INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL
SUBMITTED BY
THE UNITED STATES OF AMERICA

October 14, 2019

ANNEXES
VOLUME V

Annexes 109 through 120

ANNEX 109

136 S.Ct. 1310
Supreme Court of the United States

BANK MARKAZI, aka Central Bank of Iran, Petitioner
v.
Deborah PETERSON, et al.

No. 14–770.
|
Argued Jan. 13, 2016.
|
Decided April 20, 2016.

Synopsis

Background: Representatives of hundreds of Americans killed in Iran-sponsored terrorist attacks brought action against Islamic Republic of Iran under the Terrorism Risk Insurance Act (TRIA) and the Iran Threat Reduction and Syria Human Rights Act of 2012, seeking turnover of $1.75 billion in assets based unpaid compensatory damages judgments against Iran stemming from terrorist attacks. The United States District Court for the Southern District of New York, Katherine B. Forrest, J., 2013 WL 1155576, granted summary judgment to plaintiffs, and denied reconsideration, 2013 WL 2246790. Defendant appealed. The United States Court of Appeals for the Second Circuit, John M. Walker, Jr., Circuit Judge, 758 F.3d 185, affirmed. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that the Iran Threat Reduction and Syria Human Rights Act of 2012 does not offend separation-of-powers principles.

Affirmed.

Justice Thomas joined in part.

Chief Justice Roberts filed a dissenting opinion, in which Justice Sotomayor joined.

***1314** *Syllabus* [*]

American nationals may seek money damages from state sponsors of terrorism in the courts of the United States. See 28 U.S.C. § 1605A. Prevailing plaintiffs, however, often face practical and legal difficulties enforcing their judgments. To place beyond dispute the availability of certain assets for satisfaction of judgments rendered in terrorism cases against Iran, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012. As relevant here, the Act makes a designated set of assets available to satisfy the judgments underlying a consolidated enforcement proceeding which the statute identifies by the District Court's docket number. 22 U.S.C. § 8772. Section 8772(a)(2) requires a court, before allowing execution against these assets, to determine, ***1315** *inter alia,* "whether Iran holds equitable title to, or the beneficial interest in, the assets."

Respondents—more than 1,000 victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members—rank within 16 discrete groups, each of which brought suit against Iran. To enforce judgments they obtained by default, the 16 groups moved for turnover of about $1.75 billion in bond assets held in a New York bank account—assets that, respondents alleged, were owned by Bank Markazi, the Central Bank of Iran. The turnover proceeding began in 2008. In 2012,

the judgment holders updated their motions to include execution claims under § 8772. Bank Markazi maintained that § 8772 could not withstand inspection under the separation-of-powers doctrine, contending that Congress had usurped the judicial role by directing a particular result in the pending enforcement proceeding. The District Court disagreed, concluding that § 8772 permissibly changed the law applicable in a pending litigation.

The Second Circuit affirmed.

Held : Section 8772 does not violate the separation of powers. Pp. 1322 – 1329.

(a) Article III of the Constitution establishes an independent Judiciary with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60. Necessarily, that endowment of authority blocks Congress from "requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, 115 S.Ct. 1447, 131 L.Ed.2d 328. Although Article III bars Congress from telling a court how to apply pre-existing law to particular circumstances, *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 438–439, 112 S.Ct. 1407, 118 L.Ed.2d 73, Congress may amend a law and make the amended prescription retroactively applicable in pending cases, *Landgraf v. USI Film Products,* 511 U.S. 244, 267–268, 114 S.Ct. 1483, 128 L.Ed.2d 229; *United States v. Schooner Peggy,* 1 Cranch 103, 110, 2 L.Ed. 49. In *United States v. Klein,* 13 Wall. 128, 146, 20 L.Ed. 519, this Court enigmatically observed that Congress may not "prescribe rules of decision to the Judicial Department ... in [pending] cases." More recent decisions have clarified that *Klein* does not inhibit Congress from "amend[ing] applicable law." *Robertson,* 503 U.S., at 441, 112 S.Ct. 1407; *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447. Section 8772 does just that: It requires a court to apply a new legal standard in a pending postjudgment enforcement proceeding. No different result obtains because, as Bank Markazi argues, the outcome of applying § 8772 to the facts in the proceeding below was a "foregone conclusio[n]." Brief for Petitioner 47. A statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. See *Pope v. United States,* 323 U.S. 1, 11, 65 S.Ct. 16, 89 L.Ed. 3. Pp. 1322 – 1326.

(b) Nor is § 8772 invalid because, as Bank Markazi further objects, it prescribes a rule for a single, pending case identified by caption and docket number. The amended law upheld in *Robertson* also applied to cases identified in the statute by caption and docket number. 503 U.S., at 440, 112 S.Ct. 1407. Moreover, § 8772 is not an instruction governing one case only: It facilitates execution of judgments in 16 suits. While consolidated for administrative purposes at the execution stage, the judgment-execution claims were not independent of the original actions for damages and each retained its separate character. In any event, the Bank's argument rests on the flawed assumption that legislation must be generally applicable. See ***1316** *Plaut,* 514 U.S., at 239, n. 9, 115 S.Ct. 1447. This Court and lower courts have upheld as a valid exercise of Congress' legislative power laws governing one or a very small number of specific subjects. Pp. 1322 – 1326.

(c) Adding weight to this decision, § 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. Measures taken by the political branches to control the disposition of foreign-state property, including blocking specific foreign-state assets or making them available for attachment, have never been rejected as invasions upon the Article III judicial power. Cf. *Dames & Moore v. Regan,* 453 U.S. 654, 674, 101 S.Ct. 2972, 69 L.Ed.2d 918. Notably, before enactment of the Foreign Sovereign Immunities Act, the Executive regularly made case-specific determinations whether sovereign immunity should be recognized, and courts accepted those determinations as binding. See, *e.g., Republic of Austria v. Altmann,* 541 U.S. 677, 689–691, 124 S.Ct. 2240, 159 L.Ed.2d 1. This practice, too, was never perceived as an encroachment on the federal courts' jurisdiction. *Dames & Moore,* 453 U.S., at 684–685, 101 S.Ct. 2972. Pp. 1327 – 1329.

758 F.3d 185, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, ALITO, and KAGAN, JJ., joined, and in all but Part II–C of which THOMAS, J., joined. ROBERTS, C.J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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Opinion

Justice GINSBURG delivered the opinion of the Court. [*]

A provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772, makes available for postjudgment execution a set of assets held at a New York bank for Bank Markazi, the Central Bank of Iran. The assets would partially satisfy judgments gained in separate actions by over 1,000 victims of terrorist acts sponsored by Iran. The judgments ***1317** remain unpaid. Section 8772 is an unusual statute: It designates a particular set of assets and renders them available to satisfy the liability and damages judgments underlying a consolidated enforcement proceeding that the statute identifies by the District Court's docket number. The question raised by petitioner Bank Markazi: Does § 8772 violate the separation of powers by purporting to change the law for, and directing a particular result in, a single pending case?

Section 8772, we hold, does not transgress constraints placed on Congress and the President by the Constitution. The statute, we point out, is not fairly portrayed as a "one-case-only regime." Brief for Petitioner 27. Rather, it covers a category of postjudgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars. Section 8772 subjects the designated assets to execution "to satisfy *any* judgment" against Iran for damages caused by specified acts of terrorism. § 8772(a)(1) (emphasis added). Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.

Adding weight to our decision, Congress passed, and the President signed, § 8772 in furtherance of their stance on a matter of foreign policy. Action in that realm warrants respectful review by courts. The Executive has historically made case-specific sovereign-immunity determinations to which courts have deferred. And exercise by Congress and the President of control over claims against foreign governments, as well as foreign-government-owned property in the United States, is hardly a novelty. In accord with the courts below, we perceive in § 8772 no violation of separation-of-powers principles, and no threat to the independence of the Judiciary.

I

A

We set out here statutory provisions relevant to this case. American nationals may file suit against state sponsors of terrorism in the courts of the United States. See 28 U.S.C. § 1605A. Specifically, they may seek "money damages ... against a foreign state for personal injury or death that was caused by" acts of terrorism, including "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" to terrorist activities. § 1605A(a)(1). This authorization—known as the

"terrorism exception"—is among enumerated exceptions prescribed in the Foreign Sovereign Immunities Act of 1976 (FSIA) to the general rule of sovereign immunity. [1]

Victims of state-sponsored terrorism, like others proceeding under an FSIA exception, may obtain a judgment against a foreign state on "establish[ing] [their] claim[s] ... by evidence satisfactory to the court." § 1608(e). After gaining a judgment, however, plaintiffs proceeding under the terrorism exception "have often faced practical and legal difficulties" at the ***1318** enforcement stage. Brief for United States as *Amicus Curiae* 2. Subject to stated exceptions, the FSIA shields foreign-state property from execution. § 1609. When the terrorism exception was adopted, only foreign-state property located in the United States and "used for a commercial activity" was available for the satisfaction of judgments. § 1610(a)(7), (b)(3). Further limiting judgment-enforcement prospects, the FSIA shields from execution property "of a foreign central bank or monetary authority held for its own account." § 1611(b)(1).

To lessen these enforcement difficulties, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA), which authorizes execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." § 201(a), 116 Stat. 2337, note following 28 U.S.C. § 1610. A "blocked asset" is any asset seized by the Executive Branch pursuant to either the Trading with the Enemy Act (TWEA), 40 Stat. 411, 50 U.S.C.App. 1 *et seq.,* or the International Emergency Economic Powers Act (IEEPA), 91 Stat. 1625, 50 U.S.C. § 1570 *et seq.* See TRIA § 201(d)(2). Both measures, TWEA and IEEPA, authorize the President to freeze the assets of "foreign enemy state[s]" and their agencies and instrumentalities. Brief for United States as *Amicus Curiae* 25. These blocking regimes "put control of foreign assets in the hands of the President so that he may dispose of them in the manner that best furthers the United States' foreign-relations and national-security interests." *Ibid.* (internal quotation marks omitted). [2]

Invoking his authority under the IEEPA, the President, in February 2012, issued an Executive Order blocking "[a]ll property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States." Exec. Order No. 13599, 3 CFR 215 (2012 Comp.). The availability of these assets for execution, however, was contested. [3]

To place beyond dispute the availability of some of the Executive Order No. 13599–blocked assets for satisfaction of judgments rendered in terrorism cases, Congress passed the statute at issue here: § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 126 Stat. 1258, 22 U.S.C. § 8772. Enacted as a freestanding measure, not as an amendment to the FSIA or the TRIA, [4] § 8772 provides that, if a court makes specified findings, "a financial asset ... shall be subject to execution ... in order to satisfy ***1319** any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by" the acts of terrorism enumerated in the FSIA's terrorism exception. § 8772(a)(1). Section 8772(b) defines as available for execution by holders of terrorism judgments against Iran "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings."

Before allowing execution against an asset described in § 8772(b), a court must determine that the asset is:

> "(A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> "(B) a blocked asset (whether or not subsequently unblocked) ...; and
>
> "(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran...." § 8772(a)(1).

In addition, the court in which execution is sought must determine "whether Iran holds equitable title to, or the beneficial interest in, the assets ... and that no other person possesses a constitutionally protected interest in the assets ... under the Fifth Amendment to the Constitution of the United States." § 8772(a)(2).

B

Respondents are victims of Iran-sponsored acts of terrorism, their estate representatives, and surviving family members. See App. to Pet. for Cert. 52a–53a; Brief for Respondents 6. Numbering more than 1,000, respondents rank within 16 discrete groups, each of which brought a lawsuit against Iran pursuant to the FSIA's terrorism exception. App. to Brief for Respondents 1a–2a. All of the suits were filed in United States District Court for the District of Columbia. [5] Upon finding a clear evidentiary basis for Iran's liability to each suitor, the court entered judgments by default. See, *e.g., Peterson v. Islamic Republic of Iran,* 264 F.Supp.2d 46, 49 (2003). The majority of respondents sought redress for injuries suffered in connection with the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon. ***1320** App. to Pet. for Cert. 21a. [6] "Together, [respondents] have obtained billions of dollars in judgments against Iran, the vast majority of which remain unpaid." *Id.,* at 53a. [7] The validity of those judgments is not in dispute. *Id.,* at 55a.

To enforce their judgments, the 16 groups of respondents first registered them in the United States District Court for the Southern District of New York. See 28 U.S.C. § 1963 ("A judgment ... may be registered ... in any other district.... A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."). They then moved under Federal Rule of Civil Procedure 69 for turnover of about $1.75 billion in bond assets held in a New York bank account—assets that, respondents alleged, were owned by Bank Markazi. See App. to Pet. for Cert. 52a–54a, 60a, and n. 1; Second Amended Complaint in No. 10–CIV–4518 (SDNY), p. 6. [8] This turnover proceeding began in 2008 when the terrorism judgment holders in *Peterson,* 264 F.Supp.2d 46, filed writs of execution and the District Court restrained the bonds. App. to Pet. for Cert. 14a–15a, 62a. Other groups of terrorism judgment holders—some of which had filed their own writs of execution against the bonds—were joined in No. 10–CIV–4518, the *Peterson* enforcement proceeding, through a variety of procedural mechanisms. [9] It is this consolidated judgment-enforcement proceeding and assets restrained in that proceeding that § 8772 addresses.

Although the enforcement proceeding was initiated prior to the issuance of Executive Order No. 13599 and the enactment of § 8772, the judgment holders updated their motions in 2012 to include execution claims under § 8772. Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion for Partial Summary Judgment in No. 10–CIV–4518 (SDNY). [10] ***1321** Making the findings necessary under § 8772, the District Court ordered the requested turnover. App. to Pet. for Cert. 109a. [11]

In reaching its decision, the court reviewed the financial history of the assets and other record evidence showing that Bank Markazi owned the assets. See *id.,* at 111a–113a, and n. 17. Since at least early 2008, the court recounted, the bond assets have been held in a New York account at Citibank directly controlled by Clearstream Banking, S.A. (Clearstream), a Luxembourg-based company that serves "as an intermediary between financial institutions worldwide." *Id.,* at 56a–57a (internal quotation makes omitted). Initially, Clearstream held the assets for Bank Markazi and deposited interest earned on the bonds into Bank Markazi's Clearstream account. At some point in 2008, Bank Markazi instructed Clearstream to position another intermediary—Banca UBAE, S.p.A., an Italian bank—between the bonds and Bank Markazi. *Id.,* at 58a–59a. Thereafter, Clearstream deposited interest payments in UBAE's account, which UBAE then remitted to Bank Markazi. *Id.,* at 60a–61a. [12]

Resisting turnover of the bond assets, Bank Markazi and Clearstream, as the District Court observed, "filled the proverbial kitchen sink with arguments." *Id.,* at 111a. They argued, *inter alia,* the absence of subject-matter and personal jurisdiction, *id.,* at 73a–104a, asserting that the blocked assets were not assets "of" the Bank, see *supra,* at 1318, n. 3, and that the assets in question were located in Luxembourg, not New York, App. to Pet. for Cert. 100a. Several of their objections to execution became irrelevant following enactment of § 8772, which, the District Court noted, "sweeps away ... any ... federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made." *Id.,* at 73a; § 8772(a)(1) (Act applies "notwithstanding any other provision of law"). After § 8772's passage, Bank Markazi changed its defense. It

conceded that Iran held the requisite "equitable title to, or beneficial interest in, the assets," § 8772(a)(2)(A), but maintained that § 8772 could not withstand inspection under the separation-of-powers doctrine. See Defendant Bank Markazi's Supplemental Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment in No. 10–CIV–4518 (SDNY), pp. 1–3, 10–16. [13]

***1322** "[I]n passing § 8772," Bank Markazi argued, "Congress effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts." App. to Pet. for Cert. 114a. The District Court disagreed. The ownership determinations § 8772 required, see *supra,* at 1320 – 1321, the court said, "[were] not mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that Clearstream and/or UBAE ha[d] some form of beneficial or equitable interest." App. to Pet. for Cert. 115a. Observing from the voluminous filings that "[t]here [was] ... plenty ... to [litigate]," the court described § 8772 as a measure that "merely chang[es] the law applicable to pending cases; it does not usurp the adjudicative function assigned to federal courts." *Ibid.* (internal quotation marks omitted). Further, the court reminded, "Iran's liability and its required payment of damages was ... established years prior to the [enactment of § 8772]"; "[a]t issue [here] is merely execution [of judgments] on assets present in this district." *Id.,* at 116a. [14]

The Court of Appeals for the Second Circuit unanimously affirmed. *Peterson v. Islamic Republic of Iran,* 758 F.3d 185 (2014). [15] On appeal, Bank Markazi again argued that § 8772 violates the separation of powers "by compelling the courts to reach a predetermined result in this case." *Id.,* at 191. In accord with the District Court, the Second Circuit responded that "§ 8772 does not compel judicial findings [or results] under old law"; "rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority." *Ibid.* Congress may so prescribe, the appeals court noted, "even when the result under the revised law is clear." *Ibid.*

To consider the separation-of-powers question Bank Markazi presents, we granted certiorari, 576 U.S. ——, 136 S.Ct. 26, 192 L.Ed.2d 997 (2015), and now affirm. [16]

II

Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). Necessarily, that endowment of authority blocks Congress from "requir[ing] federal courts to exercise the ***1323** judicial power in a manner that Article III forbids." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). Congress, no doubt, "may not usurp a court's power to interpret and apply the law to the [circumstances] before it," Brief for Former Senior Officials of the Office of Legal Counsel as *Amici Curiae* 3, 6, for "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule," *Marbury,* 1 Cranch, at 177. [17] And our decisions place off limits to Congress "vest[ing] review of the decisions of Article III courts in officials of the Executive Branch." *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447 (citing *Hayburn's Case,* 2 Dall. 409, 1 L.Ed. 436 (1792), and, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 114, 68 S.Ct. 431, 92 L.Ed. 568 (1948)). Congress, we have also held, may not "retroactively comman[d] the federal courts to reopen final judgments." *Plaut,* 514 U.S., at 219, 115 S.Ct. 1447.

A

Citing *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872), Bank Markazi urges a further limitation. Congress treads impermissibly on judicial turf, the Bank maintains, when it "prescribe[s] rules of decision to the Judicial Department ... in [pending] cases." *Id.,* at 146. According to the Bank, § 8772 fits that description. Brief for Petitioner 19, 43. *Klein* has been called

"a deeply puzzling decision," Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2538 (1998). [18] More recent decisions, however, have made it clear that *Klein* does not inhibit Congress from "amend[ing] applicable law." *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 441, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992); see *id.,* at 437–438, 112 S.Ct. 1407; *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447 (*Klein* 's "prohibition does not take hold when Congress 'amend[s] applicable law.' " (quoting *Robertson,* 503 U.S., at 441, 112 S.Ct. 1407)). Section 8772, we hold, did just that.

Klein involved Civil War legislation providing that persons whose property had been seized and sold in wartime could recover the proceeds of the sale in the Court of Claims upon proof that they had "never given any aid or comfort to the present rebellion." Ch. 120, § 3, 12 Stat. 820; see *Klein,* 13 Wall., at 139. In 1863, President Lincoln pardoned "persons who ... participated in the ... rebellion" if they swore an oath of loyalty to the United States. Presidential Proclamation No. 11, 13 Stat. 737. One of the persons so pardoned was a southerner named Wilson, whose cotton had been seized and sold by Government agents. Klein was the administrator of Wilson's estate. 13 Wall., at 132. In ***1324** *United States v. Padelford,* 9 Wall. 531, 543, 19 L.Ed. 788 (1870), this Court held that the recipient of a Presidential pardon must be treated as loyal, *i.e.,* the pardon operated as "a complete substitute for proof that [the recipient] gave no aid or comfort to the rebellion." Thereafter, Klein prevailed in an action in the Court of Claims, yielding an award of $125,300 for Wilson's cotton. 13 Wall., at 132.

During the pendency of an appeal to this Court from the Court of Claims judgment in *Klein,* Congress enacted a statute providing that no pardon should be admissible as proof of loyalty. Moreover, acceptance of a pardon without disclaiming participation in the rebellion would serve as conclusive evidence of disloyalty. The statute directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon. 16 Stat. 235; R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 323, n. 29 (7th ed. 2015) (Hart and Wechsler). Affirming the judgment of the Court of Claims, this Court held that Congress had no authority to "impai[r] the effect of a pardon," for the Constitution entrusted the pardon power "[t]o the executive alone." *Klein,* 13 Wall., at 147. The Legislature, the Court stated, "cannot change the effect of ... a pardon any more than the executive can change a law." *Id.,* at 148. Lacking authority to impair the pardon power of the Executive, Congress could not "direc[t] [a] court to be instrumental to that end." *Ibid.* In other words, the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe. See *id.,* at 146–147; *Robertson,* 503 U.S., at 438, 112 S.Ct. 1407 (Congress may not "compe [l] ... findings or results under old law"). [19]

Bank Markazi, as earlier observed, *supra,* at 1323, argues that § 8772 conflicts with *Klein*. The Bank points to a statement in the *Klein* opinion questioning whether "the legislature may prescribe rules of decision to the Judicial Department ... in cases pending before it." 13 Wall., at 146. One cannot take this language from *Klein* "at face value," however, "for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized." Hart and Wechsler 324. See, *e.g., United States v. Schooner Peggy,* 1 Cranch 103, 110, 2 L.Ed. 49 (1801). As we explained in *Landgraf v. USI Film Products,* 511 U.S. 244, 267, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the restrictions that the Constitution places on retroactive legislation "are of limited scope":

> "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing ... laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on ***1325** 'Bills of Attainder' in Art. I, §§ 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.,* at 266–267, 114 S.Ct. 1483 (citation and footnote omitted).

"Absent a violation of one of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope." *Id.,*

at 267–268, 114 S.Ct. 1483. So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases. See *Plaut,* 514 U.S., at 226, 115 S.Ct. 1447. Any lingering doubts on that score have been dispelled by *Robertson,* 503 U.S., at 441, 112 S.Ct. 1407 and *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447.

Bank Markazi argues most strenuously that § 8772 did not simply amend pre-existing law. Because the judicial findings contemplated by § 8772 were "foregone conclusions," the Bank urges, the statute "effectively" directed certain factfindings and specified the outcome under the amended law. See Brief for Petitioner 42, 47. See also *supra*, at 1322 – 1323. Recall that the District Court, closely monitoring the case, disagreed. *Supra,* at 1321 – 1322; App. to Pet. for Cert. 115a ("[The] determinations [required by § 8772] [were] not mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that Clearstream and/or UBAE ha [d] some form of beneficial or equitable interest."). [20]

In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. "When a plaintiff brings suit to enforce a legal obligation it is not any less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable." *Pope v. United States,* 323 U.S. 1, 11, 65 S.Ct. 16, 89 L.Ed. 3 (1944). In *Schooner Peggy,* 1 Cranch, at 109–110, ***1326** for example, this Court applied a newly ratified treaty that, by requiring the return of captured property, effectively permitted only one possible outcome. And in *Robertson,* 503 U.S., at 434–435, 438–439, 112 S.Ct. 1407 a statute replaced governing environmental-law restraints on timber harvesting with new legislation that permitted harvesting in all but certain designated areas. Without inquiring whether the new statute's application in pending cases was a "foregone conclusio[n]," Brief for Petitioner 47, we upheld the legislation because it left for judicial determination whether any particular actions violated the new prescription. In short, § 8772 changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.

Resisting this conclusion, THE CHIEF JUSTICE compares § 8772 to a hypothetical "law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings." *Post,* at 1335 – 1336. [21] Of course, the hypothesized law would be invalid—as would a law directing judgment for Smith, for instance, if the court finds that the sun rises in the east. For one thing, a law so cast may well be irrational and, therefore, unconstitutional for reasons distinct from the separation-of-powers issues considered here. See, *e.g., infra,* at 1327, n. 27. For another, the law imagined by the dissent does what *Robertson* says Congress cannot do: Like a statute that directs, in "Smith v. Jones," "Smith wins," *supra,* at 1323, n. 17, it "compel[s] ... findings or results under old law," for it fails to supply any new legal standard effectuating the lawmakers' reasonable policy judgment, 503 U.S., at 438, 112 S.Ct. 1407. [22] By contrast, § 8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets. Applying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.

B

Section 8772 remains "unprecedented," Bank Markazi charges, because it "prescribes a rule for a single pending case—identified by caption and docket number." Brief for Petitioner 17. [23] The amended law in *Robertson,* however, also applied to cases identified by caption and docket number, 503 U.S., at 440, 112 S.Ct. 1407 and was nonetheless upheld. Moreover, § 8772, as already described, see *supra,* at 1319 – 1321, facilitates execution of judgments in 16 suits, together encompassing more than 1,000 victims of Iran-sponsored ***1327** terrorist attacks. [24] Although consolidated for administrative purposes at the execution stage, [25] the judgment-execution claims brought pursuant to Federal Rule of Civil Procedure 69 were not independent of the original actions for damages and each claim retained its separate character. See *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 834–835, n. 10, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (postjudgment garnishment action brought under Rule 69 is part of the "process to enforce a judgment," not a new suit (alteration omitted and emphasis deleted)); 10 Cyclopedia of Federal Procedure § 36:8, p. 385 (3 ed. 2010) ("Proceedings in execution are proceedings in the action itself...."); 9A C.

