasizing the trend in the Supreme Court to apply the element approach with the importance element.[123] The First Circuit agreed that satisfying the *Cohen* test alone is insufficient to give jurisdiction over the immediate appeal from an attachment order.[124] The trend, which the First Circuit notes, follows along the same logic as that in *Kensington* and provides greater precedent from the Supreme Court as guidance.[125]

The Supreme Court in 1950 also distinguished that orders *denying* attachment may be immediately appealable because of the likelihood that complete relief may be unavailable after final judgment, but orders *granting* immunity may not be immediately appealable.[126] Although in this case, sovereign immunity was not at issue, we can still see the courts following the same trend regarding immediate appealability of attachment orders: they can be redressed after final judgment and complete relief can still be provided, thus making it unimportant for the court to decide.[127]

It is evident then that there has been a clear trend amongst the Supreme Court and some Circuit Courts historically to not only apply the *Cohen* test to appeals surrounding attachment orders and denial of attachment immunity, but also to find that attachment orders are not "important" enough to appeal immediately. The element approach would then allow trial courts to exercise discretion in whether or not review of an attachment order denying immunity is, in essence, worth the courts' time under applicable law.

B. The "Easy" Approach

The "Easy Approach" is aptly named because it takes an "all-or-nothing" stance regarding post-judgment orders denying immunity, finding that they are always immediately appealable. Some circuits have circumvented the need for

120. *Kensington*, 461 F.3d at 241.

121. *Id*.

122. *Id*. at 242.

123. United States Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 56 (1st Cir. 2009).

124. *Id*. at 57.

125. *Id*. at 56.

126. Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 399 U.S. 684, 688-89 (1950).

127. *United States Fid & Guard. Co.*, 578 F.3d at 56.

going into an in-depth analysis on the *Cohen* doctrine, and rather have decided that generally, all denials of immunity under the FSIA must be immediately appealable. Although the Third Circuit most recently applied of this type of approach, it can be seen in different ways throughout older cases in other circuits.

The Third Circuit took a rather different approach to answering the question of post-judgment attachment proceedings in a recent 2019 decision, *Crystallex International Corporation v. Bolivarian Republic of Venezuela (In re Petroleos de Venezuela)*.[128] This litigation can be traced back between the two parties as far as 2002, but for purposes of this specific issue, litigation began in 2011 when Venezuela seized gold deposits belonging to Crystallex.[129] Crystallex subsequently won an international arbitration agreement against Venezuela and sought to enforce it.[130] Petroleos de Venezuela S.A. (hereinafter "PDVSA"), Venezuela's state-owned oil company intervened in the action and moved to dismiss on grounds of sovereign immunity from attachment under the FSIA.[131] Specifically, PDVSA wanted to thwart the grant of Crystallex's motion for a writ of attachment under Federal Rule of Civil Procedure 69.[132] For reference, a Rule 69 motion takes place in a collection proceeding, and concludes that collection proceeding.[133]

The name "Easy" for this approach comes from the court in *Kensington*, which used the word "easy" to describe approaches to the issue that are fairly black and white.[134] It noted that there was some proper skepticism in prior cases to this approach, but that the *Cohen* requirements could not be eroded by it; it in fact established the rationale for the importance prong of the element approach.[135] The court in *Crystallex* used this approach in its own version, and easily concluded that it had jurisdiction to review the District Court's denial of immunity under the FSIA as a court usually would in any question of immunity.[136]

The interesting aspect is that, rather than decide jurisdiction to review of the grant of attachment under the collateral order doctrine like in the Second Circuit, the Third Circuit does not even need to arrive to that point.[137] The court uses the same statute, § 1291, but simply finds that attachment *is* a final judgment, whereas interlocutory orders usually require an application of the *Cohen* test.[138] To support

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128. Crystallex Int'l Corp. v. Bolvarian Republic of Venez. (In re Petroleos de Venezuela, S.A.), 932 F.3d 126, 126 (3d Cir. 2019).

129. David Goodwin, *New Opinion: Third Circuit Approves Attachment of U.S.-Based Assets of Venezuela's State-Owned Oil Company*, CA3blog (July 29, 2019), http://ca3blog.com/cases/new-opinion-third-circuit-approves-attachment-of-u-s-based-assets-of-venezuelas-state-owned-oil-company/.

130. *Id*.

131. *Crystallex*, 932 F.3d at 132, 134.

132. *Id*. at 134; FED. R. CIV. P. 69.

133. *See* Bryan Lammon, *Dizzing* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371 (2017) (citing Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964)).

134. Kensington Int'l Ltd. V. Rep. of Congo, 461 F.3d 238, 242 (2d Cir. 2006).

135. *Id*.

136. Crystallex, 932 F.3d at 136.

137. *Id*.