Wright & A. Miller, Federal Practice and Procedure § 2382, p. 10 (3d ed. 2008) ("[A]ctions do not lose their separate identity because of consolidation."). [26]

The Bank's argument is further flawed, for it rests on the assumption that legislation must be generally applicable, that "there is something wrong with particularized legislative action." *Plaut,* 514 U.S., at 239, n. 9, 115 S.Ct. 1447. We have found that assumption suspect:

> "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that [the Clause] requires not merely 'singling out' but also *punishment,* see, *e.g., United States v. Lovett,* 328 U.S. 303, 315–318 [66 S.Ct. 1073, 90 L.Ed. 1252] (1946), [or] a case [holding] that Congress may legislate 'a legitimate class of one,' *Nixon v. Administrator of General Services,* 433 U.S. 425, 472 [97 S.Ct. 2777, 53 L.Ed.2d 867] (1977)." *Ibid.* [27]

***1328** This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects. *E.g., Regional Rail Reorganization Act Cases,* 419 U.S. 102, 158–161, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (upholding Act that applied to specific railroads in a single region); *Pope,* 323 U.S., at 9–14, 65 S.Ct. 16 (upholding special Act giving a contractor the right to recover additional compensation from the Government); *The Clinton Bridge,* 10 Wall. 454, 462–463, 19 L.Ed. 969 (1870) (upholding Act governing a single bridge); *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 430–432, 15 L.Ed. 435 (1856) (similar); *Biodiversity Assoc. v. Cables,* 357 F.3d 1152, 1156, 1164–1171 (C.A.10 2004) (upholding law that abrogated specific settlement agreement between U.S. Forest Service and environmental groups); *SeaRiver Maritime Financial Holdings, Inc. v. Mineta,* 309 F.3d 662, 667, 674–675 (C.A.9 2002) (upholding law that effectively applied to a single oil tanker); *National Coalition To Save Our Mall v. Norton,* 269 F.3d 1092, 1097 (C.A.D.C.2001) (upholding law that applied to a single memorial).

C

We stress, finally, that § 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. See, *e.g., Zivotofsky v. Kerry,* 576 U.S. ——, ——, 135 S.Ct. 2076, 2090–2091, 192 L.Ed.2d 83 (2015). In furtherance of their authority over the Nation's foreign relations, Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states and the disposition of foreign-state property in the United States. See *Dames & Moore v. Regan,* 453 U.S. 654, 673–674, 679–681, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (describing this history). In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia,* blocking them or governing their availability for attachment. See *supra,* at 1317 – 1318 (describing the TWEA and the IEEPA); *e.g., Dames & Moore,* 453 U.S., at 669–674, 101 S.Ct. 2972. Such measures have never been rejected as invasions upon the Article III judicial power. Cf. *id.,* at 674, 101 S.Ct. 2972 (Court resists the notion "that the Federal Government as a whole lacked the power" to "nullif[y] ... attachments and orde[r] the transfer of [foreign-state] assets."). [28]

Particularly pertinent, the Executive, prior to the enactment of the FSIA, regularly made case-specific determinations whether sovereign immunity should be recognized, and courts accepted those determinations as binding. See *Republic of Austria v. Altmann,* 541 U.S. 677, 689–691, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004); *Ex parte Peru,* 318 U.S. 578, 588–590, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). As this Court explained in *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945), it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." ***1329** This practice, too, was never perceived as an encroachment on the federal courts' jurisdiction. See *Dames & Moore,* 453 U.S., at 684–685, 101 S.Ct. 2972 ("[P]rior to the

enactment of the FSIA [courts would not have] reject[ed] as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.").

Enacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. See *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488–489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). But it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress. See *Republic of Iraq v. Beaty,* 556 U.S. 848, 856–857, 865, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009). By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets.

* * *

For the reasons stated, we are satisfied that § 8772—a statute designed to aid in the enforcement of federal-court judgments—does not offend "separation of powers principles ... protecting the role of the independent Judiciary within the constitutional design." *Miller v. French,* 530 U.S. 327, 350, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). The judgment of the Court of Appeals for the Second Circuit is therefore

Affirmed.

Chief Justice ROBERTS, with whom Justice SOTOMAYOR joins, dissenting.
Imagine your neighbor sues you, claiming that your fence is on his property. His evidence is a letter from the previous owner of your home, accepting your neighbor's version of the facts. Your defense is an official county map, which under state law establishes the boundaries of your land. The map shows the fence on your side of the property line. You also argue that your neighbor's claim is six months outside the statute of limitations.

Now imagine that while the lawsuit is pending, your neighbor persuades the legislature to enact a new statute. The new statute provides that for your case, and your case alone, a letter from one neighbor to another is conclusive of property boundaries, and the statute of limitations is one year longer. Your neighbor wins. Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to ensure your neighbor's victory, or the court, which presided over the *fait accompli* ?

That question lies at the root of the case the Court confronts today. Article III of the Constitution commits the power to decide cases to the Judiciary alone. See *Stern v. Marshall,* 564 U.S. 462, 484, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Yet, in this case, Congress arrogated that power to itself. Since 2008, respondents have sought $1.75 billion in assets owned by Bank Markazi, Iran's central bank, in order to satisfy judgments against Iran for acts of terrorism. The Bank has vigorously opposed those efforts, asserting numerous legal defenses. So, in 2012, four years into the litigation, respondents persuaded Congress to enact a statute, 22 U.S.C. § 8772, that for this case alone eliminates each of the defenses standing in respondents' way. Then, having gotten Congress to resolve all outstanding issues in their favor, respondents returned to court ... and won.

***1330** Contrary to the majority, I would hold that § 8772 violates the separation of powers. No less than if it had passed a law saying "respondents win," Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory.

I

A

Article III, § 1 of the Constitution vests the "judicial Power of the United States" in the Federal Judiciary. That provision, this Court has observed, "safeguards the role of the Judicial Branch in our tripartite system." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 850, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). It establishes the Judiciary's independence by giving the Judiciary distinct and inviolable authority. "Under the basic concept of separation of powers," the judicial power "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern,* 564 U.S., at 483, 131 S.Ct. 2594 (internal quotation marks omitted). The separation of powers, in turn, safeguards individual freedom. See *Bond v. United States,* 564 U.S. 211, 223, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). As Hamilton wrote, quoting Montesquieu, " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " The Federalist No. 78, p. 466 (C. Rossiter ed. 1961); see Montesquieu, The Spirit of the Laws 157 (A. Cohler, B. Miller, & H. Stone eds. 1989) (Montesquieu).

The question we confront today is whether § 8772 violates Article III by invading the judicial power.

B

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 219, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). We surveyed those ruins in *Plaut* to determine the scope of the judicial power under Article III, and we ought to return to them today for that same purpose.

Throughout the 17th and 18th centuries, colonial legislatures performed what are now recognized as core judicial roles. They "functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments." *Ibid.* They "constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints." G. Wood, The Creation of the American Republic 1776–1787, pp. 154–155 (1969). And they routinely intervened in cases still pending before courts, granting continuances, stays of judgments, "new trials, and other kinds of relief in an effort to do what 'is agreeable to Right and Justice.' " *Id.,* at 155; see Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208, 216–218 (1902) (collecting examples of such laws).

The judicial power exercised by colonial legislatures was often expressly vested in them by the colonial charter or statute. In the Colonies of Massachusetts, Connecticut, and Rhode Island, for example, the assemblies officially served as the highest court of appeals. See 1 The Public Records of the Colony of Connecticut 25 (Trumbull ed. 1850); M. Clarke, Parliamentary Privilege in the American Colonies 31–33 (1943). Likewise, for more than a half century, the colonial assembly ***1331** of Virginia could review and set aside court judgments. *Id.,* at 37–38. And in New Hampshire, where British authorities directed judicial appeals to the governor and his council, those officials often referred such matters to the assembly for decision. *Id.,* at 33. Colonial assemblies thus sat atop the judicial pyramid, with the final word over when and how private disputes would be resolved.

Legislative involvement in judicial matters intensified during the American Revolution, fueled by the "vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies." *Plaut,* 514 U.S., at 219, 115 S.Ct. 1447; see Wood, *supra,* at 155–156. The Pennsylvania Constitution of 1776 epitomized the ethos of legislative supremacy. It established a unicameral assembly unconstrained by judicial review and vested with authority to " 'redress grievances.' " Report of the Committee of the Pennsylvania Council of Censors 42 (F. Bailey ed. 1784) (Council Report); see Williams, The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism, 62 Temp. L. Rev. 541, 547–548, 556 (1989). The assembly, in turn, invoked that authority to depart from legal rules in resolving private disputes in order to ease the "hardships which will always arise from the operation of general laws." Council Report 42–43.

The Revolution-era "crescendo of legislative interference with private judgments of the courts," however, soon prompted a "sense of a sharp necessity to separate the legislative from the judicial power." *Plaut,* 514 U.S., at 221, 115 S.Ct. 1447. In 1778, an influential critique of a proposed (and ultimately rejected) Massachusetts constitution warned that "[i]f the legislative and judicial powers are united, the maker of the law will also interpret it; and the law may then speak a language, dictated by the whims, the caprice, or the prejudice of the judge." The Essex Result, in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, p. 337 (O. Handlin & M. Handlin eds. 1966). In Virginia, Thomas Jefferson complained that the assembly had, "in many instances, decided rights which should have been left to judiciary controversy." Jefferson, Notes on the State of Virginia 120 (Peden ed. 1982). And in Pennsylvania, the Council of Censors—a body appointed to assess compliance with the state constitution—decried the state assembly's practice of "extending their deliberations to the cases of individuals" instead of deferring to "the usual process of law," citing instances when the assembly overturned fines, settled estates, and suspended prosecutions. Council Report 38, 42. "[T]here is reason to think," the Censors observed, "that favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief." *Id.,* at 38.

Vermont's Council of Censors sounded similar warnings. Its 1786 report denounced the legislature's "assumption of the judicial power," which the legislature had exercised by staying and vacating judgments, suspending lawsuits, resolving property disputes, and "legislating for individuals, and for particular cases." Vermont State Papers 1779–1786, pp. 537–542 (W. Slade ed. 1823). The Censors concluded that "[t]he legislative body is, in truth, by no means competent to the determination of causes between party and party," having exercised judicial power "without being shackled with rules," guided only by "crude notions of equity." *Id.,* at 537, 540.

The States' experiences ultimately shaped the Federal Constitution, figuring prominently in the Framers' decision to ***1332** devise a system for securing liberty through the division of power:

> "Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them." *Plaut,* 514 U.S., at 221, 115 S.Ct. 1447.

As Professor Manning has concluded, "Article III, in large measure, reflects a reaction against the practice" of legislative interference with state courts. Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 Colum. L. Rev. 1648, 1663 (2001).

Experience had confirmed Montesquieu's theory. The Framers saw that if the "power of judging ... were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary." Montesquieu 157. They accordingly resolved to take the unprecedented step of establishing a "truly distinct" judiciary. The Federalist No. 78, at 466 (A. Hamilton). To help ensure the "complete independence of the courts of justice," *ibid.,* they provided life tenure for judges and protection against diminution of their compensation. But such safeguards against indirect interference would have been meaningless if Congress could simply exercise the judicial power directly. The central pillar of judicial independence was Article III itself, which vested "[t]he judicial Power of the United States" in "one supreme Court" and such "inferior Courts" as might be established. The judicial power was to be the Judiciary's alone.

II

A

Mindful of this history, our decisions have recognized three kinds of "unconstitutional restriction[s] upon the exercise of judicial power." *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447. Two concern the effect of judgments once they have been rendered: "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch," *ibid.,* for to do so would make a court's judgment merely "an advisory opinion in its most obnoxious form," *Chicago & Southern Air Lines, Inc. v. Waterman*

S.S. Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948). And Congress cannot "retroactively command[ ] the federal courts to reopen final judgments," because Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut,* 514 U.S., at 218–219, 115 S.Ct. 1447. Neither of these rules is directly implicated here.

This case is about the third type of unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 does precisely that, changing the law—for these proceedings alone—simply to guarantee that respondents win. The law serves no other purpose—a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute " 'sweeps away ... any ... federal or state law impediments that might otherwise exist' " to bar respondents from obtaining Bank Markazi's assets. *Ante,* at 1321 (quoting App. to Pet. for Cert. 73a). In the District Court, Bank Markazi had invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1611(b)(1). Brief for Petitioner 28. Section 8772(a)(1) eliminates that immunity. Bank Markazi had argued that its status as a separate juridical entity under federal common law and international ***1333** law freed it from liability for Iran's debts. See *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 624–627, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983); Brief for Petitioner 27–28. Section 8772(d)(3) ensures that the Bank is liable. Bank Markazi had argued that New York law did not allow respondents to execute their judgments against the Bank's assets. See N.Y.U.C.C. Law Ann. § 8–112(c) (West 2002); see also App. to Pet. for Cert. 126a (agreeing with this argument). Section 8772(a)(1) makes those assets subject to execution. See *id.,* at 97a.

Section 8772 authorized attachment, moreover, only for the

> "financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518(BSJ)(GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings...." § 8772(b).

And lest there be any doubt that Congress's sole concern was deciding this particular case, rather than establishing any generally applicable rules, § 8772 provided that nothing in the statute "shall be construed ... to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than" these. § 8772(c). [1]

B

There has never been anything like § 8772 before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings. That fact alone is "[p]erhaps the most telling indication of the severe constitutional problem" with the law. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (internal quotation marks omitted). Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut,* 514 U.S., at 230, 115 S.Ct. 1447.

Section 8772 violates the bedrock rule of Article III that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872). *Klein* arose from congressional opposition to conciliation with the South, and in particular to the pardons Presidents Lincoln and Johnson had offered to former Confederate rebels. See *id.,* at 140–141; see, *e.g.,* Presidential ***1334** Proclamation No. 11, 13 Stat. 737. Although this Court had held that a pardon was proof of loyalty and entitled its holder to compensation in the Court of Claims for property seized by Union forces during the war, see *United States v. Padelford,* 9 Wall. 531, 543, 19 L.Ed. 788 (1870), the Radical Republican Congress wished to prevent pardoned rebels from obtaining such compensation. It therefore enacted a law prohibiting claimants from using a pardon as evidence of loyalty, instead requiring the Court of Claims and Supreme Court to dismiss for want of jurisdiction any suit based on a pardon. See Act of July 12, 1870, ch. 251, 16 Stat. 235; see also *United States v. Sioux Nation,* 448 U.S. 371, 403, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980).

Klein's suit was among those Congress wished to block. Klein represented the estate of one V.F. Wilson, a Confederate supporter whom Lincoln had pardoned. On behalf of the estate, Klein had obtained a sizable judgment in the Court of Claims for property seized by the Union. *Klein,* 13 Wall., at 132–134. The Government's appeal from that judgment was pending in the Supreme Court when the law targeting such suits took effect. The Government accordingly moved to dismiss the entire proceeding.

This Court, however, denied that motion and instead declared the law unconstitutional. It held that the law "passed the limit which separates the legislative from the judicial power." *Id.,* at 147. The Court acknowledged that Congress may "make exceptions and prescribe regulations to the appellate power," but it refused to sustain the law as an exercise of that authority. *Id.,* at 146. Instead, the Court held that the law violated the separation of powers by attempting to "decide" the case by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Id.,* at 145–146. "It is of vital importance," the Court stressed, that the legislative and judicial powers "be kept distinct." *Id.,* at 147.

The majority characterizes *Klein* as a delphic, puzzling decision whose central holding—that Congress may not prescribe the result in pending cases—cannot be taken at face value. [2] It is true that *Klein* can be read too broadly, in a way that would swallow the rule that courts generally must apply a retroactively applicable statute to pending cases. See *United States v. Schooner Peggy,* 1 Cranch 103, 110, 2 L.Ed. 49 (1801). But *Schooner Peggy* can be read too broadly, too. Applying a retroactive law that says "Smith wins" to the pending case of *Smith v.* ***1335** *Jones* implicates profound issues of separation of powers, issues not adequately answered by a citation to *Schooner Peggy*. And just because *Klein* did not set forth clear rules defining the limits on Congress's authority to legislate with respect to a pending case does not mean—as the majority seems to think—that Article III itself imposes no such limits.

The same "record of history" that drove the Framers to adopt Article III to implement the separation of powers ought to compel us to give meaning to their design. *Plaut,* 514 U.S., at 218, 115 S.Ct. 1447. The nearly two centuries of experience with legislative assumption of judicial power meant that "[t]he Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities." *INS v. Chadha,* 462 U.S. 919, 961, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (Powell, J., concurring in judgment) (internal quotation marks omitted). Article III vested the judicial power in the Judiciary alone to protect against that threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot.

The Court says it would reject a law that says "Smith wins" because such a statute "would create no new substantive law." *Ante,* at 1323, n. 17. Of course it would: Prior to the passage of the hypothetical statute, the law did not provide that Smith wins. After the passage of the law, it does. Changing the law is simply how Congress acts. The question is whether its action constitutes an exercise of judicial power. Saying Congress "creates new law" in one case but not another simply expresses a conclusion on that issue; it does not supply a reason.

"Smith wins" is a new law, tailored to one case in the same way as § 8772 and having the same effect. All that both statutes "effectuat[e]," in substance, is lawmakers' "policy judgment" that one side in one case ought to prevail. *Ante,* at 1326. The cause for concern is that though the statutes are indistinguishable, it is plain that the majority recognizes no limit under the separation of powers beyond the prohibition on statutes as brazen as "Smith wins." Hamilton warned that the Judiciary must take "all possible care ... to defend itself against [the] attacks" of the other branches. The Federalist No. 78, at 466. In the Court's view, however, Article III is but a constitutional Maginot Line, easily circumvented by the simplest maneuver of taking away every defense against Smith's victory, without saying "Smith wins."

Take the majority's acceptance of the District Court's conclusion that § 8772 left "plenty" of factual determinations for the court "to adjudicate." *Ante,* at 1324 – 1325, and n. 20 (internal quotation marks omitted). All § 8772 actually required of the court was two factual determinations—that Bank Markazi has an equitable or beneficial interest in the assets, and that no other party does, § 8772(a)(2)—both of which were well established by the time Congress enacted § 8772. Not only had the assets at issue been frozen pursuant to an Executive Order blocking "property of the Government of Iran," Exec. Order No. 13599,

77 Fed. Reg. 6659 (2012), but the Bank had "repeatedly insisted that it is the sole beneficial owner of the Blocked Assets," App. to Pet. for Cert. 113a. By that measure of "plenty," the majority would have to uphold a law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings, and that Smith's claim was within the statute of limitations. In reality, the Court's "plenty" is plenty of nothing, and, apparently, nothing is plenty for the Court. See D. Heyward & I. Gershwin, Porgy and Bess: Libretto 28 (1958).

***1336** It is true that some of the precedents cited by the majority, *ante,* at 1325 – 1327, have allowed Congress to approach the boundary between legislative and judicial power. None, however, involved statutes comparable to § 8772. In *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992), for example, the statute at issue referenced particular cases only as a shorthand for describing certain environmental law requirements, *id.,* at 433–435, 112 S.Ct. 1407 not to limit the statute's effect to those cases alone. And in *Plaut,* the Court explicitly distinguished the statute before it—which directed courts to reopen final judgments in an entire class of cases—from one that " 'single[s] out' any defendant for adverse treatment (or any plaintiff for favorable treatment)." 514 U.S., at 238, 115 S.Ct. 1447. *Plaut,* in any event, held the statute before it *invalid,* concluding that it violated Article III based on the same historical understanding of the judicial power outlined above. *Id.,* at 219–225, 240, 115 S.Ct. 1447. [3]

I readily concede, without embarrassment, that it can sometimes be difficult to draw the line between legislative and judicial power. That should come as no surprise; Chief Justice Marshall's admonition "that 'it is a *constitution* we are expounding' is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution—that of separation of powers." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 596–597, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring) (quoting *McCulloch v. Maryland,* 4 Wheat. 316, 407, 4 L.Ed. 579 (1819)). But however difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line. The Court's failure to enforce that boundary in a case as clear as this reduces Article III to a mere "parchment barrier [ ] against the encroaching spirit" of legislative power. The Federalist No. 48, at 308 (J. Madison).

C

Finally, the majority suggests that § 8772 is analogous to the Executive's historical power to recognize foreign state sovereign immunity on a case-by-case basis. As discussed above, however, § 8772 does considerably more than withdraw the Bank's sovereign immunity. *Supra,* at 1319 – 1321. It strips the Bank of any protection that federal common law, international law, or New York State law might have offered against respondents' claims. That is without analogue or precedent. In any event, the practice of applying case-specific Executive submissions on sovereign immunity was not judicial acquiescence in an intrusion on the Judiciary's role. It was instead the result of substantive sovereign immunity law, developed and applied by the courts, which treated such a submission as a dispositive fact. See *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486–487, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983); *Ex parte Peru,* 318 U.S. 578, 587–588, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

The majority also compares § 8772 to the political branches' authority to "exercise[ ] control over claims against foreign states and the disposition of foreign-state property in the United States." ***1337** *Ante,* at 1327 (citing *Dames & Moore v. Regan,* 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981)). In *Dames & Moore,* we considered whether the President had authority to suspend claims against Iran, and to nullify existing court orders attaching Iran's property, in order to fulfill U.S. obligations under a claims settlement agreement with that country. *Id.,* at 664–667, 101 S.Ct. 2972. We held that the President had that power, based on a combination of statutory authorization, congressional acquiescence, and inherent Executive power. See *id.,* at 674–675, 686, 101 S.Ct. 2972.

The majority suggests that *Dames & Moore* supports the validity of § 8772. But *Dames & Moore* was self-consciously "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright,* 321 U.S. 649, 669, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (Roberts, J., dissenting). The Court stressed in *Dames & Moore* that it "attempt[ed] to lay down no general 'guidelines' covering other situations not involved here, and attempt[ed] to confine the opinion only to the very questions necessary to [the]

decision of the case." 453 U.S., at 661, 101 S.Ct. 2972; see also *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 438, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (GINSBURG, J., dissenting) ("Notably, the Court in *Dames & Moore* was emphatic about the 'narrowness' of its decision.").

There are, moreover, several important differences between *Dames & Moore* and this case. For starters, the executive action *Dames & Moore* upheld did not dictate how particular claims were to be resolved, but simply required such claims to be submitted to a different tribunal. 453 U.S., at 660, 101 S.Ct. 2972. Furthermore, *Dames & Moore* sanctioned that action based on the political branches' "longstanding" practice of "settl[ing] the claims of [U.S.] nationals against foreign countries" by treaty or executive agreement. *Id.,* at 679, 101 S.Ct. 2972. The Court emphasized that throughout our history, the political branches have at times "disposed of the claims of [U.S.] citizens without their consent, or even without consultation with them," by renouncing claims, settling them, or establishing arbitration proceedings. *Id.,* at 679–681, 101 S.Ct. 2972 (internal quotation marks omitted). Those dispositions, crucially, were not exercises of judicial power, as is evident from the fact that the Judiciary lacks authority to order settlement or establish new tribunals. That is why *Klein* was not at issue in *Dames & Moore*. By contrast, no comparable history sustains Congress's action here, which seeks to provide relief to respondents not by transferring their claims in a manner only the political branches could do, but by commandeering the courts to make a political judgment look like a judicial one. See *Medellín v. Texas,* 552 U.S. 491, 531, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (refusing to extend the President's claims-settlement authority beyond the "narrow set of circumstances" defined by the " 'systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned' " (quoting *Dames & Moore,* 453 U.S., at 686, 101 S.Ct. 2972)).

If anything, what *Dames & Moore* reveals is that the political branches have extensive powers of their own in this area and could have chosen to exercise them to give relief to the claimants in this case. Cf. 50 U.S.C. § 1702(a)(1)(C) (authorizing the President, in certain emergency circumstances, to confiscate and dispose of foreign sovereign property). The authority of the political branches is sufficient; they have no need to seize ours.

* * *

***1338** At issue here is a basic principle, not a technical rule. Section 8772 decides this case no less certainly than if Congress had directed entry of judgment for respondents. As a result, the potential of the decision today "to effect important change in the equilibrium of power" is "immediately evident." *Morrison v. Olson,* 487 U.S. 654, 699, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting). Hereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases. Today's decision will indeed become a "blueprint for extensive expansion of the legislative power" at the Judiciary's expense, *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 277, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991), feeding Congress's tendency to "extend[ ] the sphere of its activity and draw[ ] all power into its impetuous vortex," The Federalist No. 48, at 309 (J. Madison).

I respectfully dissent.

All Citations

136 S.Ct. 1310, 194 L.Ed.2d 463, 84 USLW 4222, 14 Cal. Daily Op. Serv. 4110, 2016 Daily Journal D.A.R. 3729, 26 Fla. L. Weekly Fed. S 100

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice THOMAS joins all but Part II–C of this opinion.

1 The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country" and renders a foreign government "presumptively immune from the jurisdiction of United States courts unless one of the Act's express exceptions to sovereign immunity applies." *OBB Personenverkehr AG v. Sachs,* 577 U.S. ——, ——, 136 S.Ct. 390, 394, 193 L.Ed.2d 269 (2015) (internal quotation marks omitted); see 28 U.S.C. § 1330(a) (conferring jurisdiction over "any claim ... with respect to which the foreign state is not entitled to immunity"); § 1604 (on "[i]mmunity of a foreign state from jurisdiction").

2 Again expanding the availability of assets for postjudgment execution, Congress, in 2008, amended the FSIA to make available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state. See § 1083 of the National Defense Authorization Act for Fiscal Year 2008, 122 Stat. 341, 28 U.S.C. § 1610(g). Section 1610(g) does not take precedence over "any other provision of law," as the TRIA does. See TRIA § 201(a). Hence, the FSIA's central-bank immunity provision, see *supra,* at 1316, limits § 1610(g), but not the TRIA.

3 As a defense to execution, Bank Markazi contended that the blocked assets were not assets "of" Bank Markazi. See TRIA § 201(a). Referring to state property law, Bank Markazi asserted that the assets were "of" a financial intermediary which held them in the United States on Bank Markazi's behalf. See App. to Pet. for Cert. 96a–100a.

4 Title 22 U.S.C. § 8772(a)(1) applies "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempt[s] any inconsistent provision of State law."

5 The 16 judgments include: *Wultz v. Islamic Republic of Iran,* 864 F.Supp.2d 24 (DC 2012); *Murphy v. Islamic Republic of Iran,* 740 F.Supp.2d 51 (DC 2010); *Valore v. Islamic Republic of Iran,* 700 F.Supp.2d 52 (DC 2010) (granting judgment in consolidation of four actions at issue here: *Valore,* No. 1:03–cv–01959; *Bonk v. Islamic Republic of Iran,* No. 1:08–cv–01273; *Spencer v. Islamic Republic of Iran,* No. 1:06–cv–00750; and *Arnold v. Islamic Republic of Iran,* No. 1:06–cv–00516); *Estate of Brown v. Islamic Republic of Iran,* No. 1:08–cv–00531 (DDC, Feb. 1, 2010); *Acosta v. Islamic Republic of Iran,* 574 F.Supp.2d 15 (DC 2008); *Beer v. Islamic Republic of Iran,* 574 F.Supp.2d 1 (DC 2008); *Kirschenbaum v. Islamic Republic of Iran,* 572 F.Supp.2d 200 (DC 2008); *Levin v. Islamic Republic of Iran,* 529 F.Supp.2d 1 (DC 2007); *Estate of Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229 (DC 2006); *Estate of Bland v. Islamic Republic of Iran,* No. 1:05–cv–02124 (DDC, Dec. 6, 2006); *Greenbaum v. Islamic Republic of Iran,* 451 F.Supp.2d 90 (DC 2006); *Campuzano v. Islamic Republic of Iran,* 281 F.Supp.2d 258 (DC 2003) (awarding judgment in both the *Rubin* action, *Rubin v. Islamic Republic of Iran,* No. 1:01–cv–01655, the plaintiffs of which are respondents here, and the *Campuzano* action, the plaintiffs of which are not); *Peterson v. Islamic Republic of Iran,* 264 F.Supp.2d 46 (DC 2003). Three additional groups of plaintiffs with claims against Iran were voluntarily dismissed from the instant litigation after "informing the [District Court] that none of the plaintiffs in those actions ha[d] obtained judgments for damages against Iran." App. to Pet. for Cert. 19a.

6 "At approximately 6:25 a.m. Beirut time, ... [a] truck crashed through a ... barrier and a wall of sandbags, and entered the barracks. When the truck reached the center of the barracks, the bomb in the truck detonated...." *Peterson,* 264 F.Supp.2d, at 56 (footnote omitted). "As a result of the Marine barracks explosion, 241 servicemen were killed...." *Id.,* at 58. The United States has long recognized Iran's complicity in this attack. See H.R.Rep. No. 104–523, pt. 1, p. 9 (1996) ("After an Administration determination of Iran's involvement in the bombing of the Marine barracks in Beirut in October 1983, Iran was placed on the U.S. list of state sponsors of terrorism on January 19, 1984.").

7 Some of these 16 judgments awarded compensatory and punitive damages. See, *e.g., Wultz,* 864 F.Supp.2d, at 42; *Acosta,* 574 F.Supp.2d, at 31. Both § 201(a) of the TRIA and § 8772(a)(1) permit execution only "to the extent of any compensatory damages."

8 Federal Rule of Civil Procedure 69(a)(1) provides: "A money judgment is enforced by writ of execution.... The procedure on execution —and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

9 Some moved to intervene; others became part of the proceeding by way of an interpleader motion filed by Citibank. App. to Pet. for Cert. 15a, 52a–53a, n. 1; Third–Party Petition Alleging Claims in the Nature of Interpleader in No. 10–CIV–4518 (SDNY), pp. 12–14. One group of respondents intervened much later than the others, in 2013, after § 8772's enactment. See App. to Pet. for Cert. 18a–19a.

10 Before § 8772's enactment, respondents' execution claims relied on the TRIA. Even earlier, *i.e.,* prior to Executive Order No. 13599, which blocked the assets and thereby opened the door to execution under the TRIA, respondents sought turnover pursuant to the FSIA's terrorism judgment execution provisions. See Second Amended Complaint in No. 10–CIV–4518 (SDNY), pp. 27, 35–36; *supra,* at 1317 – 1318, and n. 2.

11 In April 2012, the last of the bonds matured, leaving only "cash associated with the bonds" still restrained in the New York bank account. App. to Pet. for Cert. 61a.

12 Citibank is a "neutral stakeholder," seeking only "resolution of ownership of [the] funds." App. to Pet. for Cert. 54a (internal quotation marks omitted). UBAE did not contest turnover of the $1.75 billion in assets at issue here (though it disputed the District Court's personal jurisdiction in anticipation of other execution claims not now before us). See Memorandum of Law in Support of Banca UBAE, S.p.A.'s Opposition to the Plaintiffs' Motion for Partial Summary Judgment in No. 10–CIV–4518 (SDNY), pp. 1–2.

13 In addition, Bank Markazi advanced one argument not foreclosed by § 8772's text, and another that, at least in Bank Markazi's estimation, had not been rendered irrelevant by § 8772. First, Bank Markazi argued that the availability of the assets for execution was a nonjusticiable political question because execution threatened to interfere with European blocking regulations. App. to Pet. for Cert. 92a–94a. Second, the Bank urged that execution would violate U.S. treaty obligations to Iran. See Defendant Bank Markazi's Supplemental Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment in No. 10–CIV–4518 (SDNY), pp. 2–3, 21–25. The District Court found these arguments unavailing. The matter was justiciable, the court concluded, because § 8772's enactment demonstrated that the political branches were not troubled about interference with European blocking regulations. App. to Pet. for Cert. 94a–96a. And treaty provisions interposed no bar to enforcement of § 8772 because, the court reiterated, § 8772 displaces "any" inconsistent provision of law, treaty obligations included. *Id.,* at 101a–102a.

14 Bank Markazi and Clearstream unsuccessfully sought to defeat turnover on several other constitutional grounds: the Bill of Attainder, *Ex post facto,* Equal Protection, and Takings Clauses. See *id.,* at 115a–119a. Those grounds are no longer pressed.

15 Clearstream and UBAE settled with respondents before the Second Circuit's decision. *Peterson v. Islamic Republic of Iran,* 758 F.3d 185, 189 (2014).

16 Respondents suggest that we decide this case on the ground that § 201(a) of the TRIA independently authorizes execution against the assets here involved, instead of reaching the constitutional question petitioner raises regarding § 8772. Brief for Respondents 53. The Court of Appeals, however, did not "resolve th[e] dispute under the TRIA," 758 F.3d, at 189, nor do we. This Court generally does not decide issues unaddressed on first appeal—especially where, as here, the matter falls outside the question presented and has not been thoroughly briefed before us.

17 Consistent with this limitation, respondents rightly acknowledged at oral argument that Congress could not enact a statute directing that, in "Smith v. Jones," "Smith wins." Tr. of Oral Arg. 40. Such a statute would create no new substantive law; it would instead direct the court how pre-existing law applies to particular circumstances. See *infra* this page and 1323 – 1327. THE CHIEF JUSTICE challenges this distinction, *post,* at 1322 – 1323, but it is solidly grounded in our precedent. See *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 439, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992) (A statute is invalid if it "fail[s] to supply new law, but direct[s] results under old law."), discussed in R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015).

18 See also *id.*, at 323 (calling *Klein* a "delphic opinion"); Tyler, The Story of *Klein* : The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts, in Federal Courts Stories 87 (V. Jackson & J. Resnik eds. 2010) (calling *Klein* "baffl[ing]") (Tyler).

19 Given the issue before the Court—Presidential pardons Congress sought to nullify by withdrawing federal-court jurisdiction—commentators have rightly read *Klein* to have at least this contemporary significance: Congress "may not exercise [its authority, including its power to regulate federal jurisdiction,] in a way that requires a federal court to act unconstitutionally." Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2549 (1998). See also Tyler 112 ("Congress may not employ the courts in a way that forces them to become active participants in violating the Constitution.").

20 The District Court understandably concluded that § 8772 left it "plenty ... to adjudicate." App. to Pet. for Cert. 115a. For one, the statute did not define its key terms, "beneficial interest" and "equitable title." To arrive at fitting definitions, the District Court consulted legal dictionaries and precedent. See *id.,* at 111a–112a; *Zivotofsky v. Clinton,* 566 U.S. ——, ——, 132 S.Ct. 1421, 1427, 182 L.Ed.2d 423 (2012) (Interpretation of statutes "is a familiar judicial exercise."). Further, § 8772 required the District Court to determine whether the Bank owned the assets in question. § 8772(a)(2)(A). Clearstream contended that there were triable issues as to whether Bank Markazi was the owner of the blocked assets. App. to Pet. for Cert. 37a–39a, 111a. The court rejected that contention, finding that Clearstream and UBAE were merely account holders, maintaining the assets "on behalf of" the Bank. *Id.,* at 112a–113a; see *id.,* at 38a–39a. Next, § 8772 required the court to determine whether any party, other than the Bank, possessed a "constitutionally protected interest" in the assets. § 8772(a)(2)(B). Clearstream argued that it had such an interest, but the court disagreed. App. to Pet. for Cert. 117a–118a (determining that Clearstream had no constitutionally protected "investment-backed expectatio[n]" in the assets). Finally, prior to the statute's enactment, Bank Markazi and Clearstream had argued that the assets in question were located in Luxembourg, not New York. *Supra,* at 1321. Leaving the issue for court resolution, Congress, in § 8772(a)(1), required the District Court to determine whether the assets were "held in the United States."

21 Recall, again, that respondents are judgment creditors who prevailed on the merits of their respective cases. Section 8772 serves to facilitate their ability to collect amounts due to them from assets of the judgment debtor.

22 The dissent also analogizes § 8772 to a law that makes "conclusive" one party's flimsy evidence of a boundary line in a pending property dispute, notwithstanding that the governing law ordinarily provides that an official map establishes the boundary. *Post,* at 1316. Section 8772, however, does not restrict the evidence on which a court may rely in making the required findings. A more fitting analogy for depicting § 8772's operation might be: In a pending property dispute, the parties contest whether an ambiguous statute makes a 1990 or 2000 county map the relevant document for establishing boundary lines. To clarify the matter, the legislature enacts a law specifying that the 2000 map supersedes the earlier map.

23 At oral argument, Bank Markazi clarified that its argument extended beyond a single pending case, encompassing as well "a limited category of cases." Tr. of Oral Arg. 5. See also *id.,* at 57–58.

24 Section 8772's limitation to one consolidated proceeding operates unfairly, Bank Markazi suggests, because other judgment creditors "would be subject to a completely different rule" if they "sought to execute against the same assets" outside No. 10–CIV–4518. Brief for Petitioner 26 (citing § 8772(c) ("Nothing in this section shall be construed ... to affect ... any proceedings other than" No. 10–CIV–4518)). But nothing in § 8772 prevented additional judgment creditors from joining the consolidated proceeding after the statute's enactment. Indeed, one group of respondents did so. See *supra,* at 1320, n. 9.

25 District courts routinely consolidate multiple related matters for a single decision on common issues. See, *e.g., Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC,* 476 B.R. 715, 717 (S.D.N.Y.2012) (deciding several legal questions arising in over 80 cases concerning "the massive Ponzi scheme perpetrated by Bernard L. Madoff").

26 Questioning this understanding of the proceedings below, THE CHIEF JUSTICE emphasizes that many of the judgment creditors were joined in the *Peterson* enforcement proceeding by interpleader. See *post,* at 1333, n. 1. That is true, *supra,* at 1320, n. 9, but irrelevant. As explained above, execution proceedings are continuations of merits proceedings, not new lawsuits. Thus, the fact that many creditors joined by interpleader motion did not transform execution claims in 16 separate suits into "a single case." *Post,* at 1333, n. 1.

27 Laws narrow in scope, including "class of one" legislation, may violate the Equal Protection Clause if arbitrary or inadequately justified. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (*per curiam*) (internal quotation marks omitted); *New Orleans v. Dukes,* 427 U.S. 297, 305–306, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (*per curiam*).

28 THE CHIEF JUSTICE correctly notes that the Court in *Dames & Moore v. Regan,* 453 U.S. 654, 661, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), urged caution before extending its analysis to "other situations" not presented in that case. *Post,* at 1337. Much of the Court's cause for concern, however, was the risk that the ruling could be construed as license for the broad exercise of unilateral executive power. See 453 U.S., at 688, 101 S.Ct. 2972; *American Ins. Assn. v. Garamendi,* 539 U.S. 396, 438, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (GINSBURG, J., dissenting). As § 8772 is a law passed by Congress and signed by the President, that risk is nonexistent here.

1 The majority quarrels with the description of § 8772 as being directed to a single case, noting that the claimants had sought attachment of the assets in various prior proceedings. *Ante,* at 1326. Those proceedings, however, were not simply consolidated below, but rather were joined in the single interpleader action that was referenced by docket number in § 8772. See § 8772(b). See generally 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1702 (3d ed. 2001) (explaining that interpleader is a "joinder device" that brings together multiple claimants to a piece of property in a "single" action to "protect [ ] the stakeholder from the vexation of multiple suits"). That is presumably why respondents did not dispute Bank Markazi's characterization of the proceedings as "a single pending case" when they opposed certiorari, Pet. for Cert. i, and why the majority offers no citation to refute Wright & Miller's characterization of an interpleader action as a "single proceeding," 7 Federal Practice and Procedure § 1704. In any event, nothing in the majority's opinion suggests that the result would be different under its analysis even if it concluded that only a single case were involved.

2 The majority instead seeks to recast *Klein* as being primarily about congressional impairment of the President's pardon power, *ante,* at 1323 – 1324, despite *Klein*'s unmistakable indication that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns. 13 Wall., at 147 ("The rule prescribed is *also* liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." (emphasis added)). The majority then suggests that *Klein* stands simply for the proposition that Congress may not require courts to act unconstitutionally. *Ante,* at 1323, and n. 19. That is without doubt a good rule, recognized by this Court since *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). But it is hard to reconstruct *Klein* along these lines, given its focus on the threat to the separation of powers from allowing Congress to manipulate jurisdictional rules to dictate judicial results. See Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1373 (1953) ("[I]f Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it ... as the Court itself made clear long ago in *United States v. Klein*.").

3 We have also upheld Congress's long practice of settling individual claims involving public rights, such as claims against the Government, through private bills. See generally *Pope v. United States,* 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3 (1944). But the Court points to no example of a private bill that retroactively changed the law for a single case involving private rights.

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ANNEX 110

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRAN HEISER and GARY HEISER, et al., : Case No.
Plaintiffs, : 00-CV-02329
v. :
THE ISLAMIC REPUBLIC OF IRAN, et al., : Judge: DAR
Defendants. :

MARIE CAMPBELL, et al., : Case No.
Plaintiffs, : 00-CV-02104
v. :
THE ISLAMIC REPUBLIC OF IRAN, et al., : Judge: DAR
Defendants. :

Deposition of Patrick Clawson, Ph.D.
Washington, D.C.
Tuesday, November 25, 2003

Reported by: Kimberly Francis Smith
Job No. 156499

November 25, 2003
9:00 a.m.

Deposition of Patrick Clawson, Ph.D., held at the offices of:

Piper Rudnick
1200 - 19th Street, N.W.
Washington, D.C. 20036

Pursuant to notice, before Kimberly Francis Smith, a Notary Public of the District of Columbia.

APPEARANCES:

For the Plaintiffs:
Piper Rudnick
1200 - 19th Street, N.W.
Washington, D.C. 20036
(202) 861-3900
BY: Louis J. Rouleau, Esq.

Also Present:
T. J. O'Toole, Videographer

CONTENTS

EXHIBITS

Exhibits were premarked and retained by Mr. Rouleau.

PROCEEDINGS

(9:01 a.m.)

THE VIDEOGRAPHER: This is tape number 1 of the videotaped deposition of Dr. Patrick Clawson taken by the plaintiffs in the matter of Fran Heiser and Gary Heiser, et al., versus the Islamic Republic of Iran, et al., Case Number 00-CV-02329 DAR, and Case Number 01-CV-02104 DAR entitled Marie Campbell, et al., versus the Islamic Republic of Iran. These cases are in the U.S. District Court for the District of Columbia.

This deposition is being held at the law offices of Piper Rudnick located at 1200 - 19th Street, Northwest, in Washington, D.C. on November 25th, 2003, at approximately 9:01 a.m.

My name is T. J. O'Toole. I'm representing Esquire Deposition Services. I'm a certified legal video specialist. The court reporter is Kimberly Francis Smith, also representing Esquire Deposition Services.

Will counsel please introduce himself and indicate which party he represents.

MR. ROULEAU: Louis Rouleau of Piper Rudnick, Washington, D.C., counsel for plaintiffs.

THE VIDEOGRAPHER: Thank you. Will the court reporter please swear in the witness.

Thereupon,

PATRICK CLAWSON, PH.D.

the Witness, called for examination by counsel for the Plaintiffs and, having been sworn by the notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. ROULEAU:

Q. Good morning.

A. Good morning.

Q. Can you please state your full name for the record?

A. Patrick Lyle Clawson.

Q. And, Mr. Clawson, are you currently employed?

A. Correct.

Q. And where are you employed?

A. I work at the Washington Institute for Near East Policy which is located at 1828 L Street, Northwest, Washington, D.C.

Q. And what is your position at the Washington Institute for Near East Policy?

A. I am the deputy director.

Q. And can you give some background about what that position entails?

A. I supervise a staff of approximately 30 researchers, research assistants, and administrative staff who investigate questions of Middle Eastern politics including the politics of Iran and Saudi Arabia, also security issues, economics, U.S. policy concerns.

We put on conferences, presentations. I testify -- we testify -- excuse me -- at Congressional hearings. We appear often in media outlets. And we write scholarly books and articles.

Q. And is it fair to say that a large focus for the institute is on the Middle East itself?

A. Correct, almost entirely focused on the Middle East or U.S. policies towards the Middle East.

Q. And, Mr. Clawson, what is your educational background if you can take us through from undergrad going forwards?

A. I have a bachelor's degree in economics from Oberlin College in Oberlin, Ohio. And I have a master's and a Ph.D. in economics from the New School for Social Research in New York City.

Q. And have you written any books concerning Iran?

A. Iran has been the main or partial subject of approximately 12 of my roughly 30 books that I have either written or edited.

Q. And have you written any articles on Iran?

A. I have written several dozen articles about Iran, mostly about contemporary Iran, its politics and economics, but also some an Iranian history.

Q. And what languages other than English do you speak if any?

A. My Persian or Farsi is quite good as is my French. I also have some Spanish and German and

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Hebrew.
Q. And what language do they speak in Iran?
A. They speak -- the principal language is Persian or Farsi.
Q. And are you able to read Persian as well, speak it?
A. Yes. I try to read two Iranian newspapers in Persian every day as well as one in English. Don't always make it, but I try.
Q. Dr. Clawson, I have what's in front of you a binder in which I've marked some -- premarked some deposition exhibits. If you would turn to what I've marked as Deposition Exhibit Number 1, do you recognize that document?
A. Yes. This is a brief professional biography of myself.
Q. And is that -- is it your curriculum vitae?
A. Yes.
Q. Is it up to date?
A. Yes.
Q. Dr. Clawson, have you testified

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previously in the United States District Court for the District of Columbia on issues relating to Iran, Iranian sponsorship of terrorism, and the Iranian economy?
A. More than ten times, yes.
Q. And do you recall in what cases?
A. Goodness, gracious. Let's see. Help me on this one. I think of the first one as being the Flatow case. Then --
Q. Did you testify in the Colonel Higgins case?
A. In the Higgins case. I was trying of think of them chronologically. And this isn't going to work. The Ciccipio case. There was also the Marine barracks bombing case. I don't know the names of all the defendants in that. The Anderson case. I'm leaving out a bunch.
Q. But about --
A. Almost all of these cases have been about kidnappings and hostage taking in the 1990s in Lebanon. In addition there was the Marine barracks case which was also in Lebanon which

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was -- excuse me -- in the 1980s, not 1990s.
Q. And those were similar FSIA cases like these, correct?
A. Those were all FSIA cases. Yes.
Q. And in those cases were you qualified as an expert witness?
A. Yes.
Q. In what area or areas were you qualified to testify as an expert witness, if you know?
A. Certainly about Iranian support for terrorism, about Iran's economy, about Iran's budget, government budget, and several other areas depending on the case.
Q. Dr. Clawson, I'd like to talk a little now about the Islamic Republic of Iran which I'll refer to as Iran. Okay?
A. Yes, sir.
Q. Could you please describe when Iran was created?
A. The revolution that brought to power the current government took place in 1978, '79. And the present system was put in place in the spring

Page 12

of 1979.
Q. And you mention -- was there an Iranian revolution I believe you mentioned?
A. Yes, sir.
Q. And what international goals if any did the Iranian revolution have?
A. During the course of the revolution and particularly after the new government came to power it made it clear in frequent statements that it wanted to reduce American influence in the middle east, using the slogan death to America.
And it also wanted to have Iran's revolution taken as a model by Muslim populations throughout the world to bring to power governments committed to implementing this vision, this particular vision of Islamic religious law and this particular vision of an anti-western foreign policy.
Q. And Iranians are Shiite Muslims, correct?
A. About 90 percent or a little less of Iran's population is Shiite.

Q. And so it's accurate to say that the government of Iran is anti-western and specifically anti-American, correct?

A. Correct, sir.

Q. And does Iran use terrorism as a means of accomplishing its goals of ridding the middle east of western influence and in particular American influence?

A. Yes. Iran has actively supported terrorism ever since the Iranian revolution of 1978, '79. It has supported many different types of terrorism directed against America and American interests as well as directed against some of America's friends and allies in the region.

Q. Dr. Clawson, please refer to what were previously marked as Deposition Exhibits 2 through 15 which I will represent are copies of Patterns of Global Terrorism for years 1984 through 1988.

If you'd just look through those and confirm that these were authored by the office of counterterrorism of the United States Department of State.

A. (Reviewing document.) Yes, sir. These appear just looking at the cover pages to be the Patterns of Global Terrorism reports for the years you mention.

Q. And are you familiar with these publications?

A. Yes, sir. The Patterns of Global Terrorism reports issued annually are the bible of those of us who follow terrorism. They are very carefully prepared. Every word is fought over. I've been consulted several times both inside -- when I was inside the government and outside the government about the exact phrasing to be used.

So they are very carefully done reports that reflect an interagency consensus about terrorism developments in the year that they cover.

Q. I'd like to draw your attention to Deposition Exhibit Number 5 which is the Patterns of Global Terrorism report for the year 1987. If you could, go to page 35. And do you see on page 35 where there is a subheading in bold titled Iran?

A. Yes.

Q. If you could, read into the record that first paragraph, please.

A. Of the 44 terrorist incidents in which Iran was identified as the sponsor we recorded 25 in the middle east, 10 in western Europe, and 9 in Asia. The preferred means were bombings, 27, and armed attacks, 13;

Tehran uses terrorism skillfully and selectively to support its long-term objectives of ridding the middle east of all western influence, intimidating Iranian dissidents overseas, forcing Arab countries to end their support for Iraq, and exporting Khomeini's vision of radical Islamic vision to all parts of the Muslim world;

We believe that most Iranian leaders agree that terrorism is an acceptable policy option although some may disagree on specific operations.

Q. And, Dr. Clawson, do you agree with this assessment?

A. Yes. It's a very careful assessment.

Q. Okay. Now, referring to Exhibit Number 13 which is the patterns of global terrorism for

year 1995, if you would turn to page 23 of that report just below the subtitle in bold titled Overview of State Sponsored Terrorism, do you see that?

A. Yes.

Q. It states in part: "The United States currently lists Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism."

Do you understand that Iran is considered to be a state sponsor of terrorism by the United States Government?

A. Oh, yes.

Q. Do you know how long it's been on that list?

A. Since the list was first mandated by Congress and prepared by the State Department, Iran was a charter member of that list.

The list -- it's a little bit unclear exactly what year it starts. But Iran's been on that list for more than 15 years. In other words, at first the list was just a letter sent to

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Congress. Then it becomes an officially established list.

Q. Is it currently still listed --

A. Oh, yes.

Q. -- as a member?

A. Yes. It's still listed.

Q. In the third paragraph on that same page it states:

"Iran continued in 1995 to be the world's most active supporter of international terrorism."

Do you see that?

A. Sure.

Q. And do you agree with this assessment?

A. Yes, at that time.

Q. Right. If you would, refer to Deposition Exhibit Number 14, if you will. And I've gone ahead and tabbed the page.

So you can just go to the tabbed page of Exhibit 14 which has a subtitle in bold titled Overview of State Sponsored Terrorism. Deposition Exhibit Number 14 is the patterns of global

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terrorism for the year 1996, correct?

A. Correct.

Q. And where I tabbed on the page it states in part:

"Iran, the most active state sponsor of terrorism today, continues to provide direction and support to terrorism -- terrorist groups including Hezbollah in Lebanon."

And do you agree that Iran in 1996 was the most active state sponsor of terrorism?

A. Yes. And indeed I would argue that it continues to be today. And that continues to be the judgment of the U.S. Government, that it's the most active state sponsor of terrorism.

You will note the wording is a bit different from the previous year. Some dispute arose about non-state sponsors of terrorism. But among the state sponsors Iran is clearly the most active.

Q. And do you agree that Iran provided direction and support to terrorist groups in 1996?

A. Oh, yes.

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Q. Thank you. Dr. Clawson, I'd now like to turn your attention or rather I'd like us to talk about the ministry of information and security. Are you familiar with the Iranian agency known as the ministry of information and security?

A. Yes, sir.

Q. And what is the ministry?

A. The ministry of information and security can be thought of as analogous to the Soviet Union's KGB in that it has responsibilities for surveillance of both domestic dissidents as well as foreign intelligence responsibilities.