138. *Id*.

this claim, the court cites its 2014 precedent, *Bryan v. Erie County Office of Children & Youth.*[139] The court firmly decided this issue in that case, and used much of its energy instead towards of deciding whether jurisdiction still existed with PDVSA under *Bancec* doctrine under the commercial activity exception.[140]

A look into the Third Circuit's precedent in *Bryan* reveals why this seemed to be a well-settled issue to them in this case. It was in *Bryan* that the Third Circuit concluded that collection actions in and of themselves are final judgments.[141] This is because of finality, and finality is defined in that case as the end of litigation on all the merits.[142] The court explains what is meant by "finality" and explains:

> A Rule 60 motion does not "affect the judgment's finality or suspend its operation . . . so it does not form part of the original action. Indeed, Rule 60(b)5) motions are used by a judgment-debtor to relieving itself on an already final judgment that has been satisfied, released, or discharged.[143]

The rationale behind this is that a collection action to enforce a money judgment, such as a Rule 60 in *Bryan* or a Rule 69 in *Crystallex*, has no bearing on the judgment's finality nor does it suspend its operation.[144] The collection proceeding's only purpose is to enforce the judgment that has already been finalized.[145]

Both *Bryan* and *Crystallex* cite to *Peacock v. Thomas* to show how a collection proceeding is simply meant to "assist" in the final judgment enforcement.[146] *Crystallex* applied the logic from *Bryan* to the Rule 69 collection proceeding before them and it seemed quite simple that § 1291 applied as a final order and jurisdiction was appropriate.[147] All that was truly left for them to decipher was the immunity issue, which is essentially whether or not PDVSA was Venezuela's "alter ego" to satisfy the *Bancec* factors regarding the commercial activity exception.

Essentially, the law that comes out of *Crystallex* in addition to the Third Circuit precedent is that appealing an attachment action on grounds of immunity is totally separate from the collateral order doctrine because the judgment is already final at that point in the litigation, and the enforcement of the judgment via attachment has no bearing on the finality.[148] The collateral order doctrine need not even be part of the conversation regarding post-judgment attachment in the Third Circuit's perspective.

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139. *Id.* (citing Bryan v. Erie Cty. Office of Children and Youth, 752 F.3d 316 (2014)).

140. *Id.* at 136-38 (citing First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983); EM Ltd. v. Banco Cent. De la Republica Arg., 800 F.3d 78 (2d Cir. 2015)).

141. *Bryan*, 752 F.3d at 320-321.

142. *Id.* at 321.

143. *Id.* at 321.

144. *Id.* at 321.

145. *Id.*; *See, e.g.* Sunderland v. City of Philadelphia, 575 F.2d 1089, 1090 (3d Cir. 1978).

146. *Id.* (citing Peacock v. Thomas, 516 U.S. 349, 356 (1996)).

147. *Crystallex*, 932 F.3d at 136.

148. *Id.*

Crystallex compares the attachment issue to the 1610(g) factors, implying that jurisdictionally the two scenarios look strikingly similar to the *Bancec* factors. There they say that if it is not a terrorism attachment issue, the creditor would still need to satisfy the *Bancec* factors regardless.[149] On all fronts, the Third Circuit court says there is ample jurisdiction to hear post-judgment proceedings related to the FSIA.

The Fifth Circuit came to the same conclusion but has provided a slightly better explanation for its reasoning in its precedent.[150] In *FG Hemisphere Associations v. Republique du Congo* (hereinafter "*Hemisphere*"), the Fifth Circuit addressed the jurisdictional question in one sentence: "[t]he district court's denial of immunity under the FSIA is immediately appealable under the collateral order doctrine."[151] This case arises out of a defaulted loan, which resulted in FG Hemisphere successfully seeking judgment against the defendant, the Congo, in the Southern District of New York.[152] As expected, the Congo argued that the trial court in that case did not have jurisdiction to order execution on its shares.[153] Much like the court in *Crystallex*, the court in this case made a simple matter-of-fact statement on an extremely complex, unsettled issue. Following the trail of cited precedent, one will find that in 1991, the Fifth Circuit looked to the same *Cohen* plus importance standard as seen in the Second and First Circuits, but instead decided that a grant of attachment thus a denial of immunity actually *is* an important issue of law and falls within the *Cohen* test.[154] In doing so, the court emphasized this important issue of law when it stated:

> The collateral order doctrine permits appellate review of certain district court orders that pose a "risk of important and probably irreparable loss if an immediate appeal is not heard" . . . These courts have recognized that the entitlement under the FSIA "is an immunity from suit rather than a mere defense to liability it is effectively lost if a case is permitted to go to trial."[155]

The importance prong strongly effects appeals on immunity from suit because, as the quote notes above, a wrongful denial of immunity in that situation would not have a remedy. But it is evident from the above quote that the 1991 doctrine was discussing the legal importance only of immunity from suit, and then the more recent *Hemisphere* case took this to mean that the same applied to immunity from attachment. The Seventh Circuit used the *Hemisphere* case as support for its same assertion that denial of immunity from attachment is immediately appealable.[156] The Seventh Circuit in that case states that immunity from attachment should be

149. *Crystallex*, 932 F.3d at 139.