It is the successor agency to the Shah of Iran's organization for information and security often referred to by the initials of its Persian name, SAVAK, S-A-V-A-K. The ministry is just the ministry of information and security. It takes over the personnel from the Shah's SAVAK.

It functions in the shadows for the first few years and then is formally created as a ministry in the early and mid-1980s -- I'd have to go back and check whether it was 1984 -- and

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because of its role in persecuting domestic dissidents becomes very controversial in Iran in the late 1990s after it assassinated a number of leading intellectuals and journalists in Iran.

And there is a committee appointed to investigate it by the now president of Iran, Mohammed Khatami, K-h-a-t-a-m-i. The report of that committee is then leaked in large parts to the Iranian press and we learn a great deal about how the ministry has functioned over the years as a result of that investigation.

Q. And either through that report or other sources is the ministry involved in Iran's sponsorship of terrorism?

A. Yes. In a German -- a Berlin court, Berlin, Germany, a former high official of the ministry who defected testified about the ministry's role in the killings of several Iranian dissidents in a Berlin restaurant.

And that dissident provided us with quite a bit of specific details about how the ministry supports terrorist activities.

Q. And how does the ministry support terrorist activities?
A. It provides excellent technical support. It provides -- that is to say the techniques that are to be used. It provides political direction and it provides finances.
It is not the only Iranian agency that does this. But it is a large agency estimated to have 30,000 employees. And it is one of the most professionally competent intelligence agencies in the world.
Q. You also mention -- you mentioned that provides financing as well as political direction. Does it provide military training?
A. I would say at least paramilitary training, training in the use of arms and explosives.
Q. Okay. Dr. Clawson, are you familiar with the Iranian agency known as the Iranian Islamic Revolutionary Guard Corps?
A. Yes.
Q. And I'm going to refer to that as the

Guard Corps. Okay?
A. Fine.
Q. Is the Guard Corps known by any other name?
A. It's often referred to as the Pasdaran, P-a-s-d-a-r-a-n. It's also often referred to in Iran just as the Corps. Or the Iranian word for that is Sepah, S-e-p-a-h.
Q. And what is the Guard Corps?
A. After the Iranian revolution the new government is uncertain of the loyalty of the Iranian military with good reason because the Iranian military almost overthrew the new revolutionary government in at least one major coup attempt.
And the new government therefore forms a revolutionary military body which is explicitly conceived of as a check on the military and as directly responding to the supreme religious leader.
This Guard Corps then expands dramatically once the war with Iraq begins in 1980.

And after the end of that war the Guard Corps becomes particularly active in terrorist activities as well as some more innocent things, drug interdiction for instance.
Q. You mention that it got involved in terrorist activities. And can you just elaborate on what sort of terrorist activities it was involved in?
A. It was very involved in supporting the Hezbollah organization in Lebanon, in the kidnappings of the 1980s, and in attacks on Jewish and Israeli targets worldwide such as the bombings of a Jewish community center in Argentina and also the Israeli embassy in Argentina, both of which killed many, many people.
Q. You mentioned that the Guard Corps was involved in supporting Hezbollah. What sort of support -- what form did that support take?
A. The support took the form of the dispatch of Guard personnel to Lebanon where they provided significant training and also just military support for Hezbollah operations, running

a military camp in Lebanon for that purpose, and they provided substantial financial assistance to Hezbollah.
We don't know -- I don't know the exact breakdown between how much of the financial assistance came through the ministry of the information and security and how much came through the Guard Corps. But both of them were very active in Lebanon, continue to be active in Lebanon.
Q. We keep on mentioning Hezbollah. Dr. Clawson, who or what is Hezbollah if you know?
A. Hezbollah is an Arabic term. It literally means the party of god. There have been a variety of different groups that have used that name.
But particularly since the late 1980s the name is generally associated with the largest such group, the Hezbollah in Lebanon which is founded by their own account at the direction of the Iranian government where it first starts as a faction within the larger Shia political movement and then splits off to become its own separate

organization.

And it has become the largest armed group in Lebanon outside the government. It engaged in many terrorist activities, kidnapping of Americans for instance. And it also engaged in armed struggle against the Israelis which eventually led to the Israeli withdrawal from Lebanon.

Q. Is it still involved or engaged in terrorist activities?

A. It is. Hezbollah is very much engaged in terrorist activities. It is actively supporting with both financial and technical means many of the radical Palestinian groups which are engaging in attacks on civilian targets inside Israel.

It is also by their own account actively debating whether to resume direct attacks against Americans and American interests abroad. And it has established a presence inside Iraq for the purposes of which we are not quite sure. Neither we, the analytical community, nor by press accounts the U.S. Government are sure.

Q. I just want to make sure the record's clear that both the ministry of information security and the Guard Corps participated in the development of Hezbollah, correct?

A. Correct. Correct. The ministry of information and security brought with it a great many technical skills which were very useful for Hezbollah's terrorist activities. And the Guard Corps brought with it particularly the revolutionary spirit and political direction as well as some technical skills and finance.

Q. Dr. Clawson, are you familiar with the organization known as Saudi Hezbollah?

A. Yes, sir.

Q. And what connection if any is there between Hezbollah and Saudi Hezbollah?

A. Well, at the very least the two organizations are inspired by the same ideology. The two organizations both owe allegiance to Iran's supreme religious leader. And that process is a formal oath taking process. And the two organizations receive support from the government

of Iran at -- through various different mechanisms.

It is possible that the members of Saudi Hezbollah see themselves more directly as members of the same organization as Hezbollah in Lebanon. Accounts differ. And it may be that perceptions of members of Saudi Hezbollah on this point also differ.

Q. And who comprises the membership of Saudi Hezbollah?

A. So far as we know it's entirely composed of Saudi Shiites. The Shia population of Saudi Arabia is heavily concentrated in the eastern provinces of Saudi Arabia along the Persian Gulf in the area where the oil fields are found. And it is discriminated against by the Saudi government in a whole variety of different ways.

It is often thought to account for somewhere between 10 and 15 percent of the total Saudi population but fully a third or more of the population of the eastern province.

Q. And do Shiite Saudis have a general affinity to Iran who are majority Shiites as well?

A. The Saudi Shias have historically regarded Iran, as you said, with an affinity. It is a complicated relationship because the Saudi Shias simultaneously see themselves as ethnically Arab and therefore don't like ethnic Persians. There is an historic animosity there yet there is a strong religious affinity. And many of the religious leaders of the Saudi Shia community have been trained in Iran and have lived there for many years.

Q. You mentioned that the Shiites are a minority in Saudi Arabia. So what are the majority of Saudi Arabians?

A. Most Saudis are Sunni and are particularly of a school of Sunni thought which is usually called in the west Wahabi, W-a-h-a-b-i, that has a particularly strict interpretation on many of the questions that so separate the Sunnis and the Shia.

So the division between Sunni and Shia is particularly acute between the Wahabis and the Shia.

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Q. And you mentioned earlier that the Shiite Saudis are a repressed minority in Saudi Arabia. What form does that repression take, or discriminated against?

A. It takes many different forms. Some of the more pressing are that it's very difficult for a Saudi Shia to get jobs in the government or with government owned enterprises such as the oil company.

And it's very difficult for the Saudi Shia to build new mosques, to have public observance outside of their mosques of their religious events. And the education system in Saudi Arabia includes a whole variety of elements in the curriculum which are explicitly anti-Shia.

Q. Okay. Thank you.

A. There are also reports of other forms of more direct repression.

Q. Such as?

A. Lots of suggestions that anybody who's prominent in the Shia community is going to be picked up and interrogated by the police, asked to

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inform on other people. The young Shia people are frequently beaten up by the police.

Q. What was the state of relations between Iran and Saudi Arabia from 1990 to, say, about 1997?

A. Terrible.

Q. Why is that?

A. Indeed the relationships deteriorate more sharply in the course of the 1980s with Iran's supreme religious leader at the time, Ayatollah Khomeini, K-h-o-m-e-i-n-i, issuing many statements about how the Saudis are perverting Islam.

This becomes particularly acute after a large number of Iranian pilgrims to Mecca are killed in a horrible accident during the pilgrimage. Khomeini blames this on the Saudi authorities.

He refers to the Saudi government as occupiers of the holiest places and compares them to Israeli occupiers of Jerusalem, which infuriates the Saudi government.

So relationships become very bad.

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Historically the relationships across the Persian Gulf have been tense for centuries between Persians and Arabs. But this becomes particularly acute at this time.

Then the presence of the United States forces in Saudi Arabia after the 1990 Iraqi invasion of Kuwait adds a whole new layer of reasons why Iran is upset at the Saudis. It's very upset at the presence of American forces in Saudi Arabia.

Q. Is that because it's antithetical to the revolution, that is, the expulsion of western influence?

A. Correct. It's also antithetical to the interests of the Iranian state in establishing itself as the great power in the region.

Q. Dr. Clawson, for the period 1995 to 1996 is it accurate to say that the Shiite minority in Saudi Arabia is supported -- was sympathetic to Iran and supported by Iran?

A. Yes, sir. This is a period of considerable tension and turmoil in the Arab states

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of the Gulf in which there are large scale riots in the island of Bahrain, the island country of Bahrain, B-a-h-r-a-i-n, just off the coast of Saudi Arabia, connected to Saudi Arabia by a causeway. And that's a majority Shia country.

Iran is afterwards discovered by the Bahraini government to have been actively fomenting violence and revolution there.

The Saudis in fact send troops to this island to help the government there put down these riots and to combat the Iranian sponsored terrorist activities being done by a Hezbollah organization, Bahraini Hezbollah, in that island.

There's a tremendous flow of people back and forth between Bahrain and the eastern province of Saudi Arabia.

Q. Just so I understand -- so the Bahrain Saudi -- excuse me -- the Bahrain Hezbollah, it's well known that they were really supported by Iran itself, correct?

A. I think -- I would say it's well accepted that the allegations of the Bahraini

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government along with the individuals they present show that Iran was meddling, by the way, not very efficiently.

Most of the troubles being caused in Bahrain were by Bahraini based organizations objecting to the discrimination they faced. And Iran's meddling was actually not very effective in Bahrain. Their attempts were not as successful as in some other cases.

Q. Dr. Clawson, are you familiar with the bombing of the Khobar Towers complex in Dhahran, Saudi Arabia, on June 25th, 1996?

A. Yes, sir. For the record Dhahran is in the eastern province, not very far from the Saudi end of the causeway to Bahrain.

Q. Thank you. What is the basis of your knowledge of the bombing?

A. Well, this was extensively reported upon both in the U.S. press and in the regional press in Saudi Arabia, for that matter in the Iranian press.

Also at the time of the bombing I was working for the Defense Department at the National

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Defense University. At that time I had a top secret clearance and I received some classified information and briefings about the bombing and the responsibility for the bombing.

Q. And do you know who was behind the bombing?

A. Well, we have -- there is an excellent reason to believe that Iran directed the bombing. We have the testimony of numerous people who were arrested by the Saudi authorities who have provided this information on interrogation.

And the United States Government has revealed considerable amounts of intelligence intercepts supporting this allegation. And we have the testimony of FBI officials in this matter.

There has also been a lot of analytical work done by various scholars attempting to poke holes in the theory that Iran was responsible. And it's been a subject of considerable debate in the scholarly counterterrorism Saudi watching and Iran watching press.

And I think that it's fair to

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characterize the state of that debate is that there is a general consensus that Iran was involved.

Q. And so it's your expert opinion that Iran was behind the bombing, correct?

A. Yes.

Q. And do you know whether the ministry of information and security and/or the Guard Corps participated in the bombing?

A. Well, there's extensive evidence available in the public record about the involvement of the Guard Corps and in particular of some top officials of the Guard Corps in this affair.

By the way, the same top official who was responsible for directing this affair also directed the business in Bahrain. The ministry of information, there's less evidence -- less breadth of evidence available.

On that score we really have to rely upon the statements of the United States Government, especially of Louis Freeh, the former director of the FBI, who has on numerous occasions

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specifically identified the ministry of information and security and stated that those who were interrogated specifically identified the ministry of information and security as well as the Revolutionary Guard Corps.

Mr. Freeh has also identified the Revolutionary Guard Corps. It is just that we have quite a bit of support from other accounts, leaked Saudi accounts, leaked Iranian dissident accounts suggesting that the Guard Corps was involved.

Q. Dr. Clawson, have you studied Iran's economy during your professional career?

A. Yes, sir.

Q. And what information sources are available to someone such as yourself trying to learn about Iran's economy?

A. Iran is actually a relatively open country. It is not a closed society the way some authoritarian, totalitarian states are in that way. So there are detailed reports from its central bank, from the International Monetary Fund, and many articles in the Iranian press.

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It is not totally open. So, for instance, there are secret government accounts. And it is clear from most of these sources that these secret accounts cover part of the financing of the Guard Corps and of the ministry of information and security as well as other secret activities such as the nuclear program.

Q. And are you familiar with Iran's current yearly expenditures on terrorist activities?

A. It's difficult to put a precise number on Iran's spending on terrorist activities partly because of the limitations of our information, partly because there's a penumbra of activities of what you might call terrorist.

These organizations like the ministry of information and security and the Revolutionary Guard Corps engage in non-terrorist activities as well. So exactly where one draws the line between what one calls terrorist and what one calls not is a little unclear.

And also Iran's economy is rather distorted so that it is a little hard to translate

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spending in their domestic currency to dollars. All this means I'm more comfortable giving a range of their expenditure rather than a specific number. I can't point to a definite number of how much Iran spends on terrorism.

Q. I understand there is not a budget line for terrorism. So could you give a range on its current yearly expenditures for terrorism?

A. I've testified in the past that the expenditures go up and go down. We're not always certain how much they are in a given year until afterwards.

But I'm reasonably confident that the expenditures remained within the 50 million a year to 150 million dollar a year range that they've been at for quite some time.

I would say that because of the upturn in Palestinian violence which Iran is interested in supporting that the expenditures are more likely to be at the upper end of that range than at the lower end. But as usual we will really have a better idea about Iran's expenditures only with a few

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years' lag.

Q. Can you compare that range of between 50 million and 150 million with the amount of money Iran spent yearly on terrorist activities in 1996?

A. In 1996 expenditures were probably somewhat less principally because Iran at that time was having a very difficult economic situation with the price of oil being low.

And also at that moment the Palestinian/Israeli peace process was proceeding rather well and so it was more difficult for Iran to find Palestinians interested in terrorist attacks. But Iran's expenditure was almost certainly still within the 50 million to 150 million dollar range.

Q. Thank you. Is Iran through the ministry of information and security and the Revolutionary Guard Corps still engaging in terrorism today?

A. Yes.

Q. Dr. Clawson, if this Court were to award punitive damages in order to deter Iran from engaging in further terrorist activity and we were

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to use the annual figures for Iran's expenditures, or that range that we just discussed from 1996 to present, what multiple of that yearly figure do you think given Iran's recent terrorist activities would in fact serve to deter Iran?

A. Iranian officials pay close attention to these cases and would interpret very carefully -- excuse me -- would overinterpret any Court variation from the multiple that has been used in the past, so that past judgments which have awarded punitive damages of let us say $300 million would be very carefully compared to what the action of this Court is.

And if this Court were to award a lesser amount that would be interpreted as indicating that the United States is less concerned about Iran's support for terrorism. So, for instance, in the case brought by the ex-hostages from the U.S. Embassy seizure which for a variety of legal reasons damages were not awarded --

Q. You're referring to the Roeder case, correct?

A. I believe that is the case. I confess I don't remember how it's referred to legally.

Q. I will represent to you that that's it's --

A. I appreciate that. This was interpreted -- I would say misinterpreted in Iran as an indication of a lagging U.S. concern about Iranian support for terrorism.

So if this Court were to vary from the precedent of the past Courts' judgments I think that it would be my judgment that Iranian media and Iranian political figures would interpret that as indication of a change in degree of U.S. concern about Iranian support for terrorism.

Q. And in the cases where you testified as an expert witness, do you know generally how much the Court awarded in those cases for punitive damages?

A. In nearly every case although not every case the Court took the midpoint between the lower estimate of 50 million and the higher estimate of 150 million, that is to say $100 million, and used

a multiple of three times to arrive at the figure of $300 million.

Q. Dr. Clawson, do you believe that a judgment awarded in these cases will have some impact on Iran and its dealings with the world and in particular with the United States?

A. We have a track record of Iranian officials discussing these cases, discussing their impact on Iranian-American relations. And indeed we have Iranian members of the parliament complaining that these cases are an important part of Iran's inability to improve its relationships with the United States.

We also at the same time have on the record Hezbollah in Lebanon openly discussing whether or not to directly target Americans. And we have a number of Iranian political figures in their statements and newspaper articles making suggestions that Iran should more actively target Americans through terrorist activities.

So the issue of how actively Iran should sponsor terrorist attacks against Americans is in

debate in Iran and these cases are an important element in that discussion.

MR. ROULEAU: Okay. Thank you, Dr. Clawson. I have no more further questions.

THE WITNESS: Thank you.

THE VIDEOGRAPHER: This ends tape number 1 and concludes the testimony of Dr. Patrick Clawson in the matter of Heiser versus the Islamic Republic of Iran. The date is November 25th, 2003. The time is 9:47 a.m. Off the record.

(Whereupon, at 9:47 a.m., signature having been waived, the deposition was concluded.)

CERTIFICATE OF NOTARY PUBLIC AND REPORTER

I, Kimberly Francis Smith, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the testimony of said witness was taken in machine stenotype and thereafter converted to typewriting by me or under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of this action.

_____

Kimberly Francis Smith, Notary Public
in and for the District of Columbia
My Commission Expires May 14, 2005.

ANNEX 111

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JH

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FRAN HEISER, et al.,	:	
Plaintiffs,	:	
	:	00-cv-2329
v.	:	01-cv-2104
ISLAMIC REPUBLIC OF IRAN, et al.,	:	
Defendants.	:	

Washington, D.C.
December 12, 2003
8:43 a.m.

Transcript of Hearing-Morning Session
Before the Honorable Deborah A. Robinson
Unites States Magistrate Judge

APPEARANCES:

For the Plaintiffs: SHALE STILLER, ESQ.
LOUIS J. ROULEAU, ESQ.
MELISSA MACKIEWICZ, ESQ.
HANK WALTHER, ESQ.
ELIZABETH R. DEWEY, ESQ.

For the Defendants: NO APPEARANCE

Court Reporter: JON HUNDLEY
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disclose what was discussed in those meetings; however, that's one of the bases upon which he is going to render his expert opinion on the bombing itself.

JUDGE ROBINSON: May I assume, then, that you are prepared, as you would with respect to any expert witness, to elicit not only the expert's opinion, but the underlying basis of it?

MR. ROULEAU: Correct.

JUDGE ROBINSON: Very well. Let's proceed, then.

PATRICK L. CLAWSON, PLAINTIFFS' WITNESS, SWORN

DIRECT EXAMINATION

JUDGE ROBINSON: Dr. Clawson, good morning. There is water in the pitcher next to and a supply of clean cups, so please feel free to pour a glass of water before Mr. Rouleau begins.

THE WITNESS: Thank you.

JUDGE ROBINSON: You're welcome.

Now, Mr. Rouleau, you may proceed.

MR. ROULEAU: Thank you.

Your Honor, before I begin, Mr. Walther has asked permission to be excused.

JUDGE ROBINSON: You may be excused, Mr. Walther.

MR. WALTHER: Thank you, Your Honor.

JUDGE ROBINSON: Thank you.

BY MR. ROULEAU:

Q Good morning.

A Good morning.

Q Could you please state your full name for the record?

A My name is Patrick Lisle Clawson.

Q Are you currently employed, Mr. Clawson?

A Yes.

Q And where are you employed?

A At the Washington Institute for Near East Policy.

Q And where is that located?

A That's located at 1828 L Street, Suite 1050, here in Washington, D.C.

Q And what is your position at the Washington Institute for Near East Policy?

A I am the Deputy Director.

Q And what does that position entail?

A I am responsible for supervising the day-to-day activities of the institute, including supervising the research of a staff of approximately 30 researchers and research assistants.

Q And is it fair to say that a large focus for institute is on the Middle East?

A Almost exclusively on the Middle East.

Q And what about the Middle East, if you can just explain that a little bit more?

A Our focus is on U.S. policy concerns in the Middle East and in developments in the Middle East that are of interest to U.S. policymakers. So we do quite a lot of work, for instance, on the Persian Gulf countries including Saudi Arabia, Iran, Iraq, and we look at questions such as U.S. security presence in the regions, threats that face the region and terrorism. We also do a lot on the Arab-Israeli peace process.

Q Mr. Clawson, can you briefly explain your educational background for the Court, starting with your undergraduate work and then following that on through?

A My bachelor's degree is from Oberlin College in Oberlin, Ohio, and my master's and doctorate are both from the New School for Social Research in New York City. All of those degrees are in economics.

Q And Mr. Clawson, have you written any books concerning Iran?

A I have written approximately -- I couldn't find the exact count this morning; my apologies -- twelve books and monographs about Iran, primarily about its current economic and security and foreign affairs policies.

Q Have you written any articles on Iran as well?

A I have written more than 30 articles in scholarly magazines and journals about Iran, again primarily about its economic policy and its foreign affairs policy, but also a few about its history.

Q I'm sorry, I didn't catch that.

A A few about its history as well.

Q And have you written any books or articles or given any lectures on Iran's sponsorship of terrorism?

A I have done that on numerous occasions, and I have also testified on the subject before several committees of the U.S. Congress.

Q Is that an area of particular interest for you?

A It is an area that I follow quite closely.

Q What languages other than English do you speak, if any?

A I speak Persian, which is known as Farsi,

and French, as well as decent Spanish, German and Hebrew.

Q And do you read Middle East newspapers regularly as part of your research duties?

A I read one Iranian newspaper every day. I try to read two others. I think that's -- I don't always read those every day, but I file clippings from them.

Q Dr. Clawson, that big binder in front of you is for you. If you could turn the tab, you'll see it's 27, and then there's letters that follow that. If you could turn to the tab that's marked Plaintiffs' Exhibit 27-A? Could you identify this document?

A It's a brief professional biography of myself.

Q And is it up to date?

A Yes, sir.

Q And Dr. Clawson, have you testified previously in the United States District Court for the District of Columbia on issues relating to Iran, Iranian sponsorship of terrorism, and the Iranian economy?

A Yes.

Q About how many times?

A Somewhere between ten and twelve. I'm not sure.

Q In those cases, were you qualified as an expert witness?

A Correct. In each case.

Q And in do know what areas you were qualified as an expert?

A I was qualified in the areas of Iran in support for terrorism, Iran's economy, and in some cases other such issues.

MR. ROULEAU: Your Honor, at this time, plaintiffs would offer Dr. Clawson as an expert in the areas of Iran, Iran's sponsorship of terrorism, and the Iranian economy.

JUDGE ROBINSON: The Court will receive Dr. Clawson as an expert in the areas of the Government of Iran, the support of terrorism by the Government of Iran, and the economy of Iran.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Dr. Clawson, can you please describe when the Islamic Republic of Iran, which I will refer to as Iran, was created?

A After the revolution in 1978-79, there was a referendum which created the Islamic Republic in

the spring of 1979.

Q And what was the impetus for the Iranian revolution?

A Dissatisfaction with the rule of the previous Shah of Iran led to widespread agitation against his government, a mass popular movement. An important element in that mass popular movement, but not the only one, was that led by the Ayatollah Ruhollah Khomeini, Ruhollah, R-u-h-o-l-l-a-h Khomeini, and he and many of the clerics then became involved in agitating for an Islamic Republic.

Q And what international goals, if any, did the Iranian revolution have?

A It was explicitly anti-American and it was very explicitly aimed at reducing United States influence in Iran and indeed throughout the Middle East and the broader Muslim world. It was also interested in establishing an Islamic government as they conceived it, which meant a particularly politicized version of Islam for which purpose they were prepared to use violent means, including terrorism.

Q So it's fair to say that the Government of Iran was anti-West and then specifically

anti-American?

A Correct, sir.

Q Did they ever use -- did they have a specific slogan that they would use with respect to America?

A "Death to America" was a very popular slogan, particularly in the early years of the revolution.

Q And are Iranians Shiite Muslims or Suni Muslims?

A About 90 percent of Iranians are Shiite Muslims. It's one of the few countries in the world which has traditionally had a Shiite-dominated government.

Q And I believe you mentioned this, but just to clarify, does Iran use terrorism as a means of accomplishing its goals of ridding the Middle East of Western influence and specifically American influence?

A Both in the time of the revolution and today, the Iranian Government has used terrorism for the purpose of reducing if not eliminating Western and particularly American influence in the Middle East in general.

Q Dr. Clawson, again referring to the binder

before you, if you would take a look at Plaintiffs' Exhibits 27-B through 27-P? If you would just go ahead and take a moment and look through those?

A Twenty-seven-B through 27 --

Q Through 27-P as in Paul.

A Right.

[Pause.]

BY MR. ROULEAU:

Q Okay?

A Yes, sir.

Q Do you recognize those documents?

A Oh, yes, sir.

Q And could you identify them for the record, please?

A Certainly. These are the annual reports prepared by the U.S. Department of State about the patterns of global terrorism. It's issued each year in the spring regarding the patterns of global terrorism for the preceding year, and in many conversations with the preparers of these reports and with other terrorism experts, I can say with great confidence that these reports are regarded as the most definitive and careful statement by the U.S. Government about terrorist activities. Every word is argued about in an interagency process.

Q And I will represent and you can verify that Tabs 27-B through 27-P represent the patterns of global terrorism for years 1984 through 1998, correct?

A Correct, sir. My apologies for not saying that.