150. FG Hemisphere Assocs. v. Republique du Congo, 455 F.3d 575, 584 (5th Cir. 2006).

151. *Id*.

152. *Id*. at 581.

153. *Id*. at 580.

154. Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 385 (5th Cir. 1991).

155. *Id*.

156. Rubin v. Islamic Republic of Iran, 637 F.3d 783, 790 (7th Cir. 2011).

treated no differently than immunity from suit, because ultimately, both create intrusions on a foreign sovereigns immunity in United States courts.[157] Therefore, the Seventh Circuit agrees with the Fifth Circuit (and the Third Circuit), but all of these circuits appear to use different reasoning to reach the same conclusion. The "Easy Approach" name is thus appropriate because all these courts rather easily conclude that orders denying immunity should always be immediately appealable.

C. Comparing the Approaches

There are a few noticeable errors with all the opinions that fall under the "Easy Approach" umbrella. The first error lies with the Fifth Circuit's 2006 opinion. *Hemisphere* states in its conclusory sentence that orders denying immunity should be immediately appealable but fails to clarify what type of immunity.[158] As we now know, there is a significant difference for the sake of civil procedure between immunity from *suit* and immunity from *attachment*; both have different forms of relief so must be redressed differently, and the opinions of the "Easy Approach" appear to ignore that fact.[159]

Although the facts in *Hemisphere* surround the issue of attachment immunity, the opinion bases its assertion that denial of such immunity on a case about immunity from suit.[160] Being that the governing law of the Fifth Circuit was applied to a different set of facts, thus naturally warranting a different opinion, it was erroneous for the Fifth Circuit to make a blanket opinion that all denials of immunity are immediately appealable. The Seventh Circuit was in part correct in its calculation that immunity from suit and immunity from attachment should be treated the same but missed its point by wrongfully applying the law. It is true that they should be treated the same, but only in that they should both be subjected to the *Cohen* test. Even after applying the *Cohen* test to appeals from denials of attachment immunity the same as for immunity from suit, the rest should still be opposite because of the difference in timing between the two. However, this explains how the Seventh Circuit reached its conclusion that both denials of immunity from suit or attachment should be treated the same, in that the opinion was based on the erroneous application of law from the Fifth Circuit.[161]

The next issue with these approaches lies with the rationale in *Crystallex* and the Third Circuit precedent in that the attachment proceeding is not as final as the courts in those cases describe. A final order is defined in the Bouvier Law Dictionary, for example, as "the last order of a court and from it an appeal may be taken . . . while an interlocutory order is an order in the midst of the process."[162] Since the first question in a suit against a foreign entity is one of jurisdiction, it

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157. *Id*.

158. *Hemisphere*, 455 F.3d at 584.

159. *See generally* E.H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R.3d 322 (1969).

160. *Hemisphere*, 455 F.3d at 584; *see* Stena Rederi AB, 923 F.2d at 385 (stating that denial of immunity from suit causes an irreparable injury if the immune party is forced to go through trial).

161. *Rubin*, 637 F.3d at 790.

162. Final Definition, Bouvier Law Dictionary, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION.

then follows that the same question arises when an order for attachment against a foreign entity is given, thus rendering the litigation on-going and not final; so long as § 1609 provides for immunity from attachment, no judgment ordering attachment can be final until the question of immunity is answered.[163] The Third Circuit wrongfully ignored this reasoning when it opined that the attachment proceeding bears no effect on the judgment regarding liability.[164]

Additionally, the precedent established in *Cohen* makes it clear that appealability is not meant for black and white or overbroad applications.[165] When the Court determined that the court order fixing security in that case was appealable, it was sure to clarify that the intent was not that *every* order granting security should be appealable.[166] It therefore sets out that, after applying the elements to the facts at hand, the importance of the unsettled question of law becomes a fact-sensitive inquiry.[167] The same logic then follows that any determination of appealability should be categorical based on an analysis and application of the collateral order doctrine.

Generally, the main interest that may be lost if the appellate court does not have jurisdiction is the right to not have their assets attached. But that interest does not warrant immediate appeal because that right is not "vindicated" or permanently lost if the foreign party is forced to undergo the attachment proceeding. This is because whatever property or assets are attached from that proceeding can always be given back. Contrasted from the pre-judgment order denying immunity from suit, if the foreign party is required to undergo litigation when they may have a right not to, then the damage from that decision cannot be undone.

Lastly, not only do the First and Second Circuit approaches have Supreme Court support, but the support and opinions are also unified. All agree: that the collateral order doctrine "small class" is to be applied narrowly and strictly; that the *Cohen* test should be applied to jurisdictional questions of immunity from attachment; and that the legal importance of the appeal must be considered.[168] Meanwhile in other circuits, one can see overwhelming inconsistency in their assertions that denials of attachment immunity should be immediately appealable; some say that the judgments are final and not interlocutory, some say that they should just be treated the same as appeals dealing with immunity from suit, and others apply the same *Cohen* test but come to a different conclusion than the First and Second Circuits.

These inconsistencies show that the proposition that these denials should be immediately appealable calls upon a highly unstable area of law with little sound support. The unity among the "element" approach circuits greatly undermines the

163. 28 U.S.C. § 1609; *See* 15A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.2 (1992).

164. Crystallex, 932 F.3d at 139.

165. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 546 (1949).

166. *Id*. at 547.

167. *Id*.

168. *See Kensington*, 461 F.3d at 240-42; United States Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 54-57 (1st Cir. 2009).

black and white conclusion from the other circuits that all use inconsistent and unprecedented reasoning to reach their blanket-opinions.[169]

VI. CONCLUSION

Many legal professionals have high hopes that the Supreme Court resolves this issue soon, as the effects of inconsistent decisions from lower courts and unwieldy litigation can bear a great expense to commercial activity and foreign relations among the United States and foreign entities alike.[170]

However, this note offers the opinion that when the issue does reach the Supreme Court, it should side with the "element approach," and likely would do so based on its trends surrounding similar issues.[171] This was made clear with its following statement in *Digital Equipment:*

> We have repeatedly held that the statute entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment" . . . but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system" . . . nonetheless be treated as final. The latter category compromises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and would render such important questions effectively unreviewable on appeal from final judgment in the underlying action.[172]

Here one can see the element approach making an appearance because, although the Court recognizes the appearance of finality in these cases, it nevertheless leaves room for discretion regarding whether the appeal is of "importance." While it may be understandable from the above excerpt how the Third Circuit could find that the question of attachment immunity should be appealable because it leaves "nothing more" to do, the proper interpretation would recognize the emphasis on importance and whether or not the matter would be effectively unreviewable on appeal.

The Supreme Court's most recent trends favor a "stringent" or narrow application of the *Cohen* test, truly reserving appeal only for those "small classes" that fit within the definition and category.[173] It emphasizes the interest in having judicial efficiency and sensible policies for the best guidance on rulings.[174] It then follows that the Second and First Circuits got it right with the element approach—there, a sensible, easy-to-follow precedent was established to determine

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169. *See Crystallex*, at 139 (3d Cir. 2019); FG Hemisphere Assocs. v. Republique du Congo, 455 F.3d 575, 584 (5th Cir. 2006); *Rubin*, 637 F.3d at 790.

170. Victoria A. Valentine, *The Foreign Sovereign Immunities Act's Crippling Effect on United States Businesses*, 24 MICH. ST. INT'L L. REV. 625 (2016).

171. *Will*, 546 U.S. at 349 (citing Digital Equip., 511 U.S. at 868; Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

172. *Digital Equip.*, 511 U.S. at 867.

173. *Id.* at 868.

174. *Id.* at 867-68.

attachment immunity which is legally and factually based. The Third Circuit's new opinion in *Crystallex* disregards the Supreme Court's goal for judicial efficiency by creating new precedent that is too overbroad with little legal foundation.

Furthermore, as a matter of policy, the Supreme Court could adequately and accurately act in the best interest of both parties by not allowing denial of attachment immunity to be immediately appealable as the Second Circuit points out.[175] On its face, it appears that the potentially immune party may have to be subject to attachments on its property it should ultimately not be, it is still the best decision considering that the creditor party receiving the payment could simply be forced to pay it back should they be unsuccessful on appeal.

In the event the attachment is denied and immunity granted, and the wronged-party is later successful on appeal, the debtor party may no longer have the assets to pay the creditor party what it is rightfully owed by the time the appeal is decided. This leaves the court with a party who committed a wrongdoing and cannot be held accountable, as well as an aggrieved party who will never have an opportunity to obtain a remedy for the wrong done to them. Therefore, it is in the best interest of both the United States and foreign entities that a simple and efficient rule govern appealability of attachment immunity, and that all parties' potential rights be considered in the process with the element approach.

It is of high importance that courts accurately determine both liability and immunity considering the state of foreign affairs within the United States and its trade partners, alongside the unstable economies of some foreign entities which United States corporations do business with. While this complex body of law may seem far removed from the average person, a decision regarding immunity from suit or attachment can greatly affect those involved.

175. Kensington Int'l Ltd. v. Republic of Congo, 461 F.3d 238, 241 (2d Cir. 2007).