Q And if you --

JUDGE ROBINSON: Dr. Clawson, what is the basis of your testimony that these reports represent the most definitive and authoritative statements of the United States regarding patterns of global terrorism?

THE WITNESS: Both when I was in the U.S. Government and before joining the government and after leaving the government, I have had many occasions to sit with the people in the State Department and the Central Intelligence Agency who work in terrorism issues and this is the report that is always referred to as the statement that's -- the publicly released statement about terrorism that is most carefully prepared by the government and is used to reflect the government's judgment about what happened in preceding years. That's one reason there is such active lobbying by people like me outside the government to try to get certain

phrasing and certain wording in there and vigorous discussions that take place in an interagency process about exactly how to evaluate the evidence and what does it lead to --

JUDGE ROBINSON: Now, you --

THE WITNESS: -- and whatnot.

JUDGE ROBINSON: I apologize, I didn't mean to cut you off.

THE WITNESS: I'm sorry, Your Honor.

In other words, this is a document which people look at with great interest, which everybody in the terrorism research community regards as sort of the definitive judgment by the United States Government, and people in the government regard it as the time, the opportunity for them to evaluate what have been the trends in the preceding year and to render a judgment as to whether certain episodes were or were not terrorism and to present the U.S. Government's judgment as to who is responsible for those episodes.

JUDGE ROBINSON: Now, you used the modifying phrase "publicly released document." What is the distinction that you draw between the publicly released patterns of global terrorism reports and other reports which I conclude, based

on your testimony, were not publicly released?

THE WITNESS: When I was working for the United States Government and the Department of Defense from 1993 through 1997, I had a top-secret security clearance and I know that at that time, there were classified versions of these reports that were prepared that would provide more information about the sources and methods. I do not know if that continues to be the case, although I would hardly be surprised if it were the case.

At least in those years, any of the judgments that were reached in these reports were identical with the judgments that were released in the -- that were contained in the classified versions. The differences would be information that might appear in the classified versions which it was felt would be inappropriate to release to the public because it could reveal information about sources and methods.

JUDGE ROBINSON: Thank you, Dr. Clawson.

You may continue, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Dr. Clawson, I would like to draw your attention to Plaintiffs' Exhibit 27-E, which is the

Patterns of Global Terrorism for 1987. I would like you to refer to page 35, if you would, to the paragraph that's entitled Iran.

A Yes, sir.

Q Do you see that?

A Yes, sir.

MR. ROULEAU: And it should be tabbed both in your binder as well as Your Honor's binders.

JUDGE ROBINSON: It is. Thank you.

BY MR. ROULEAU:

Q Dr. Clawson, would you kindly read out loud that first paragraph that follows the subtitle Iran in bold?

A "Of the 44 terrorist incidents in which Iran was identified as the sponsor, we recorded 25 in the Middle East, 10 in Wester Europe, and 9 in Asia. The preferred means were bombings (27) and armed attacks (13). Tehran uses terrorism skillfully and selectively to support its long-term objectives of ridding the Middle East of all Western influence, intimidating Iranian dissidents overseas, forcing Arab countries to end their support for Iraq, and supporting Khomeini's vision or a radical Islamic revolution to all parts of the Muslim world. We believe that most Iranian leaders

agree that terrorism is an acceptable policy option, although some may disagree on specific operations."

Q Dr. Clawson, do you agree with this assessment?

A Yes. Indeed, in light of evidence available now not available perhaps at the time that this was written, I suspect that several other judgments would be made tougher.

JUDGE ROBINSON: What is your understanding, Dr. Clawson, of to whom the phrase "most Iranian leaders" referred at least as of 1987 when this report was drafted -- was prepared, excuse me.

THE WITNESS: Iranian politics has, since the early days of the Islamic revolution, been sharply divided between groups which are often referred to in Iran as well as in the West as radicals and moderates, and there has been a continuing -- there was continuing debate about the extent to which some of the prominent moderate leaders thought that terrorism was an acceptable policy option, and one of the things which has emerged as a result of the election of a new Iranian president in 1997 and the investigations

about Iran's past intimidation of dissidents at home was to what a remarkable extent some of those who we thought of as moderates back in the early 1980s turn out to have been very key in supporting terrorism against Iranian dissidents.

Similarly, the results of a Berlin court trial about the murder of four Iranian dissidents in Berlin -- at that trial, testimony by a gentleman who hadn't previously been a high official in Iranian's security services provided quite a bit of information about how a number of people generally thought of at this time that this report was written in 1985 as moderates were, in fact, directly ordering terrorist activities.

JUDGE ROBINSON: Thank you, Dr. Clawson.

You may continue, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Dr. Clawson, referring to Plaintiffs' Exhibit 27-M, which is the Patterns of Global Terrorism for 1995, again if you could go to page 23, which should be tabbed in your book, and I'll direct your attention to the subheading titled Overview of State-Sponsored Terrorism.

A Yes, sir.

Q In the first paragraph down below, it's sort of the last two sentences, states, "The United States currently lists Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism." Do you see that?

A Yes, sir.

Q And do you understand that Iran is considered to be a state sponsor of terrorism by the United States Government?

A Oh, yes, sir. It has been listed as such ever since those lists were first prepared.

Q And could you explain a little bit for the Court what those lists are, what the purpose is?

A Well, Congress mandated the list initially to require that the government take a variety of actions against countries on that list, but the preparation of that list has over the years become a major exercise in listing which countries provide support for terrorism.

Q And how long has Iran been on that list?

A Ever since the list was first begun.

Q Okay. Are they currently on that list?

A They are currently on that list.

Q And so Iran was on that list in 1996, correct?

A Correct.

Q In '95?

A Correct.

Q Okay. Again if you would indulge me, referring to page 23 right where we were, on the third paragraph under Overview of State-Sponsored Terrorism, it starts with "Iran continued."

A Yes, sir.

Q Could you read the first two sentences out loud, please?

A "Iran continued in 1995 to be the world's most active supporter of international terrorism. Although Tehran tried to project a moderate image in the West, it continued to assassinate dissidents abroad and maintained its support and financing of groups that pose a threat to U.S. citizens."

Q And Dr. Clawson, do you agree with that assessment?

A In 1995, yes. I would say for today that we would rephrase that to say that Iran is the world's most active state supporter of international terrorism because there are groups such as al Qaeda which are non-state actors that are important in the international terrorism business.

JUDGE ROBINSON: Dr. Clawson, what other non-state actors were active supporters of or participants in international terrorism as of the time this 1995 report was prepared?

THE WITNESS: Well, there were any number of insurgent organizations, like the Tamil Tigers and Sri Lanka, for instance, responsible for a killing of an Indian prime -- a prime minister of India, and there were a number of Latin American groups, the Peruvian group the Shining Path, which was quite active at the time. So there were a fair number of these organizations outside the Middle East as well as inside the Middle East.

There were some radical Palestinian groups that were opposing Arab-Israeli peace that were quite active that drew some support from Iran but were not necessarily controlled and directed by any state.

I am sure I'm leaving out other separatist organizations that don't immediately come to mind.

JUDGE ROBINSON: What other than this 1995 Patterns of Global Terrorism report is the basis of your opinion?

THE WITNESS: Well, certainly at this time in 1995 when I was working for the Department of

Defense, I was very involved in following Iran's support for terrorism, receiving many briefings about the matter from officials in the U.S. Government as well as working with a whole set of colleagues who were following issues of terrorism around the world, and we would frequently -- indeed, I was preparing at this time a report that was called The Strategic Assessment by the National Defense University that was evaluating the threats to the United States from all across the world and had a team of 20 colonels and high U.S. Government officials working for me in preparing this. So we were looking at around the world. So that gave me, I think, pretty good access to people following many different terrorists and threats to the United States and supporters of terrorism, and I don't think there was any question in the minds of anyone on that team that Iran was the most active supporter.

JUDGE ROBINSON: Thank you, Dr. Clawson.

You may continue, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Following up on Her Honor's discussion or question, last question, Dr. Clawson, did you still

have that same job that you had in 1995 with the government in 1996?

A Correct, sir.

Q In June of 1996?

A Correct.

Q So you were still doing the same activities?

A And still had a top-secret security clearance and following very closely U.S. security presence in the region, had gone several times to the Persian Gulf to visit with U.S. Forces in the area and had consulted with U.S. commanders and briefed U.S. commanders in the region and been briefed by them.

Q Dr. Clawson --

JUDGE ROBINSON: Excuse me just one moment, Mr. Rouleau.

[Pause.]

JUDGE ROBINSON: You may continue, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Dr. Clawson, referring to Plaintiffs' Exhibit 27-N, again I tabbed it and I would like to state for the record that this is the Patterns of

Global Terrorism for 1996. It looks a little bit different because we had to pull it up off of the State Department website. For some reason, it was missing at the last minute from our library. So I apologize. But I did tab the section that I would like us to go to because it's not consecutively paginated.

Do you see that tab?

A Yes, sir.

Q Again, it says Overview of State-Sponsored Terrorism, and this is for 1996?

A Yes, sir.

Q If you would go down to the fourth paragraph, can you read the first sentence of the fourth paragraph starting with "Iran"?

A "Iran, the most active state sponsor of terrorism today, continues to provide direction and support to terrorist groups, including Hizbollah in Lebanon."

Q Okay. And to follow up on our last line of questions, do you agree with that statement for 1996?

A Oh, yes, sir.

Q Is it fair to say that your conclusions with respect to Iran's sponsorship of terrorism in

1995 are the same for 1996?

A Yes, sir.

Q Okay.

JUDGE ROBINSON: Just one moment, Mr. Rouleau.

[Pause.]

JUDGE ROBINSON: You may continue.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q Dr. Clawson, do you agree that Iran provided direction and support to terrorist groups in 1996?

A Yes, sir.

Q And it did so also in 1995, correct?

A Correct, sir.

Q Okay.

Dr. Clawson, are you familiar with the Iranian agency known as the Ministry of Information and Security?

A Yes, sir.

Q And could you -- I will refer to that agency as the Ministry, okay?

A Yes.

Q And could you -- well, could you explain what the Ministry is for the Court?

A The Ministry is the Iranian Government agency responsible for tracking both dissidents at home as well as engaging in intelligence operations abroad. in that sense, it has a mandate rather like that of the former KGB of the Soviet Union, covering both domestic and external issues.

It is the successor to the Shah's agency -- excuse me -- the Shah's Organization for Information and Security. The Organization for Information and Security of the Shah was known often by its Persian initials, SAVAK, and this now is the Ministry instead of the Organization for Information and Security.

In the early days after the revolution, this large imperial agency was kept together and tried to demonstrate its usefulness to the new revolutionary government because of its well respected technical skills at the job of an intelligence agency. It then became in the early 1980s a ministry, and indeed became a vital part of the apparatus of the Islamic Republic.

As a result of its sponsorship of -- or its, excuse me, its carrying out of some assassinations of Iranian dissidents in the mid 1990s which was very much opposed by the man who

then became the president of Iran in 1997, a commission was set up to investigate its activities. The report of that commission was leaked and we learned a great deal about its organization and activities from that.

Q Let me stop you. Did you read that report?

A I read the press accounts in the Iranian press about that report, but the whole report has not, to my knowledge, ever been published.

Q Okay. Is it fair to say that the Ministry is involved in Iran's sponsorship of terrorism?

A Certainly. Certainly.

Q In what ways?

A Well, we know from the Berlin court trial that I referred to earlier and the high-level official who defected from that agency that this agency has been the organization tasked to organize a great many of Iran's terrorist activities abroad, and in particular it has a lot of technical expertise in things like signals intelligence, wiretapping, surveilling people, organizing individuals for carrying out terrorist activities and the like.

Q Did the Ministry provide funding and

training for terrorists?

A Absolutely, sir.

Q And did it do so -- did it do that in 1995?

A Yes, sir.

Q How about 1996?

A Oh, yes, sir, and indeed got rather -- it got caught doing this in the country of Bahrain by the Bahrainian government, which arrested a number of Bahrainians who had been in contact with the Iranian authorities, including the Ministry, and put them on trial.

Q And was the community that studies terrorism, including the U.S. Government, aware of the Ministry's activities?

A Oh, yes, sir.

Q Dr. Clawson --

A I should comment that this is precisely the moment when the German court is holding its trial in 1996.

Q Dr. Clawson, are you familiar with the Iranian agency known as the Iranian Islamic Revolutionary Guard Corps?

A Yes, sir.

Q Okay. And will refer to them as the Guard

Corps, okay?

A Certainly.

Q And if you could explain or describe that agency to the Court.

A After the Iranian revolution, the new government is concerned that the military may not be loyal to the revolutionary government, and therefore establishes a parallel military and paramilitary organization, the Guard Corps, to provide politically reliable military protection for the new government. Then when the war with Iraq starts in September of 1980, the Guard Corps dramatically expands and becomes involved in that fighting, and the Guard Corps also then becomes involved in activities abroad, trying to exploit the revolution abroad, and in 1982, after Israel invades Lebanon, the Guard Corps sends units to Lebanon which become very involved in fighting the Israelis and also in establishing political movement in Lebanon to carry out terrorist attacks against Americans, other Westerners and the Israelis.

Q All right.

Is the Guard Corps known by any other name?

A It's sometimes referred to as the IRGC. In Persian, it's usually referred to as the Pasdaran, P-a-s-d-a-r-a-n, or the Corps, the Persian word for which is Sepah, S-e-p-a-h.

Q And is the Guard Corps involved in Iran's sponsorship of terrorism?

A Very much so.

Q Can you explain how?

A There's a certain competition in many fields of the Iranian Government between revolutionary institutions and parallel traditional government institutions, and the relationship between the Ministry and the Guard Corps is a good example of this competition in which the Guard Corps sees itself as the guardian of revolutionary values and brings with it revolutionary spirit and political skills, whereas the Ministry sees itself as the place that's technically more competent, that brings with it more competence. So you will find Guard Corps generals are going to be more involved in meeting with Hizbollah recruits in order to persuade them to become active in Iran's behalf and Ministry people are going to be more involved in training these individuals about the tasks they have to carry out. That's what we've

heard. That's the pattern we've seen in Lebanon, the pattern we saw in Bahrain and, indeed, the pattern that investigation suggests was also true in Saudi Arabia. May have been true in Saudi Arabia.

Q Is it fair to say that the Guard Corps provided military training to terrorists? You had mentioned in the Bakka Valley in Lebanon.

A Yes, sir. I'm sorry if I didn't mention the Bakka Valley. But yes, the Guard Corps was involved in providing military training, but also training for how to carry out terrorist attacks by these units.

Q And did they do so in 1995?

A Before 1995, in 1995, and after 1995.

Q And was this well known throughout the intelligence community, including the U.S. Government?

A It was hardly a secret. The Iranian press wrote about it, the Lebanese press wrote about it, the officials of Hizbollah in Lebanon openly proclaimed it and thanked Iran for its support in doing this. The Lebanese press wrote about it, Western journalists visited sites where this training went on.

Q Okay. Dr. Clawson, what or who is Hizbollah?

A Hizbollah literally means "party of God." The first time that we see a group by that name that becomes really active is in the mid 1980s in Lebanon. We now know from the accounts of its leaders and from academic researchers and the statements of the Iranian Government that it was established at the order and direction of the Government of Iran out of a more modern Shia political movement in Lebanon, and that it was established specifically for the purpose of using armed attacks, including terrorist attacks, to drive Western and U.S. influence out of Lebanon as well as to drive the Israelis out of Lebanon.

Q So it was a terrorist organization?

A The U.S. Government has long argued that Hizbollah both had a terrorist aspect and also a military aspect, fighting the Israeli presence in Lebanon as well as charitable and political wings, and that they were all inseparably linked, carried out charitable activities such as running hospitals in schools, in large part to further its goal of identifying terrorists and attracting people to be terrorists or military fighters.

Q And I understand that, but at the same time that it may be doing something charitable, it was also engaging in military and terrorist activities, correct?

A Correct, sir.

Q Is it fair to say that Hizbollah is an Iranian creation?

A By the accounts both of the Iranian officials and Hizbollah officials and as well as academic scholars, it is indeed and was created at the direction of the Government of Iran.

JUDGE ROBINSON: Just one moment, Mr. Rouleau, before you move on.

[Pause.]

JUDGE ROBINSON: Dr. Clawson, there have been references during the course of these proceedings by plaintiffs' counsel to an entity known as Saudi Hizbollah.

THE WITNESS: Yes, Your Honor.

JUDGE ROBINSON: Tell us about that, please.

THE WITNESS: Yes, Your Honor. Indeed, I spent yesterday reviewing a manuscript by a scholar for us trying to evaluate the extent to which the -- trying among other things to evaluate the extent

to which Saudi Hizbollah is a branch of the same organization of Hizbollah in Lebanon or is a fraternal organization with similar goals and objectives that works closely with Hizbollah in Lebanon, and --

JUDGE ROBINSON: What is your opinion regarding that distinction and what are the reasons for it and the basis upon which you reached it?

THE WITNESS: I do not know what the answer to that question is because we don't have sufficient information about Saudi Hizbollah to judge to what extent the leadership of the organization regards itself as belonging to the exact same movement and responding to the same leadership as those in Lebanon, and it would certainly seem that there are inconsistent attitudes held by some of the different members of the organization as to whether they are a closely allied organization sharing the same objectives or goals or whether they are part of the same broader international organization.

JUDGE ROBINSON: Does that inability to render an opinion apply to the issue of the support of the Saudi Hizbollah, whatever the nature of that entity may be, by the Government of Iran or the

MOIS or the IRGC?

THE WITNESS: No, not at all. It's very clear that the Government of Iran, at least the Revolutionary Guard Corps -- I can't be as confident about the MOIS, but it's very clear that the Government of Iran was very involved in urging the formation of the Saudi Hizbollah, providing it with material assistance of recruiting for Saudi Hizbollah among Saudi Shia students who were studying in Iran. So the Government of Iran was instrumental in the creation of this organization.

The question is more to what extent, because they are in Saudi Arabia rather than Lebanon, they see themselves as a different organization or just a different branch of the same organization, but that they share the goal of eliminating Western, especially American, influence in the region, of ultimately establishing Islamic states in their countries. That, there is no doubt about whatsoever. That they were materially and financially supported by Iran, there is no doubt whatsoever.

There has always been a certain ambiguity about the extent to which these radical Islamic movements would work within the framework of

existing state boundaries or to what extent they would work within the broader Muslim community as a whole, and it would appear that in a group like Saudi Hizbollah, that there are real differences of opinion on that question, and I just -- I don't know to what extent the leadership of that organization sees itself as a separate group allied with Hizbollah in Lebanon or it sees itself as part of the same group entirely.

JUDGE ROBINSON: Now, you answered -- in response to one of Mr. Rouleau's questions, you discussed the formation of Hizbollah. May I ask you to do the same, please, to the extent that you can, with respect to Saudi Hizbollah.

THE WITNESS: The formation of Saudi Hizbollah we don't have as rich a record. It's not as large an organization; it hasn't been as forthcoming about its background. But certainly the -- both from Saudi Shia political leaders who I have spoken with in Saudi Arabia and from Iranian accounts about their activities in Saudi Arabia and from Saudi officials describing their perception of the situation, it would seem -- I have very little doubt that Saudi Hizbollah was formed at the order of the Iranian Government, but as I say, I don't --

we don't have the open acknowledgement by all the sides that we have with Hizbollah in Lebanon.

JUDGE ROBINSON: Did you say that you don't believe or that you -- is it your opinion that the Saudi Hizbollah was not formed at the direction of the Government of Iran? Is that what you said?

THE WITNESS: No. I'm sorry if I'm unclear, Your Honor. I think that it was --

JUDGE ROBINSON: We all in the judicial system have the horrible habit of excessive use of double negatives.

THE WITNESS: I think there is excellent evidence to suggest that Saudi Hizbollah was formed at the direction of the Government of Iran. The only thing which is lacking is the open acknowledgement of that fact by the leaders of the organization and by the Iranian Government. But we have accounts of Saudi Shiites about their political situation and how Hizbollah merged in that situation; we have accounts of Saudi Government officials; we have information from individuals who were arrested who belong to Saudi Hizbollah; we have accounts of how similar organizations were formed elsewhere in the Gulf and

their accounts of their relationship with Saudi Hizbollah. So putting this together, I think we have a very convincing story here. The only piece which is lacking is the actual acknowledgement by the leadership of Saudi Hizbollah as to who ordered their creation.

JUDGE ROBINSON: Because there is, in your words, some evidence that the Saudi Hizbollah was formed at the direction of the Government of Iran, am I correct in my assumption that there is also some evidence that it was not?

THE WITNESS: I don't know of any.

JUDGE ROBINSON: You don't know whether there is evidence --

THE WITNESS: Excuse me. I don't know of any such evidence and I certainly heard people active in the Saudi Shia community arguing that the only way this organization could have been formed is with Iranian involvement and direction.

JUDGE ROBINSON: What is your understanding of when the organization entity known as Saudi Hizbollah was formed regardless of by whom it was formed --

THE WITNESS: It would --

JUDGE ROBINSON: -- without regard to by

whom it was formed?

THE WITNESS: It would seem that it was probably formed sometime between 1991, when U.S. Forces show up in Saudi Arabia, and 1994, but I don't know exactly when in that timeframe the group was formed. In other words, there may have -- there start to be individuals recruited for a cause like this in that timeframe, but I don't know what time the organization is formed.

JUDGE ROBINSON: Are you aware of any reference in 1996 Patterns of Global Terrorism Report to Saudi Hizbollah?

THE WITNESS: I am not aware of such things, and I think that's an example of the kind of issue which the U.S. Government analysts preparing this report would have been very careful about. They would not include information about Saudi Hizbollah until they had really extensive and convincing information, and at the time of the Khobar Towers bombing, there was a vigorous debate as to whether or not Iran was responsible for this and a lot of shouting and fighting and disagreement about that within the U.S. Government for several years.

JUDGE ROBINSON: To what extent does that

debate continue?

THE WITNESS: I don't think there is any further debate about that matter. The issue is quite clearly resolved by the late 1990s.

JUDGE ROBINSON: You may continue, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

JUDGE ROBINSON: Thank you, Dr. Clawson.

BY MR. ROULEAU:

Q Dr. Clawson, is it surprising that the leadership of Saudi Hizbollah has not come out and declared that it's a creation of Iran given Iran-Saudi relations?

A Well, were the leadership to come out and say that, they would suffer politically with their potential supporter in Saudi Arabia given that Saudi-Iranian relations have been quite tense over the years and that the -- they would suffer. So I would assume that they would try not to reveal this fact.

Q So that's not surprising to you?

A Not at all surprising.

Q And we were talking about Saudi Hizbollah. Who are the members of Saudi Hizbollah, if you know?

A To a person, they are members of the Saudi Shia community, which is a persecuted minority present primarily in the eastern part of Saudi Arabia, and including in the town where the Khobar Towers building was located.

Q So Khobar Towers is in the Eastern Province?

A Correct.

Q And are Muslims in the Eastern Province mainly Shiites or Suni?

A Mainly Shiites, a fact which the Saudi Government denies.

Q And do Shiite Saudis have a general affinity to Iran?

A They have a complex relationship to Iran. On the one hand, they regard it as in some ways their protector, certainly as the country to which they have to send young men to be trained to be clerics. Yet, on the other hand, they are indeed proud of being Arabs and not Persians. So the relationship is quite complex. But yes, there is an affinity and at the same time a certain desire to establish a difference.

Q You mentioned that the Shiites in Saudi Arabia are a repressed minority. Can you just

explain a little bit to the Court?

A It's difficult for them to get permission to build Mosques; it's difficult for them to hold their religious observances in public. Very, very few Shiites work for the government. I have been in the Council General's Office, the U.S. Council General's Office in the Eastern Province and seen Shia notables coming to complain, asking the U.S. Government to intervene on their behalf with the government about the lack of employment opportunities for young people, and there's a great deal of social discrimination against them, discrimination in admissions to universities, you name it.

Q Okay. What was the state of relations between Iran and Saudi Arabia from 1990 to about 1997?

A Terrible. The leader of the Iranian revolution, Ayatollah Khomeini, before his death, issued virulent, vicious statements about the Saudis and how they were following what he called American Islam rather than true Islam. This was particularly inflamed by some episodes that took place during the annual pilgrimage to Mecca where a large number of Iranians were killed in an accident

that the Iranians blamed on the Saudis, and admittedly the Saudi police handled it badly. But relationships were truly horrific.

Q You previously testified that Khobar Towers is in the Eastern Province, correct?

A Correct, sir.

Q Okay. So I would like to talk a little bit about Khobar Towers now. Are you familiar with the bombing of the Khobar Towers complex --

A Yes.

Q -- that took place on June 25, 1996?

A Yes, sir.

Q And what is the basis of your knowledge of the bombing?

A I was working at the U.S. Government at the time and had visited U.S. Forces in Saudi Arabia beforehand. I spent many hours meeting with the people -- the U.S. Government commission investigating the bombing and spent many hours after its report was issued about follow-up activities about the bombing, spent a lot of time with the Saudi officials discussing the bombing. So I have a lot of information from my time within the U.S. Government and also from academic study of the issue.

Q And at that time, did you have a security clearance --

A Yes, sir.

Q -- with the government?

A I had top-secret clearance.

Q Okay. So were you privy to a lot of discussions or meetings that you can't disclose --

JUDGE ROBINSON: Let me ask you to proceed by non-leading questions, Mr. Rouleau.

MR. ROULEAU: Certainly, Your Honor.

BY MR. ROULEAU:

Q At that time, you mentioned some of the activities that you did. Did you have an opportunity to meet with any of the U.S. officials who were actually investigating the bombing?

A Oh, yes, sir. And indeed, I mentioned earlier that there was a vigorous discussion about who was responsible for the bombing. I participated in that -- or I was a minor bit participant in that discussion and received information, classified briefings, as that discussion proceeded.

Q And do you have an opinion as to whether or not Iran was behind the bombing?

A Initially no, but over time, a wealth of

evidence accumulated that -- even by the time I left the government in 1997, I did not think that the evidence was conclusive, but the wealth of information which then became available with better cooperation between the Saudi Government and the FBI I think clinched the matter.

Q And what information more precisely clinched the matter for you?

A Well, we had been hearing a story from the Saudis -- their investigation, proceeding by techniques which would, I suspect, shock this Court, had come to that conclusion early on, but it was after the Saudis cooperated much more closely with the FBI that the FBI was able to develop on its own and using U.S.-style investigative techniques information which arrived at the same conclusion, which I thought was all the more convincing given that the initial inclinations of many of those investigators was to be highly skeptical of the Saudi account of what had happened.

JUDGE ROBINSON: Dr. Clawson, you just stated the conclusion of the FBI in response to Mr. Rouleau's question. Perhaps Mr. Rouleau's next question would have been to ask what your opinion

is. If that was your next question, Mr. Rouleau, you may proceed, or I will simply interject and ask the question; that is, what is your opinion?

THE WITNESS: I think there is no doubt that Iran was responsible for the Khobar Towers bombing.

JUDGE ROBINSON: And what is the basis of your opinion?

THE WITNESS: We have both the Saudi evidence to suggest that this was the case, which I thought was a pretty good case, but I wasn't prepared to endorse, say, in 1997 when I left the U.S. Government because I knew that the FBI was continuing its investigations, and now we also have the FBI coming to very, very similar conclusions as the Saudis did.

JUDGE ROBINSON: On what evidence have you based or on what evidence do you base your opinion?

THE WITNESS: I would base my opinion on the -- both what I thought was quite convincing evidence from the Saudis, but I was prepared to suspend that until I saw what the FBI developed, and once I saw that the FBI developed the same -- a story that was almost exactly the same as the Saudis' story, I said, look, this is two

independent confirmations of the same account.

Furthermore, as time has passed, we have not heard any other account which has emerged, and yet generally with these terrorist episodes, if we get it wrong initially, additional evidence emerges later which suggests that this is the case, and we have not seen that at all in this case.

So it's two accounts which come to much the same conclusions, no other independent evidence to suggest the contrary. I think that's pretty compelling.

JUDGE ROBINSON: What is the evidence to which you refer? You refer generically to evidence gathered by -- you didn't indicate whom -- by Saudi officials and evidence amassed by the FBI, and you said that you relied on evidence -- on both of the two categories of evidence. What was the evidence?

THE WITNESS: Well, in the Saudi case, their response to the bombings is to round up a large number of people in the Eastern Province and to interrogate them vigorously and to put a great deal of pressure upon these individuals to tell them who is responsible for this and what kind of organization was there, and they come up quite quickly with an account of how this took place.

Then the FBI uses much more -- relies on physical evidence and it relies on intelligence intercepts, and so for instance there's a lucky break about an individual who is a Saudi individual in Canada who indiscreetly refers to his role in the bombing and then he is delivered by the Canadian authorities into U.S. hands and he is interrogated here before he is returned to Saudi Arabia because of certain complex deportation matters.

The FBI gathers additional evidence which is presented then in the indictment against individuals held for their involvement in the Khobar Towers bombing, and the former FBI director Louis Freeh speaks eloquently and writes eloquently about Iran's involvement in this and provides some accounts of the information by which the FBI came to its conclusions.

JUDGE ROBINSON: Mr. Rouleau, do you intend to elicit the evidence from Dr. Clawson or from someone else?

MR. ROULEAU: Well, I would like to try to elicit some more from him right now with respect to the specific evidence upon which he relied.

JUDGE ROBINSON: Very well. Before you do

that, there is one further question to ensure our common understanding regarding relevant background and orientation.

You just testified that -- I believe your words were you that you now have no doubt that the Government of Iran was responsible for the bombing of Khobar Towers --

THE WITNESS: Correct, Your Honor.

JUDGE ROBINSON: -- in June of 1995.

THE WITNESS: Ninety-six, Your Honor.

JUDGE ROBINSON: What is your opinion regarding the involvement of Saudi Hizbollah in that bombing?

THE WITNESS: There is no doubt that Saudi Hizbollah was involved in carrying out the bombing.

JUDGE ROBINSON: By "involved in carrying out the bombing," what do you mean?

THE WITNESS: That the people who carried out the bombing were members of Saudi Hizbollah.

JUDGE ROBINSON: Now, Mr. Rouleau, I will ask again whether you intend to elicit the evidence which forms the basis of Dr. Clawson's opinion from Dr. Clawson or is this evidence to be elicited from some other witness?

MR. ROULEAU: Well, I can certainly and I

intend to ask Dr. Clawson specifically what you have reviewed and who you spoke with that led you to your ultimate conclusion which you have already given to this Court expressing Iran and Saudi Hizbollah's involvement. So if you could describe to the extent that you can and that you're permitted the exact evidence that you reviewed or to whom you spoke and what you gathered to the extent that you can in forming your opinions.

THE WITNESS: Yes, sir. I spoke with officials of the Saudi Government.

BY MR. ROULEAU:

Q Can you name who?

A I'd rather not, sir. Those were in confidential discussions when I was representing the United States Government, so -- I spoke with political activists in the Eastern Province of Saudi Arabia.

JUDGE ROBINSON: Are you prepared to identify them?

THE WITNESS: I would have to go back and review my records of all of the individuals and see what the character of the conversations was. I know that one former Saudi diplomat that I spoke with, Turki al-Hamad, that was not a confidential

conversation. Just T-u-r-k-i and his last name is a-l hyphen H-a-m-a-d. But I would be reluctant to reveal the content of those conversations given the difficult circumstances that Saudi Shia face in the Eastern Province unless I had the permission of the individuals involved, which I think would be quite difficult to secure without a trip there, and I am not sure I could find those individuals given the passage of time.

In addition, many conversations with U.S. Government officials who had been involved, U.S. military officials, Air Force officials had been involved in the investigations, and that would include people at the general officer rank as well as more working level people involved in the investigation.

JUDGE ROBINSON: Are you prepared to identify them or to testify with respect to the conversations?

THE WITNESS: Your Honor, I would have to go back and verify that with each of the individuals involved since at that time I was U.S. Government official and those conversations were -- could well -- did touch on classified information. It would be quite a complicated process, frankly,

to --

BY MR. ROULEAU:

Q Is there anything you can disclose that would not touch on anything that would fall under the rubric --

JUDGE ROBINSON: Well, I don't think Dr. Clawson finished identifying generically the evidence that led him to the opinions that he has expressed here in the courtroom, so let's do that first, or we will allow Dr. Clawson to do that first and then you may ask the question regarding what it is that he is able to discuss.

THE WITNESS: Your Honor, essentially they were conversations with reporters who were investigating the matters and trying to formulate questions to pose either to U.S. Government officials or Saudi officials or, for that matter, to Iranian officials about this.

JUDGE ROBINSON: Are you able to identify the reporters or testify regarding the dates of your conversations with them and the information conveyed during the discussions?

THE WITNESS: I don't think I have records on that. I would have to go back. But certainly it begins as early as 1996; it reaches a crescendo

around the period of the time of Hani Sayegh's detention in Canada and his deportation here, and also the time that it becomes public knowledge that President Clinton has sent a letter to Iranian President Hatami asking for Iranian cooperation about the investigation in this matter, in particular for an opportunity to interrogate two named individuals about their involvement in the Khobar Towers bombings. At that time, there were a lot of questions being asked by reporters about this, and that would have been a crescendo. That letter and my conversations about that matter, then, with the Iranian Government officials and the reasons why Iran did not provide those two individuals by their accounts are another factor.

JUDGE ROBINSON: What is the other evidence? You have named conversations with Saudi officials, and perhaps I should say officials of Saudi Arabia, discussions with political activists, discussions with U.S. Government officials, discussions with reporters. What other evidence have you considered in formulating the opinion that you have expressed here in the courtroom?

THE WITNESS: President Clinton's letter to President Rafsanjani and the Iranian response to

that letter as characterized to me by the U.S. -- excuse me -- by the Swiss ambassador to Iran who represented U.S. interests in this matter and as characterized to me by the U.S. Government officials who were responsible for drafting the letter and for reviewing the response, people who worked at the National Security Council.

JUDGE ROBINSON: Are you prepared to offer or to provide either letter or testify with respect to the contents of either letter?

THE WITNESS: No, Your Honor, I'm not, because I only had those letters read to me. I do not have copies of them and have not seen physical copies.

JUDGE ROBINSON: Very well. What other evidence --

THE WITNESS: They were both described to me by long-time friends and acquaintances who were at the time working at the National Security Council. One is the President's special advisor on the Middle East, Mr. Martin Indyk, and the other is his deputy, Mr. Bruce Reidel.

JUDGE ROBINSON: All right. In formulating the opinions that you've expressed here in court, what else did you review or consider?

THE WITNESS: I also considered the indictment in 2001 in the Eastern District of Virginia, I believe, by the United States Government of named individuals for their involvement in the bombing and the speeches and testimony -- speeches and writing by FBI Director Freeh at that time, and also my consultations at that time with U.S. Government experts working on terrorism issues.

JUDGE ROBINSON: Are you prepared to identify the individuals with whom you consulted?

THE WITNESS: I would rather not since some of them are at U.S. Government intelligence agencies that I was visiting for the purpose of consultation with them.

JUDGE ROBINSON: Can we generically describe the individuals as intelligence officials?

THE WITNESS: Yes. Yes, Your Honor, that would be very accurate.

JUDGE ROBINSON: Of the U.S. Government?

THE WITNESS: That would be very accurate.

JUDGE ROBINSON: What else did you consider or review in formulating the opinions that you've expressed here in court?

THE WITNESS: The reports both in the

Saudi press and in the Iranian press about the matter, so the character of the Iranian reaction to this and what they did not say as well as what they did say, which is where, unlike in other circumstances where they have felt that they could make a good argument they were not involved and they have presented good cases they were not to make that argument, there is no effort in this case, no effort in this case for them to present that kind of information.

In the Saudi press, which admittedly is very much controlled by the Saudi Government, again, there is rather supportive statements made about the --

JUDGE ROBINSON: Are you able to identify the press reports that you considered in formulating the opinion that you have -- or opinions that you've expressed in court this morning?

THE WITNESS: I would have to go back and review my records very carefully, but I would think that -- I can identify it as having been from the major Iranian newspapers such as the newspaper Kahan, the largest circulation newspaper at that time that's controlled by hard-liners, and also the

newspaper Etelaat, E-t-e-l-a-a-t, which is another major newspaper in Iran at the time. And, as I say, it's as much what they don't say as what they do say and the comparison of how Iran reacts in other terrorist episodes which I find quite damning.

JUDGE ROBINSON: What else did you review or consider in formulating the opinions that you've expressed in court this morning?

THE WITNESS: Well, opinions expressed in court, many conversations with European officials who follow -- and Israeli officials who follow these matters, and

JUDGE ROBINSON: Are you able to identify them, the European --

THE WITNESS: I --

JUDGE ROBINSON: -- these intelligence officials of the European government?

THE WITNESS: These were intelligence officials in Israel and intelligence officials from the British, French and German governments, as well as members of the foreign ministry of each of those four countries.

JUDGE ROBINSON: Are you able to directly the officials or to testify with respect to the

information that you received from them?

THE WITNESS: I would really need to consult with any of those before I did it, and I would be very surprised if they would be prepared to be identified.

JUDGE ROBINSON: What else did you consider or review or evaluate in formulating the opinions that you expressed in court this morning regarding Khobar Towers?

THE WITNESS: Personal conversations with officials of the State Department, of the National Security Council, about what are U.S. Government policy options in face of the evidence that Iran is responsible.

JUDGE ROBINSON: Are you able to identify those officials or testify with respect to the information that you received from them?

THE WITNESS: I can certainly identify Martin Indyk and Bruce Reidel.

JUDGE ROBINSON: Are you able to testify regarding the information that you received from them?

THE WITNESS: I can certainly say that they felt that there was no doubt that Iran was responsible by the time we get into the time frame

of the 2000 campaign.

JUDGE ROBINSON: Okay. Is there anything else that you considered in formulating the opinions regarding Khobar Towers that you expressed in court this morning?

THE WITNESS: Well, Your Honor, to be quite blunt, after President Clinton's October 1999 letter to President Hatami becomes public knowledge later that year, there is considerable concern on the part of the Clinton Administration and its political appointees that this could become an issue in the presidential election, and I had a number of conversations with high-level officials and political operatives about what are the options for U.S. policy in which it was universally assumed by all of these people that Iran was responsible. The only question was, okay, now what do we do about it?

But I would be very reluctant given the sensitivity of the issue at the time to discuss who I had these conversations with other than to say they were high U.S. Government officials and high Democratic officials, Democratic party officials, unless I checked with them, and I very much doubt that they would like me to violate my confidence

during those conversations.

JUDGE ROBINSON: What else did you consider or review in formulating the opinions that you expressed in court this morning regarding Khobar Towers?

THE WITNESS: I think that's a pretty comprehensive list, Your Honor.

JUDGE ROBINSON: Let me review it just to make sure my notes are accurate: 1) officials of the government of Saudi Arabia; 2) quote, "political activists," close quote; 3: U.S. government officials; 4) reporters; 5) which has two parts, Clinton's letter to Rafsanjani and Rafsanjani's response; 6) the indictment returned in the Eastern District of Virginia in 2001; 7) speeches and writings of Louis Freeh; 8) consultations with U.S. Government intelligence officials; 9) press accounts, press accounts in both the Saudi press and the Iranian press; 10) conversations with intelligence officials of the governments of Great Britain, France, Germany and Israel; 11) conversations with officials of the U.S. Department of State and the National Security Council; and 12) discussions with high-level policy officials and policy operatives in the Clinton

Administration.

Did I omit anything?

THE WITNESS: No, Your Honor.

Earlier in your list, you had U.S. Government officials. Perhaps it's worth noting that that includes military officers, including at the rank of general officers.

JUDGE ROBINSON: And is it correct that of those twelve -- those are not, of course, twelve discrete items of evidence which form the basis of the opinions that you've expressed here, but we have grouped them generically. Is it correct that of that grouping of categories of evidence, that you are prepared to testify only with respect to the indictment returned in 2001, the speeches and writings of Louis Freeh, and the press accounts in the Saudi and Iranian press?

THE WITNESS: Correct, Your Honor.

JUDGE ROBINSON: Very well. Thank you.

Why don't we take a brief recess. Dr. Clawson, I'm going to ask you to step down, please, and counsel, I will have you remain. If you would like to get a cup of coffee or tea in the cafeteria on the lower level and come right back, you're free to do so.

ANNEX 112

84TH CONGRESS } SENATE { EXECUTIVE REPT.
2d Session } { No. 9

COMMERCIAL TREATIES WITH IRAN, NICARAGUA, AND THE NETHERLANDS

MONDAY, JULY 9, 1956.—Ordered to be printed

Mr. GEORGE, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Executive E, Executive G, and Executive H, 84th Congress, 2d session]

The Committee on Foreign Relations, having had under consideration the treaties listed below, recommends that the Senate give its advice and consent to their ratification:

1. Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed at Tehran on August 15, 1955 (Ex. E, 84th Cong., 2d sess.);
2. Treaty of Friendship, Commerce, and Navigation with the Republic of Nicaragua, and a protocol relating thereto, signed at Managua on January 21, 1956 (Ex. G, 84th Cong., 2d sess.); and
3. Treaty of Friendship, Commerce, and Navigation between the United States of America and the Kingdom of the Netherlands, together with a protocol and an exchange of notes relating thereto, signed at The Hague on March 27, 1956 (Ex. H, 84th Cong., 2d sess.).

MAIN PURPOSE

The objective of these treaties is to establish a comprehensive reciprocal basis for the protection of American commerce and citizens, and their business and other interests abroad. To this end they provide either national or most-favored-nation treatment with respect to entry, travel and residence, basic personal freedoms, guaranties with respect to property rights, the conduct and control of business enterprises, taxation, exchange restrictions, the exchange of goods, and navigation. The treaty with Iran, in addition, has broad provisions concerning the privileges and immunities of consular officers such as are usually found in more detailed form in consular conventions.

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The treaties with Nicaragua and the Netherlands follow in practically all respects the provisions of previous postwar commercial treaties, the most recent of which, a treaty with the Federal Republic of Germany, was approved by the Senate on July 27, 1955, by a vote of 83 to 0. The Iranian treaty is somewhat more general and compares closely with the treaty of amity and economic relations with Ethiopia, approved by the Senate July 21, 1954, by a vote of 86 to 1. The provisions of the three treaties are further summarized and discussed, particularly in the respects in which they differ from other postwar commercial treaties, in other sections of this report.

BACKGROUND AND COMMITTEE ACTION

These are the 13th, 14th, and 15th treaties of friendship, commerce, and navigation entered into since World War II. They are a part of a continuing program of this Government to bring earlier treaties up to date and negotiate new ones with nations with which the United States does not have such treaties.

The Iran treaty replaces two provisional agreements of 1928. The Nicaraguan treaty replaces one of 1867 which was terminated in 1902. The Netherlands treaty replaces a convention of 1852 and an agreement on trademarks of 1883.

The latest of these three treaties was received by the Senate on May 7, 1956. During the time that they have been pending before the Foreign Relations Committee, the committee received no indication of opposition to their provisions.

On July 3, 1956, the committee heard Thorsten V. Kalijarvi, Deputy Assistant Secretary of State, on the three commercial treaties. Although this hearing was in executive session, it has been printed for the information of the Senate along with the additional information requested at that time and supporting statements received by the committee from the American Arbitration Association and the Bar Association of the city of New York.

At the conclusion of the hearing on July 3, 1956, the committee voted to report the treaties favorably to the Senate for action thereon.

SUMMARY OF THE TREATY WITH IRAN

Article I states that—

> there shall be firm and enduring peace and sincere friendship between the United States of America and Iran.

Article II provides for rights of entry and travel, freedom of religion and of communication, right to engage in trade and related commercial activities, and the right to engage in the practice of professions subject to qualification under the applicable legal provisions governing admission to professions. The parties, however, reserve the right to apply measures which are necessary to maintain public order, and to protect public health, morals, and safety.

Articles III, IV, V, and VI spell out the rights of nationals and companies of one party in the territory of the other with respect to juridical status, access to courts, protection of property, pursuit of permissible enterprises, acquisition and sale of property, protection of inventions, trademarks, and trade names, and equal or most favored nation treatment regarding taxes, fees, or charges.

Article VII concerns exchange restrictions and provides that such shall be applied only when necessary without discrimination and under conditions permitting the withdrawal of specified categories of foreign exchange in the currency of the other party (i. e., United States dollars, earned or held in Iran).

Articles VIII and IX, relating to exports and imports of products, provided for most-favored-nation treatment of such products.

Article X details the rights of vessels flying the flag of either party in the ports of the other and in general provides national and most-favored-nation treatment, except for coastwise, inland, and fishing traffic.

Article XI governs the operation of publicly owned or controlled enterprises of one party in the territory of the other party in such a manner as to assure them (with two exceptions) no competitive advantage over privately owned enterprises.

Articles XII–XIX deal with the rights, privileges, immunities, and duties of consular officials and their residences and places of business. In substance these articles provide for treatment generally accorded by international law and usage to such officials, or as provided for in United States consular conventions with other states.

Article XX reserves the right of the parties (1) to regulate the importation and exportation of gold or silver; (2) to control fissionable materials and their radioactive byproducts; (3) to regulate the traffic in arms, ammunitions, and implements of war; and (4) to undertake necessary measures for the maintenance or restoration of international peace and security or for the protection of the parties' essential security interests.

Articles XXI–XXIII provide the settlement of disputes, superseding of two 1928 treaties, and the duration and termination of the treaty which shall be as follows: the treaty will run for 10 years and continue in force thereafter until terminated by one of the parties upon 1 year's written notice.

SUMMARY OF THE TREATY WITH NICARAGUA

Under article I each party agrees to accord equitable treatment to the persons, property, enterprises, and other interests of nationals and companies of the other party.

Article II provides for entry, residence, travel, religious freedom, and the right to gather and disseminate information and to communicate with other persons, subject to necessary measures to maintain public order and protect the public health, morals, and safety.

Article III provides for the treatment of nationals of either party when taken into custody by the other.

Article IV extends the applicable workmen's compensation and social-security benefits of one party to nationals of the other within its territories.

By article V national and most-favored-nation treatment is assured for access to courts and administrative tribunals.

Article VI guarantees property rights against unreasonable searches and seizures. If any property is expropriated for public purposes or reasons of social utility, it shall be compensated for promptly and fairly.

The right of nationals of one party to do business in the territory of the other party is set forth in article VII, subject to limitations

which each party reserves to itself on public utilities, shipbuilding, air or water transport, banking, or the exploitation of land or other natural resources.

Articles VIII and IX cover the rights to employ accountants, executive personnel, attorneys, agents, and so forth, to engage in scientific, educational, religious, and philanthropic activities on the basis of national treatment, to lease land and buildings and other immovable property, to dispose of inheritances which by reason of alienage cannot be retained, and to own, possess and dispose of personal property.

Article X concerns patents and trademarks and provides for cooperation in furthering the interchange and use of scientific and technical knowledge, particularly in the interests of "increasing productivity and improving standards of living."

Article XI guarantees national and most-favored-nation treatment regarding taxation except for reserved rights to—

(*a*) Extend specific advantages regarding taxes, fees, and charges to nationals, residents, and companies of other countries on a basis of reciprocity;

(*b*) Accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and

(*c*) Apply special provisions in allowing to nonresidents exemptions of a personal nature in connection with income and inheritance taxes.

Article XII concerns exchange restrictions and commits the parties to impose them only when necessary, without discrimination, and subject to provisions for withdrawal of certain categories of foreign exchange.

Article XIII accords most-favored-nation treatment to commercial travelers, their samples, and the taking of orders.

Articles XIV and XV provide most-favored-nation treatment by one party to the products of the other party. This shall not apply, however, to products of national fisheries, advantages accorded to adjacent countries in order to facilitate frontier traffic, or to advantages obtained through membership in a customs union or free trade area. Prompt publication of customs laws and regulations and an appeals procedure are also specified.

National and most-favored-nation treatment is provided under article XVI by each party in matters affecting internal taxation, sale, distribution, storage, and use of products of the other. The article also defines "coffee" to designate the coffee bean or consumable preparations made from the coffee bean and the parties agree to continue present policies designed to prevent the commercial usage of that term in any deceptive manner.

Articles XVII and XVIII deal with Government corporations or enterprises and monopolies and insure competitive equality with private enterprise.

Articles XIX and XX concern freedom of navigation and freedom of transit. Article XXI contains the usual exceptions relating to the import of gold and silver, to fissionable materials, to traffic in arms, ammunition and implements of war and to measure for collective or individual self-defense. An additional exception is made to cover any special benefits or advantages which Nicaragua may accord to

other Central American Republics as a result of the creation of an integrated Central American regional economic organization.

Article XXII contains definitions; article XXIII territorial application; article XXIV consultation and settlement of disputes; and article XXV duration, which is set at 10 years and thereafter unless denounced by one party after 1 year's written notice.

The protocol elaborates or further defines certain provisions of the treaty.

SUMMARY OF TREATY WITH THE NETHERLANDS

Article I provides that each party to the treaty shall at all times accord equitable treatment to the persons, property, enterprises, and interests of nationals of the other party and that there shall be freedom of commerce and navigation between them.

Article II relates to rights of entry and travel and also covers residence, freedom of worship and communications. These rights are subject to measures necessary to maintain public order and to protect public health, morals, and safety.

Article III provides for national treatment in the protection and security of persons of each party in the territory of the other and sets forth the rights of persons accused of crimes.

Article IV provides national treatment in regard to workmen's compensation and social-security benefits.

Article V concerns access to courts and administrative tribunals and provides national treatment therefor. The provisions regarding enforcement of commercial arbitration awards is framed in positive and effective language so as to provide for their recognition in State courts in the United States the same as the awards rendered in other States of the United States.

Article VI relates to the protection of the property of nationals of one party in the territory of the other. Such property cannot be taken except for a public purpose and then only upon adequate compensation.

Article VII accords national treatment with respect to business activities, with the usual exceptions relating to communications, transportation, banking, and the exploitation of land or other natural resources. Their right to prescribe special formalities for alien-controlled enterprises is reserved.

Article VIII permits nationals and companies of either party to engage within the territory of the other, accountants, and other technical experts and specialists of their choice and to engage in scientific, educational, religious, and philanthropic activities.

Article IX concerns property rights and includes, in addition to the usual provisions relating to personal property, inheritances, and the leasing of real property, a provision permitting United States citizens to acquire and own real property in the Netherlands. Dutch nationals are accorded the same right in the United States, subject, however, to the applicable State laws. The Netherlands, on the other hand, reserves the right to accord less than national treatment to nationals of the United States domiciled in States which do not accord Dutch citizens national treatment with respect to the right to real property.

These provisions concerning real property are broader and more detailed than the usual form

Article X provides national treatment with respect to obtaining and maintaining patents and to rights in trademarks, etc.

Under article XI, regarding taxes, fees, or charges on income and other activities and objects, national treatment is accorded.

Article XII concerns exchange restrictions and sets forth the usual conditions under which they can be applied.

The national treatment of commercial travelers and their samples is provided for in article XIII.

Article XIV relates to customs duties and quantitative restrictions and provides for most-favored-nation treatment. The conditions under which quantitative restrictions may be applied are set forth.

Article XV provides for prompt publication of customs laws and regulations and for an appeals procedure.

Article XVI provides for national and most-favored-nation treatment for products of either party within the territory of the other in matters affecting internal taxation, sale, distribution, etc.

Articles XVII and XVIII concern the operations of state-owned enterprises under conditions of competitive equality with private enterprise.

Article XIX related to the treatment to be given vessels of each country in the territory of the other, providing national and most-favored-nation treatment for them except for coastwise and inland navigation. Article XX provides for the treatment of seamen of such vessels.

Article XXI provides for freedom of transit through the territory of each party for the persons or products of the other.

Article XXII contains the usual exceptions from the treaty provisions of measures relating to the importation or exportation of gold or silver, fissionable materials and related matter, to traffic in arms, ammunition, and implements of war, to the maintenance of international peace or security, and to national fisheries. The most-favored-nation treatment is also not to apply to special advantages accorded by the United States to its Territories or possessions, to Cuba, the Philippines, the Trust Territory of the Pacific Islands, or to the Panama Canal Zone, and by the Netherlands to its Benelux partners or to Indonesia, nor to special advantages accorded either parties to adjacent countries to facilitate frontier traffic or by virtue of a customs union or free trade area of which either party may become a member.

Article XXIII contains definitions; article XXIV defines the territory to which it shall apply (excludes in the case of the United States, the Canal Zone, and the Pacific Trust Territories), which in the case of Surinam and the Netherlands Antilles shall be 1 month after receipt of notification by the United States to this effect.

By article XXV procedures for the settlement of disputes are spelled out. According to article XXVI the treaty will replace earlier treaties of 1852 and 1883. Article XXVII sets the duration of the treaty at 10 years and thereafter, subject to termination upon 1 year's written notice to that effect by either party.

The protocol contains provisions construing and clarifying the treaty and is an integral part thereof.

The exchange of notes, appended as a part of the treaty, contain a new feature which is as follows:

> It is recognized in principle that the Netherlands should continue to be able to participate in European regional arrangements which serve these aims and the broad interests of both Parties, even though the Netherlands may thereunder be obliged to grant some reciprocal advantages to participating countries which it is unable to grant to nonparticipating countries.

Consultation is provided for in this event. Should such consultation fail to lead to a satisfactory result, certain of the most-favored-nation provisions could be suspended upon 2-month notice. In that case the United States agrees to accord the Netherlands treatment no less favorable than that extended to other participants in a European regional arrangement and the Netherlands agrees to accord the United States treatment no less favorable than that accorded other nonparticipating nations in the regional arrangement.

MATTERS CONSIDERED BY THE COMMITTEE

Discrimination between American citizens.—In view of the practice of some nations of excluding certain American citizens because of their race or creed, the committee was particularly concerned lest the treaties now before the Senate would make such discrimination possible. It was assured by the Department of State that the rights accorded by treaties would apply to all American citizens regardless of race, creed, or sex.

Practice of professions.—In previous treaties, the committee has objected to provisions according national treatment to foreign nationals in the practice of professions and recommended to the Senate reservations to those provisions. During the consideration of the present treaties, the committee ascertained from the Department of State that such provisions are not contained in them. The Iranian treaty in article II, paragraph 2, provides that the nationals of one party in the territory of the other party shall—

> be permitted to engage in the practice of professions for which they have qualified under the applicable legal provisions governing admission to professions.

According to the Department of State, "applicable legal provision" encompasses compliance with State and Federal laws and regulations.

Should a State or Federal law specify United States citizenship as a condition precedent to the practice of a profession, this treaty would not waive that requirement.

Economic integration or union.—The committee took note of provisions in the treaties with Nicaragua and the Netherlands designed to enable these countries to become members of regional economic groupings, members of which would accord to each other more favorable treatment in certain matters than they would to nonmembers. Although the provisions of the two treaties differ from each other, their general purpose is to release Nicaragua and the Netherlands from the obligation to accord the United States most-favored-nation treatment with respect to those matters in the event that such economic integration or union takes place within their respective regions. In the case of the Netherlands, the United States would, for its part, be released from the obligation to accord the Netherlands most-favored-nation treatment in those respects.

The simplified form.—As already pointed out in this report, the Iranian treaty is an abridged and simplified version of the usual type of treaty. This form was first used in the Treaty of Amity and Economic Relations with Ethiopia, to which reference has been made. The simplified and more general form, in the opinion of the Bar Association of the City of New York and the committee, does not accord the degree of protection for American nations and their property that the detailed treaties of friendship, commerce, and navigation afford. The committee asked the State Department witness, Mr. Kalijarvi, whether second usage of the simplified form signified a trend toward this form. He stated:

> I think there has been a change in respect to the approach to these problems, especially as concerns the underdeveloped countries where the negotiating of the longer provisions, both of the treaty, that is the treaties of friendship, commerce, and navigation and consular arrangements, is extremely difficult, and there is under contemplation negotiations with some countries that is quite similar * * * to both the Ethiopian and Iranian treaties.

The committee appreciates the negotiating difficulties of the Department of State and the fact that the simplified treaty affords worthwhile advantages. However, it urges the Department of State to obtain the greatest degree of protection possible for American citizens and their activities and enterprises abroad which is attended by the more comprehensive type of commercial treaty.

Consular provisions.—The consular provisions in the treaty with Iran, as noted above, are less detailed and full than those found customarily in separate consular conventions. They are also less advantageous insofar as they do not provide as extensive coverage of rights and privileges. The Bar Association of the City of New York has suggested that a supplemental protocol be negotiated to bring the consular provisions more closely in line with those of other consular conventions. Although it is the view of the Department of State that this convention will meet the needs of Iran and the United States for some time, the committee hopes that the Department will undertake to negotiate a full-scale consular convention as soon as circumstances make such negotiations practicable.

Rights of entry (Iran treaty).—The committee inquired why the treaty with Iran did not contain rights of entry and establishment of enterprises such as are customarily included in treaties of this nature. It was explained by the Department of State that Iran was not prepared to specify such rights out of the fear that this might open the door to economic penetration by neighboring countries. The Department of State felt that there was some justification for this fear.

Effect on domestic laws.—The degree to which the three treaties now under consideration would affect Federal or State laws was closely examined by the committee. They do not deal with copyright; the provisions on social security conform with existing Federal legislation on the subject; and there are no provisions affecting State laws regulating the practice of professions. They contain no innovations which would raise other problems of reconciling them with domestic laws. Their effect on domestic laws, therefore, will be no greater than that of previous treaties to which the Senate has given its approval in the past.

COMMITTEE RECOMMENDATION

Treaties of friendship, commerce, and navigation, such as these, are of considerable benefit to American businessmen and other citizens. They guarantee certain basic rights and legal protection which are important to international commerce, investment, and other activities between nations.

Besides the greater certainties and benefits for our citizens which will flow from these treaties the committee was mindful of the Congress' injunction to the Department of State (contained in the Mutual Security Act of 1954, as amended) to—

> accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to nations participating in programs under this Act.

The Committee on Foreign Relations is convinced of the merits of the three treaties now before the Senate and recommends that the Senate give its advice and consent to their ratification.

○

Annex 112

ANNEX 113

EXHIBIT 10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRAN HEISER, et al.,	.	
	.	
Plaintiffs,	.	
	.	Civil Action Nos. 00-2329
	.	01-2104
v.	.	
	.	Washington, D.C.
ISLAMIC REPUBLIC OF IRAN, et al.,	.	Monday, February 9, 2004
	.	2:45 p.m.
	.	
Defendants.	.	
	.	
. . . . .	.	

DAY 3 - p.m.
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:

SHALE STILLER, ESQ.
MELISSA L. MACKIEWICZ, ESQ.
ELIZABETH R. DEWEY, ESQ.
LOUIS J. ROULEAU, ESQ.

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Court Reporter:

BRYAN A. WAYNE, RPR, CRR
Official Court Reporter
U.S. Courthouse, Room 4808-B
333 Constitution Avenue, N.W.
Washington, D.C. 20001
202-216-0313

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

Annex 113

COPY

PROCEEDINGS

THE COURT: Now, Mr. Rouleau, are you ready to proceed?

MR. ROULEAU: We are, Your Honor.

THE COURT: Very well.

MR. ROULEAU: Plaintiffs' call Patrick Clawson.

DR. PATRICK CLAWSON, WITNESS FOR THE PLAINTIFFS, SWORN

THE COURT: Now, Mr. Rouleau, you may proceed.

MR. ROULEAU: Thank you, Your Honor.

Direct Examination

BY MR. ROULEAU:

Q. Good afternoon, Dr. Clawson.

A. Good afternoon.

Q. Would you please state your full name for the record?

A. Patrick Lyle Clawson.

Q. What is your business address?

A. The Washington Institute for Near East Policy which is at 1828 L Street, N.W., Suite 1050, Washington, D.C.

Q. And you're currently employed by the Washington Institute for Near East Policy?

A. Correct, sir.

Q. What is your position at the institute?

A. I am the deputy director of the Washington Institute.

Q. And, Dr. Clawson, can you give us some background as to what that position entails?

A. Correct, sir.
Q. And do you read Middle East newspapers regularly as part of your research duties?
A. I try to read at least two Iranian newspapers every day. I always make it through one, but I don't always get through the other.
Q. And in front of you you have the binder full of some exhibits. Would you please refer to Plaintiffs' Exhibit 27A, and can you identify that document?
A. That is my resume, professional biography.
Q. And is it up-to-date?
A. Yes, sir.
MR. ROULEAU: Your Honor, plaintiffs offer Exhibit 27A into evidence.
THE COURT: Plaintiffs' Exhibit 27A will be admitted into evidence.
(Plaintiff Exhibit No. 27A received into evidence.)
BY MR. ROULEAU:
Q. Dr. Clawson, have you testified previously in the United States District Court for the District of Columbia on issues relating to Iran, the Iranian government, and Iran's sponsorship of terrorism?
A. Yes, sir.
Q. As well as the Iranian economy?

A. Yes, sir.
Q. About how many times, if you recall?
A. At least 10, sir.
Q. And in those cases were you qualified as an expert witness in those areas?
A. Correct, sir.

MR. ROULEAU: Your Honor, plaintiffs offer Dr. Clawson as an expert in the areas of the government of Iran, Iran's sponsorship of terrorism, and the Iranian economy.

THE COURT: The Court will receive Dr. Clawson as an expert in those three areas.

BY MR. ROULEAU:
Q. Dr. Clawson, can you please describe when the Islamic Republic of Iran, which I'll refer to as Iran, was created?
A. The revolution of 1978-79 resulted in the overthrow of the Shah of Iran, and shortly after that in the spring of 1979 there was a popular referendum in which the decision was made to adopt a constitution naming the country as the Islamic Republic of Iran.
Q. And what international goals, if any, did the Iranian revolution have?
A. One of the major tenets of the new government was its opposition to the United States and its presence in the Middle East, made particularly famous at marches where hundreds of thousands of Iranians would chant "Death to America."

The new Iranian government was also determined to bring governments similar to itself to other countries in the Middle East, including Saudi Arabia, that is to say governments under clerical rule.

And the new government generally wished to reduce Western cultural and political influence throughout the Middle East and throughout the Muslim world. It also wished to establish itself as the leader of the world Muslim community.

Q. And what type of Muslims are Iranians?

A. Approximately 90 percent or a little less of Iranians are members of the Shia sect of Islam.

Q. And the other 10 percent?

A. Are Sunni Muslims. There's also a small non-Muslim minority.

Q. And you testified earlier that one of the impetuses for the Iranian revolution was this Anti-West, and specifically anti-American goal, if you will?

A. That was one of the major issues raised during the course of the revolution, and one of the major complaints by the revolutionaries against the Shah's government was its close relations with the United States.

Q. And does Iran use terrorism as a means of accomplishing its political goals?

A. Ever since the Iranian revolution, the Iranian government has indeed sponsored and organized terrorist attacks in order to

accomplish these goals of reducing Western, specifically American, influence in the region, and also of promoting similar clerical rule in other countries in the region.

At different times it's used terrorism also for such purposes as opposing the existence of the state of Israel and its presence in Lebanon.

Q. And has terrorism been an effective tool for the Iranian government?

A. The Iranian government feels it has accomplished some important victories through the use of terrorism; for instance, that Iranian political leaders and newspaper commentaries have repeatedly cited the 1983 bombing of the marine barracks in Beirut, Lebanon, as the reason the United States withdrew its forces in Lebanon and reduced the presence of the U.S. Government and indeed Americans generally in Lebanon.

Iran has also cited its sponsorship of terrorist attacks against Israel and the effect that those had on sidetracking the Arab-Israeli peace process.

The Iranian government has been more cagey of the impact of the Khobar Towers bombing, which it has never openly acknowledged it was responsible for, but Iranian government officials and Iranian newspapers have cited that bombing as something which pressed the Saudi government to place limits on U.S. forces in Saudi Arabia and also to reach accommodation with Iran, which it did shortly after the bombing.

Q. And, Dr. Clawson, what is Iran's primary goal when it commits or sponsors terrorist acts, if you know?

A. The Iranian government, by the accounts of those who have defected from that government and described in a German court case in 1996 in considerable detail the thinking of the Iranian government about terrorist activities, wishes to inspire fear on the part of those against whom it attacks, whether they be, for instance, Iranian dissidents abroad or whether it be attacks against, say, the marine barracks or Khobar Towers.

The aim is not so much to kill the particular individuals who die as it is to create fear among Americans so, for instance, to create fear on the -- or grief amongst the families of those who died so that they would press to see that the U.S. presence in the area be reduced.

Q. Now, Dr. Clawson, please refer to what I've marked as Plaintiffs' Exhibit 27M. Can you identify this document?

A. Yes. It's the U.S. Department of State report entitled Patterns of Global Terrorism 1995, issued in April 1996.

Q. Are you familiar with this document?

A. Yes, sir.

Q. How so?

A. The report, which is issued each year, is very carefully read by those of us who follow the subject of terrorism. Indeed, each year for the last many years on the day that the report is issued I have avidly read it. I've often tried to get

hold of drafts of the report beforehand, indeed, to be able to comment about the report.

I've appeared on numerous television and radio shows commenting about the report the day it appears, and in numerous Internet news groups that I belong to, various academics and terrorism experts, on the day it appears, we all rush to comment about exact wording.

It is the definitive report that we all look to as establishing what terrorism occurred the year before.

Q. In referring to page 23 of Exhibit 27M, the first paragraph under the subheading of Overview of State-Sponsored Terrorism, do you see that?

A. Yes, sir.

Q. In the first paragraph, can you read the last line out loud that begins with "United States currently?"

THE COURT: Let me interrupt you just one moment, Mr. Rouleau. Is there an opinion that you intend to elicit from Dr. Clawson, or is it your intention to ask him to read from the Patterns of Global Terrorism reports which are of course publicly available materials?

MR. ROULEAU: I'm going to ask him to read a couple statements and see if he agrees with it to explain it as background information and to see if he agrees with it and thereby giving his opinion.

THE COURT: May I ask you to explain the basis upon

which you suggest that that is an appropriate manner of inquiring of an expert witness?

MR. ROULEAU: Yes, Your Honor. He just said it is the definitive statement upon which the people in the research community, the research terrorism that they look to, and I want to see if -- and to see if he agrees whether his opinion matches up with this. What I can do is ask his opinion first and then look to this as the basis.

THE COURT: That is the manner in which I will ask you to proceed.

MR. ROULEAU: Certainly, Your Honor.

THE COURT: Thank you.

BY MR. ROULEAU:

Q. Dr. Clawson, did Iran sponsor terrorist activities in the year 1995?

A. Yes, sir.

Q. And what is your basis for that opinion?

A. Many statements in the Iranian press and by Iranian political leaders welcoming terrorist acts that took place, being rather cagey about whether or not they were responsible for them, and overwhelming evidence provided in the Israeli and American press about the evidence -- the Israeli and American governments and independent journalists found that Iran was responsible for terrorist acts that year, as well as -- I'll leave it at that.

Q. Would you also rely on something like Exhibit 27M?
A. Oh, yes, sir. I would certainly regard Exhibit 27M, Patterns of Global Terrorism report, as a very carefully prepared, thoroughly thought out, detailed research.
I mean, I know from personal experience that every word is fought over in an interagency process to determine exactly the judgments that are made here.
Q. In referring back to page 23, that first paragraph again of Overview of State-Sponsored Terrorism, can you read the --
THE COURT: Can you, Mr. Rouleau, as you did with the two experts who were called this morning elicit testimony regarding what Dr. Clawson considered?
MR. ROULEAU: Certainly, Your Honor.
THE COURT: You will recall, of course, that the two expert witnesses that you called this morning identified the documents, reports, and other materials that those witnesses considered in formulating the opinions that they expressed in court.
MR. ROULEAU: Yes.
THE COURT: Would you do that, please.
BY MR. ROULEAU:
Q. Dr. Clawson, with respect to your opinion that Iran sponsored terrorism acts in 1995, what is your basis for that?
A. Statements of United States Government officials such as this report, but also public speeches by U.S. Government

officials; and, as well, the Iranian newspaper accounts about terrorist actions and the U.S. and international press, especially the Israeli press.

Q. And did you rely on Exhibit 27M?

A. Yes, sir.

THE COURT: Mr. Rouleau, do you intend to show Dr. Clawson any transcripts of the public speeches, the Iranian newspaper accounts, or the accounts in the international press so that the Court will -- so that Dr. Clawson in his testimony will be able to identify what it was that he considered as you did with the two expert witnesses who appeared this morning?

MR. ROULEAU: I'm just prepared to show him the exhibit Patterns of Global Terrorism for 1995.

THE COURT: Are you prepared to ask Dr. Clawson to identify in some other way what public speeches, Iranian newspaper accounts, and accounts in the international press he considered in forming the opinion that he's expressed?

MR. ROULEAU: I think I'd rather ask him, Your Honor, if I could, whether the Patterns of Global Terrorism were the primary source of his opinion.

THE COURT: I won't allow you to ask a leading question. Let me ask you to answer my question before you proceed. My question is whether you intend to show Dr. Clawson, whether you have identified and marked as exhibits, as you've done with your other expert witnesses, the public speeches,

Iranian newspaper accounts, and the accounts in the international press that Dr. Clawson considered in formulating the opinions that he just expressed and others that I'm sure you intend to elicit.

MR. ROULEAU: Your Honor, I am not prepared to do that, but the Court will recall this morning with respect to in particular Dr. Miller, he had based his opinion on several things. I took the time to go through the military records --

THE COURT: I'm asking about Dr. Clawson and not Dr. Miller.

MR. ROULEAU: Right. My only point being, Your Honor, is that I have the Patterns of Global Terrorism that I'm prepared to show him, and I do not have those other things. However, this morning was sufficient with Dr. Miller that I just review the military records, and he relied on tax returns; he relied on family history reports and things of that nature.

So I would ask the Court to allow me to do the same with Dr. Clawson here today.

THE COURT: I can consider your request if you would first ask Dr. Clawson to identify, as your other witnesses did, what public speeches, newspaper accounts, and international press accounts he considered in formulating his opinion.

I'm sure you appreciate that the Court, neither this Court nor the district judge who will consider this Court's report and recommendation, will be unable to fully assess the weight to be

given to the opinions without some understanding of what it was that Dr. Clawson considered in formulating the opinions that he has expressed.

MR. ROULEAU: Certainly.

THE COURT: Would you do that, please.

MR. ROULEAU: Yes, Your Honor.

THE COURT: Thank you.

BY MR. ROULEAU:

Q. Dr. Clawson, what speeches of government officials did you consider?

A. It was rare for Secretary of State Warren Christopher to address questions of the Middle East without referring to the issue.

Indeed, at that time, he was considered to be so fixated on the matter that I heard repeated complaints from European government officials that it was difficult to hold a conversation with Secretary of State Warren Christopher without him raising the question of Iranian support for terrorism and objecting to it.

And it became a common standing issue among reporters traveling with Mr. Christopher that this would be a standard line that he would include in any speech in which he addressed matters in the Middle East.

I do not have a record of his speeches on that date, but I think if I were to consult a volume of Mr. Christopher's

official addresses during the year 1995, we would find multiple references to Iranian sponsorship of terrorism.

Q. In what press accounts, either Iranian or Israeli, did you rely upon?

A. I receive an Iranian translation into English of the Iranian press *Akhbaar Ruz*, which is translations of articles from the major Iranian newspapers and the news headline from the Iranian radio, and there were repeated sermons at the Friday prayers offered at Tehran University after terrorist attacks against Israeli targets in which these people praised these terrorist attacks and referred to Iran's support for the organizations which carried out the terrorist attacks without claiming direct responsibility for the terrorist attacks.

Again, I don't have a list of the dates, but this was a common feature of the Friday prayer services at Tehran University, and this was a year in which there were a great many terrorist attacks against Israeli targets.

In the Israeli press, this was at a time when Israel's foreign minister, Shimon Peres, would frequently speak to the Israeli newspapers after the terrorist attacks complaining about how Iran had sponsored these terrorist attacks.

Again, I don't have the dates, but Mr. Peres was -- well, he spoke about the matter very often.

Q. And do you have an opinion as to whether Iran sponsored terrorist acts in the year 1996?

A. In the year 1996, early 1996, Iran sponsored a number of terrorist attacks in Israel which led to a summit with participation by President Clinton, the Israeli prime minister, and numerous, numerous Middle Eastern European leaders, and there were many speeches given there about the problem of Iranian terrorism. So the answer is yes.

Q. And are the speeches your basis for that opinion?

A. That is one important thing, but also the Patterns of Global Terrorism 1996 which is issued by the State Department.

Q. And if I could just stop you there. Would that be -- can you refer to Plaintiffs' Exhibit 27N?

A. Correct. That is the Patterns of Global Terrorism 1996, issued in April 1997.

Q. Have you reviewed this document before?

A. Yes, sir.

THE COURT: Mr. Rouleau, because one volume of exhibits that you provided the Court has an exhibit marked 27N and the Court was handed another exhibit marked 27N and the two do not appear to be the same exhibit, may I ask you to elicit testimony, please, with respect to which exhibit Dr. Clawson has before him?

MR. ROULEAU: Certainly. I think I can explain what happened, though, Your Honor. You will recall the last time in December when I went over this exhibit, it was an Internet version, and it wasn't paginated correctly.

In the interim, before I brought back Dr. Clawson today, w obtained a normal copy that reflects, for example, the Patterns of Global Terrorism for 1995, and that's what Mr. Clawson has before him. So it should be identical.

THE COURT: Would you ask him that, please, so the record is clear, because I have both of them here. And if your intention is to move in the copy which was obtained from the State Department instead of on the Internet, then I will return the copy obtained from the Internet to you and make the substitution.

MR. ROULEAU: Certainly, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, if you could refer to the first page of Exhibit 27N?

A. Yes, sir.

Q. And just shifting through that, does that look like a true and accurate copy of what you normally review from the State Department?

A. Yes, sir. I note that on the fourth page of this it's stamped Ralph J. Bunch Library, Department of State.

Q. Correct. But this is not an Internet copy, is it?

A. That's correct, sir.

THE COURT: The deputy clerk will return the Internet copy to you, Mr. Rouleau.

MR. ROULEAU: Thank you, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, are the speeches of the Secretary of State, the Iranian press, Israeli press, the types of documents --

THE COURT: Non-leading question, please, Mr. Rouleau.

BY MR. ROULEAU:

Q. The sources that you listed earlier in my response to Iran's sponsorship of terrorism in 1995 and --

THE COURT: Would you simply ask Dr. Clawson what he reviewed, please: what speeches, articles, reports form the basis of his opinion.

BY MR. ROULEAU:

Q. Are the speeches you listed and the things that you listed what you relied upon with respect to your --

THE COURT: I asked would you ask Dr. Clawson to list what documents, records, speeches, reports, and articles he considered, please. In other words, please proceed by non-leading questions.

BY MR. ROULEAU:

Q. Dr. Clawson, with respect to Iran's support of terrorism, your opinion on that subject, what did you rely upon for the year 1996?

A. I would rely upon principally Patterns of Global Terrorism. In addition, I relied upon the statements of U.S. Government leaders and the U.S. and international press.

Q. And are those the type of things that experts in your field

rely upon?

A. They are the type of things that experts in the field rely upon.

THE COURT: Would you please ask Dr. Clawson to identify the leaders and the speeches and the articles that he considered, please.

BY MR. ROULEAU:

Q. With respect, Dr. Clawson, to the year 1996, what speeches, articles, did you rely upon?

A. In addition to the speeches of Secretary of State Warren Christopher, also the speeches of President William Clinton with a bit of principal speeches of U.S. Government leaders that I would have relied upon.

As for articles, the articles around the time of the bombings of February-March 1996 that were dominating the front pages of the *Washington Post* and the *New York Times* and at the time of the summit of Western to Middle Eastern leaders condemning terrorist attacks, particularly Iranian involvement in the terrorist attacks. That would be the principal articles in the U.S. press.

As the international press, I would have relied upon the articles that appeared in the translation from the Iranian press that I receive every day, a service called *Akhbaar Ruz* that I referred to earlier, in which Iranian leaders proudly welcomed -- excuse me -- welcomed the attacks, both against Israel and

the attacks against U.S. forces at Khobar Towers, and they proudly proclaimed their support for the organizations which carried out the attacks against Israel.

THE COURT: Can you elicit, Mr. Rouleau, whether Dr. Clawson is referring to contemporaneous newspaper articles or articles which have appeared at some point in the nearly eight years that have intervened? I would of course ask the same questions with respect to speeches.

BY MR. ROULEAU:

Q. Dr. Clawson, what articles are you relying on specifically with respect to the time period?

A. My earlier response was referring to articles and speeches which would have appeared in 1996, but if I may elaborate further, Your Honor, certainly in the subsequent period we find articles in the U.S. press about the Khobar Tower matter around the time of the 2001 indictment, along with the speeches of then-FBI Director Freeh and the attorney general.

And also, there were any number of articles in the U.S. press around the time of the 1997 detention in Canada of Mr. Hami El-Sayegh, and there was a report in the Canadian Intelligence Service about Mr. El-Sayegh and his involvement in the terrorist activities at Khobar Towers.

And then there was also the speech of then U.S. Assistant Secretary of State for the Near East, Martin Indyk, gave to the Aegis Society here in Washington in 1999. I believe it was May,

which was, as far as I know, the first time that U.S. Governmen officials said that the Iranian government officials were responsible for the Khobar Tower bombings.

THE COURT: Have you obtained and identified any of those materials, Mr. Rouleau?

MR. ROULEAU: No, Your Honor.

THE COURT: So of the many items that Dr. Clawson just identified that he considered, is it correct that it is only the Patterns of Global Terrorism report for 1996 that you've marked as an exhibit?

MR. ROULEAU: And the one for 1995, Your Honor, correct.

THE COURT: One more question before you move on, Mr. Rouleau. Do you intend to elicit any testimony regarding what methodology or specialized knowledge Dr. Clawson has brought to the process of formulating these opinions so that the Court will be able to determine that there is an opinion based upon Dr. Clawson's experience and expertise and knowledge and that Dr. Clawson is not simply reporting what government officials said and what was reported in the newspaper?

MR. ROULEAU: Certainly, Your Honor.

THE COURT: Very well. Could you do that, please, regarding the opinion about which Dr. Clawson has already testified.

BY MR. ROULEAU:

Q. Dr. Clawson, with respect to your opinions that Iran sponsored terrorist acts in 1995 and 1996, can you explain how you arrive at your opinions?

A. In particular, in evaluation of Iranian government statements about this matter, the Iranian government in many fields of its policies and endeavors has not openly acknowledged what it was carrying out, but has instead used the language of Friday prayer sermons to indicate to its people what in fact it was doing behind the scenes.

Iran has a peculiar government structure in which much of the power is held by revolutionary institutions and not by the formal government, and those revolutionary institutions do not openly acknowledge much of what they do.

And the Iranian religious leaders have over the years developed a way to communicating to Iranians and to their support, particularly their supporters among Iranians, which policies the government is actually carrying out without open acknowledgment.

Those of us who study Iran have spent a lot of time and effort identifying how you can show that the Iranian government is in fact doing something, whether it be in foreign policy or domestic policy through these indirect actions.

For instance, we at the Washington Institute for Near East Policy published a book called *Who Rules Iran* by Wilfried Buchta which was written under my direction which

discusses in great detail this process, and I've spent a lot of time over the years learning how to figure out when in fact Iran is communicating that and, indeed, in many of the reports, the international press which then cite what the Iranian leaders say about a matter, reporters are not necessarily particularly adept at understanding what it is that these Iranians are communicating through those statements.

Similarly, the U.S. Government officials have spent a lot of time developing the fine art of diplomatic communication where you don't want to suggest that you're about to go to war with a country but you do want to indicate, even if necessarily indirectly, that you think that the other guy's guilty as can be but without doing it in a way that appears so threatening, that you are in fact suggesting that there may be military retaliation.

And a number of the speeches, Mr. Christopher, Mr. Clinton Mr. Indyk, one had to study them in order to understand how they were trying to get across a point about Iranian responsibility without doing it in such a way that would suggest that the United States was going to retaliate.

Therefore, what could appear to be indirect language is sometimes much bolder than it might appear to the untrained eye.

THE COURT: Would you elicit, please, the methodology by which Dr. Clawson determined that statements of U.S. Government officials and officials of other governments should

be interpreted other than as spoken or written?

THE WITNESS: It's a language of art, Your Honor, and therefore what may appear to be the plain meaning is not necessary the language of art. And after the President makes a speech, the Secretary of State makes a speech, we'd get on the telephone and try to find out, okay, who wrote that speech?

Talk to the speech writer and say, okay, what were you trying to get across about this to clarify that. At least to the Secretary of State I could usually do that. With the President I would have to speak to somebody who would work in the White House with those who could describe what was the communications.

THE COURT: So is it fair to say the comments of speech writers were taken into account in formulating the opinions about which you have testified?

THE WITNESS: Yes, Your Honor, but I would feel more comfortable in saying it's the comments of the staff working for the President, the staff working for the Secretary of State, be it either this -- because speech writing was often a process in which different people would weigh in on the text.

And so I didn't usually speak to the final person who polished the text. I would speak to the various people who prepared the first draft that the polisher would use to polish the text.

BY MR. ROULEAU:

Q. Dr. Clawson, does the Department of State designate countries as state sponsors of terrorism?
A. Yes, sir, at congressional requirement.
Q. And has the State Department designated Iran as a state sponsor of terrorism?
A. Yes, sir. Ever since Congress required that the State Department designate state sponsors of terrorism, Iran has been one of the countries so designated.
Q. And was it designated as such in 1995 and 1996?
A. Yes, sir.
Q. Dr. Clawson, are you familiar with the Iranian agency known as the Ministry of Information and Security?
A. Yes, sir.
Q. I'll refer to that as the Ministry, okay?
A. Yes, sir.
Q. What is the Ministry?
A. The Ministry is the principal Iranian agency responsible for collecting information, both about foreign intelligence and also about domestic dissidents.
Q. And when was it formed, if you know?
A. Formed is a carefully chosen word in that the Ministry is -- as soon as the revolution takes place in 1979, the previous Shah's organization for information and security is taken over by the revolutionary government, and they use its services with its approximately 30,000 employees, but they don't give this the

formal status of a ministry until approximately 1984, I want to say. At some point in the early 1980s it is formally created as a ministry. Until then it doesn't have separate ministerial status.

Q. And is the Ministry involved in Iran's sponsorship of terrorism?

A. Yes, sir.

Q. And can you elaborate on that?

A. We have a lot of information about the activities in the Ministry, both from the defectors of the Ministry who testified in the Berlin court trial, often referred to as the Mykonos trial because that's the name of the restaurant where these Iranian dissidents were killed.

And we also have information about the Ministry that came from the accounts in the Iranian press about a commission that the Iranian president established in 1997-98 to look into the activities of the Ministry, and that was widely leaked.

The author of the book that I referred to earlier, Mr. Buchta, has many contacts throughout the Ministry, and he describes the Ministry in considerable detail in that book that we published, *Who Rules Iran*, that was written under my direction.

Q. But with respect to what terrorist activities, if any, the Ministry engages in, can you elaborate on that?

A. The Ministry, both in the 1996 court trial in Germany, as

well as in the investigation by the Iranian president, was shown to be involved in the assassination of Iranian dissidents, both abroad and at home, both in the Berlin court trial and in the Iranian president's report, as well as in Mr. Buchta's book; there's a lot of wealth of information about its sponsorship of terrorist activities abroad.

There's also quite a bit of information about its role in the various hostage-takings in Lebanon in the mid-1980s that come from Lebanese accounts.

THE COURT: Have you obtained any of these, quote, Lebanese accounts, closed quote, or the book written under Dr. Clawson's direction or the accounts in the Iranian press or the transcripts of any portion of the Berlin trial or the statements of dissidents and marked them as exhibits to show to Dr. Clawson so that he might identify them as the materials that he considered in formulating his opinion?

MR. ROULEAU: No, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, do you have a copy of the transcript of the Berlin trial?

A. I have the four hundred-plus page German report. I'm told the German courts typically issue such very detailed summaries of their investigations and determinations, and I have read and studied that in great detail. It's in German. I also have a Persian translation.

Q. And how about your colleague's book on *Who Rules Iran*?
A. Since I had to go through it word by word as the person responsible for it and verify that each statement was backed up by interviews and other source material, I'm intimately acquainted with it, and I have many copies of the book.
Q. Dr. Clawson, did the Ministry engage in terrorist activities in 1995 and 1996, if you know?
A. Yes, sir. It was involved in terrorist activities both inside and outside Iran.
Q. And was the terrorism research community, including the United States Government, aware of the Ministry's terrorist activities?
A. There was broad awareness of this and broad consensus that the Ministry was involved in these activities.
Q. And, Dr. Clawson, are you familiar with the Iranian agency known as the Iranian Islamic Revolutionary Guard Corps? And I'll refer to that as the Guard Corps.
A. Yes, sir.
Q. And does the Guard Corps go by any other name?
A. It's often referred to as Pasdaran.
Q. And what is the Guard Corps's mission?
A. The Guard Corps's mission is to provide ideologically sound military force that the Islamic Republic can be certain to rely upon to carry out politically sensitive missions and to defend the revolution. In many ways it's designed to be a check on the

regular armed forces whose ideological soundness the regime is not sure of.

Q. And when was it formed --

THE COURT: Can you establish, Mr. Rouleau, whether you are eliciting -- whether these recent answers are opinions of Dr. Clawson's or testimony other than opinion testimony?

MR. ROULEAU: With respect to, Your Honor, about whether a certain agency is engaged in terrorist activities, that would be an opinion. The other information is background setting the foundation to get to that question.

THE COURT: May I ask you in your subsequent questions to please distinguish between those intended to elicit an opinion and those which are not.

MR. ROULEAU: Yes, Your Honor.

THE COURT: Thank you.

BY MR. ROULEAU:

Q. Dr. Clawson, backing up just briefly, do you have an opinion as to whether the Ministry is involved in terrorist activities?

A. Yes, sir. My opinion is that it is.

Q. And returning back to the Guard Corps, when was it formed or created, if you know?

A. It was created shortly after the Islamic revolution in 1979.

Q. And do you have an opinion as to whether the Guard Corps is

involved in Iran's sponsorship of terrorism?
A. Yes, sir, it is.
Q. And can you elaborate on its involvement? What sort of things does it do?
A. It was particularly involved in terrorism in Lebanon. It established a training camp in eastern Lebanon at which terrorists were trained, who carried out terrorist activities both in Lebanon and also where a number of the individuals who confessed to their role in the Khobar Towers bombing said that they were trained.
Q. Do you have an opinion as to whether the Guard Corps engaged in terrorist activities specifically in 1995 and 1996?
A. Yes, sir. It was involved in terrorist activities directed against Israel, for instance, and Israeli civilians in both 1995 and 1996, and it was involved in the attack at Khobar Towers in 1996.
Q. Was the community that studies terrorism, including the United States Government, aware of the Guard Corps' terrorist activities?
THE COURT: Let me interrupt you, Mr. Rouleau, would you please elicit from Dr. Clawson the basis of his testimony that the IRGC was involved in the Khobar Towers bombing in 1996?
MR. ROULEAU: Your Honor, we're not offering Dr. Clawson with respect to specifically the Khobar Towers event.

THE COURT: You want to strike the testimony he just gave, then? The testimony remains and the Court would expect that you would elicit the basis of it.

MR. ROULEAU: The question was with respect to whether it was involved in terrorist activities generally.

THE COURT: I'm speaking of the answer Dr. Clawson gave. Did you hear the answer, or do you wish the reporter to read it back?

MR. ROULEAU: No, Your Honor. I heard it. He listed that among examples.

THE COURT: How do you wish to proceed, then? Would you like a moment to confer with co-counsel?

MR. ROULEAU: I would, Your Honor.

THE COURT: Very well. We'll take a brief recess.

(Recess from 3:36 p.m. to 3:42 p.m.)

THE COURT: Now, Mr. Rouleau?

MR. ROULEAU: Yes, Your Honor. Thank you for allowing us to confer. I've conferred with counsel, and I apologize for any misunderstanding. We have not called Dr. Clawson to discuss the Khobar Towers bombing incident specifically. He mentioned that as an example in answering one of my questions, and so --

THE COURT: Do you wish to -- is it your request that the Court strike that portion of Dr. Clawson's testimony?

MR. ROULEAU: Oh, no, Your Honor. Our request is to move on with the questioning. He answered the question, and

we'd like to just move on.

THE COURT: Mr. Rouleau, it appears that there are one of two alternatives. You've indicated that you did not offer Dr. Clawson as an expert with respect to the opinion to which he just testified. If that is so, you may certainly move -- or one alternative here is that you would move to strike the opinion if you don't wish me to consider it.

Alternatively, if your request, either now or at some point in the future, is that this Court or Judge Jackson or both courts rely upon the opinion, then I will expect that you will elicit the basis of the opinion. It was for you to consider those two alternatives that we just took the recess.

What is your preference? Or what is your request?

MR. ROULEAU: I guess, and I apologize, Your Honor, as I'm not completely following -- and before I answer, I'd like to make sure I fully understand.

THE COURT: Very well. You may confer with your colleagues, then.

MR. ROULEAU: This one's for me; it's not for my colleagues. Make sure I understand, Your Honor. Dr. Clawson was qualified for the Iranian government, the Iran sponsorship of terrorism, and then the Iran economy as it relates to punitive damages.

In asking the question with respect to the Guard Corps' involvement in terrorist activities, he listed some examples as

that would be evidence thereof. And then the Court asked, well what's his basis with respect to Khobar Towers?

THE COURT: Would you like to have the reporter assist you?

MR. ROULEAU: Let me confer with counsel just one second.

(Counsel conferring.)

MR. ROULEAU: Yes. Can you read back the question?

THE COURT: It is only the -- I'm sure the reporter will be happy to assist you in any way he can. My question to you, Mr. Rouleau, concerned Dr. Clawson's answer.

MR. ROULEAU: Correct. Can you read back the answer? Thank you.

THE REPORTER: "Question: Do you have an opinion as to whether the Guard Corps engaged in terrorist activities specifically in 1995 and 1996?

"Answer: Yes, sir. It was involved in terrorist activities directed against Israel, for instance, and Israeli civilians in both 1995 and 1996, and it was involved in the attack at Khobar Towers in 1996."

MR. ROULEAU: Your Honor, I think I can clear this up by asking drawn what the basis of his opinion is with respect to the Guard Corps' involvement in terrorism in 1995 and 1996.

THE COURT: Very well. That was the second alternative that I presented. Very well.

MR. ROULEAU: Thank you.

THE COURT: You may proceed.

MR. ROULEAU: Did you understand the question?

THE WITNESS: Yes, sir. The Guard Corps' sponsorship of attacks against Israel in 1995 and 1996 is something which is discussed in the Patterns of Global Terrorism report in front of us and by the -- and the statements of the U.S. Government officials and the U.S. and international press that I mentioned earlier.

As to the Khobar Towers matter, I rely on my judgment from the statements of former FBI director Mr. Free and on the information from the Canadian Intelligence Service about Mr. Hami El-Sayegh

THE COURT: Have you obtained the transcripts of the briefings or speeches by Director Freeh and the transcripts of any speeches or briefings by the Canadian Intelligence Service or any of the articles to which Dr. Clawson just referred which he said formed the basis of his opinion?

MR. ROULEAU: I have some of that, Your Honor, and some of it I do not have. Some of it has been marked and admitted previously specifically.

THE COURT: The Court would have no way to determine whether anything that has previously been admitted was seen and considered by Dr. Clawson unless you show it to him and ask him if he can identify it. Are you prepared to do that?

MR. ROULEAU: One moment, Your Honor. I'm going to show him what's been previously marked as an exhibit, Your Honor. (Pause) Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. ROULEAU:

Q. Dr. Clawson, I've just handed you what's been previously marked and admitted as Plaintiffs' Exhibit No. 23. Can you identify that for the record?

A. It's the statement to Louis J. Freeh, former FBI director, before the Joint Intelligence Committees of October 8, 2002.

Q. Are you familiar with this document?

A. Yes, sir.

Q. Have you reviewed and considered it?

A. Yes, sir.

MR. ROULEAU: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. ROULEAU:

Q. Dr. Clawson, I've just handed you what's been previously marked and admitted as Plaintiffs' Exhibit No. 25. Can you identify that document?

A. It is an op-ed from *The Wall Street Journal* by Louis J. Free entitled "American Justice for our Khobar Heroes."

Q. Are you familiar with that article?

A. Yes, sir.

Q. Did you review and consider it in forming your opinions?

A. Yes, sir.
Q. Dr. Clawson, did you review the trial transcripts of when Director Freeh testified in this case in December?
A. Yes, sir.
Q. And is the testimony, Exhibit 23, the article 25, and then Louis Freeh's testimony the type of materials or documents customarily and ordinarily relied upon by experts in your field?
A. Yes, sir.
THE COURT: Will you inquire, Mr. Rouleau, what else Dr. Clawson considered in forming his opinion that the IRGC was involved in the Khobar Towers bombing other than the statement of Freeh before the joint committee, Freeh's op-ed article in the newspaper, and his trial testimony here?
MR. ROULEAU: Well, he listed the things he relied upon, Your Honor. He listed the Louis Freeh article and then the Canadian indictment. I think that's what you're referring to.
THE COURT: Well, would you ask, please, as well as which newspaper reports.
MR. ROULEAU: Again, Your Honor, I would just like to state for the record that we're not offering him with respect to Khobar Towers, but did you rely on anything else, Dr. Clawson --
THE COURT: As I said, the alternative would be that you would either move to strike the testimony or that you the elicit the basis of the opinion.

BY MR. ROULEAU:

Q. Dr. Clawson, is there anything else other than the things that you mentioned with respect to Khobar Towers upon which you relied?

A. These three materials would be sufficient for me to come to that conclusion that I reported earlier.

Q. Thank you.

THE COURT: Was there anything else that you considered, Dr. Clawson, in forming the opinion?

THE WITNESS: I can think of thousands of conversations with colleagues and other experts on this matter, but these three pieces of material would be sufficient for me to come to that conclusion.

THE COURT: When you say thousands of discussions, can you be more specific with regard to with whom you had the discussions or over what period of time?

THE WITNESS: I'm an expert in this topic. It's my job. I discuss this with my colleagues at work; I discuss this with other experts; I attend conferences, panels, and give speeches and testimony about this matter.

I have raised it with reporters; I have raised it with congressional committees. I have raised it with foreign government officials; I have raised it at academic conferences. I have spoken before meetings of hundreds of people, many of whom had asked me questions about this matter.

I would say that I discussed this matter on many, many occasions over the last few years. It would not be possible for me to list in a finite period of time all of the contacts that I've had about this matter.

These three pieces of information are sufficient for me to come to that conclusion. I regard them as definitive, and I would say that experts in my field would regard them as definitive.

BY MR. ROULEAU:

Q. Dr. Clawson, are you familiar with the organization known as Saudi Hizbollah?

A. Yes, sir.

Q. And what is Saudi Hizbollah, if you know?

A. Saudi Hizbollah is an organization which was formed at the order of Iran in order to advance the purposes of reducing the U.S. presence, if not eliminating the U.S. presence in Saudi Arabia and establishing a government in Saudi Arabia similar to that of Iran, clerical rule.

Q. And do you have an opinion as to whether Saudi Hizbollah is a terrorist organization?

A. Yes, sir. It is, sir.

Q. And what is your basis for that opinion?

A. We have the confessions of the individuals who were indicted for the Khobar Towers bombing as reported in the testimony that Mr. Freeh gave to this court earlier, would be

sufficient for me to come to that conclusion.
Q. And I believe you mentioned earlier that Iran formed --
THE COURT: So the record is clear, Mr. Rouleau, would you elicit whether Dr. Clawson's testimony is whether he has seen the confessions or he's read about the confessions in the op-ed piece written by Louis Freeh or the trial testimony of Louis Freeh in this court or the statement before the joint committee of Louis Freeh.
BY MR. ROULEAU:
Q. Dr. Clawson, more broadly, when you spoke earlier as to the six confessions, more precisely, what are you referring to and how did you to obtain that information?
A. My apologies for my imprecision. I was referring to the accounts of those six confessions given by Mr. Freeh in his testimony to this court.
Q. Thank you. And, Dr. Clawson, I want to make sure I understood. Did you say that Iran formed Saudi Hizbollah?
A. Correct, sir.
Q. And what's the basis for that testimony?
A. There's the Canadian intelligence report that I referred to earlier which is discussed in the indictment to Mr. El-Sayegh. We have also the description by the members of the Bahrain Hizbollah who were arrested and provide detailed confessions about their activities.
Bahrain is an island kingdom roughly a hundred miles away

from Khobar. They were arrested within six months of the Khobar bombings, and their account is that some of the individuals who ordered the forming of the Bahrain Hizbollah are the exact same Iranian individuals who were said to have formed the -- what was said in those confessions to have formed -- excuse me -- who were said in the Canadian report to have ordered the forming of Saudi Hizbollah.

THE COURT: Would you again elicit, Mr. Rouleau, which of these confessions, statements, and intelligence reports Dr. Clawson considered and also whether he read them or read about them in something authored by Louis Freeh, please.

MR. ROULEAU: Certainly, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, with respect to the Canadian report and the indictment of Al-Said, did you read that indictment?

A. I read that indictment.

Q. And with respect to Bahrain Hizbollah confessions stemming from that, how did you obtain information regarding those confessions?

A. What was purported to be those confessions was printed in the Bahrainian press and released by the Bahrainian government.

Q. And are things such as their Canadian indictment and press reports in the Bahrainian newspaper, are those sort of things that are reasonably relied upon by experts in your field?

A. Yes.

Q. And, Dr. Clawson, do you have an opinion as to whether Iran, through the Ministry and/or the Guard Corps, supports Saudi Hizbollah?

A. I have an opinion that Iran supports the Saudi Hizbollah. I similarly have an opinion that the Guard Corps supports Saudi Hizbollah.

Q. And what is the basis for your opinion that the Guard Corps supports Saudi Hizbollah?

A. In the Canadian document in the Bahrainian accounts, we see the same Guard Corps general, who is acknowledged by Iran to be a Guard Corps general, cited as the person who ordered the formation of this organization and directed the training of these individuals, and in the testimony of Mr. Freeh, there's reference to the Guard Corps' involvement.

The testimony of Mr. Freeh has reference also to the involvement of the Ministry of Information Security. That is the only information that I have about the role of the Ministry of Information and Security, and I generally feel comfortable relying upon only one piece of information when it comes from such an authoritative source.

So I'm a little hesitant to go out on a limb and talk about the Ministry of Information and Security.

Q. That's okay. My question was with respect to the Guard Corps? Thank you.

THE COURT: Will you elicit, Mr. Rouleau, whether by

Bahrainian reports Dr. Clawson means articles in the newspaper or something else?

MR. ROULEAU: Certainty, Your Honor.

BY MR. ROULEAU:

Q. What do you mean when you state Bahrainian reports?

A. My apologies for the imprecision. I meant the same, what appeared to be or reported to be the confessions of the individuals involved that were printed in the Bahrainian newspapers and distributed by the Bahrainian government.

Q. Thank you, Dr. Clawson. Dr. Clawson, is it correct that you've studied Iran's economy during your professional career?

A. Yes, sir.

Q. And what information sources are available to someone such as yourself trying to learn more about the Iranian economy?

A. There's a wealth of information available about Iran's economy. The two most authoritative report, which I regard as definitive and most experts in my field regard as definitive, are the reports of the International Monetary Fund about Iran's economy, issued approximately annually, and the reports of the Central Bank of Iran about Iran's economy issued annually.

Perhaps I would add to that, there's a third, the Statistical Abstract of Iran issued by the Iranian government each year.

Q. And do you review the reports by IMF, the report by the Central Bank of Iran, and then the last one that you mentioned,

which was the standardized --
A. Statistical Abstract.
Q. Statistical Abstract?
A. Yes.
Q. Do you review all three annually?
A. Yes, sir.
Q. Did you review those in 1996?
A. Yes, sir.
Q. And are those the type of documents reasonably relied upon by experts in your field?
A. Yes, sir.
Q. And, Dr. Clawson, are you familiar with Iran's current yearly expenditures on terrorist activities? And let me make this clear. Are you familiar with it, and if so, do you have an opinion about what it is?
A. I have an opinion about what it is within a range, but there's some considerable imprecision about that. There's not universal agreement about what constitutes terrorist activity, and there is not universal agreement about exactly how much Iran is providing.
Q. And can you explain a little bit or elaborate why there's not uniformity as to what is or is not terrorist activity?
A. Yes, sir. Under my direction, former FBI official Matthew Levitt has just finished a study for our institute regarding the matter of the Lebanese Hizbollah and explaining it

some considerable detail the debates about whether to consider as terrorist activity the charitable and political activities of associated -- carried out, excuse me -- by the terrorist groups.

So many of these terrorist groups also have charitable or political arms which Mr. Levitt explains are key to their role of recruiting terrorists and are key for providing the cover under which their terrorists act.

But, as Mr. Levitt explains in this very detailed manuscript, there has been a debate between the United States and other governments as to whether to classify these charitable and political activities done by the terrorist group as also terrorist in and of themselves.

And since especially those, as he explains, those charitable activities like running hospitals and schools are quite expensive, much more so than the direct terrorist activities, much of the money that Iran provides to terrorist groups have gone to those kind of activities.

Mr. Levitt has documented since September 11, 2001, the U.S. Government has taken a firm stance that all of these activities should be classified as terrorists and has vigorously lobbied and campaigned with the European governments and at the United Nations with an international consensus on that.

Q. What did Mr. Levitt do for the FBI, if you know?

A. Mr. Levitt was a counterterrorism analyst responsible for analyzing the financing of Hizbollah.

Q. And you testified that you would be comfortable giving a range --

A. Correct, sir.

Q. -- as to Iran's annual expenditures on terrorism?

A. Yes, sir.

Q. What would that range be?

A. I would like to give a range which may understate the case of Iran's support of saying $50 million to $150 million, although I would say some sober and cautious experts would tell me that the number is the high end of that range and may indeed exceed it. I would like to understate the matter, as I say, because there is this controversy as to about what exactly constitutes the terrorist activities and because we are not always entirely sure.

We've gotten some surprises in the past. I have to say the surprises have uniformly been in the direction of showing that Iran's support for terrorism was greater than we initially had thought. There has never been, in more than 10 years we've been following this, a surprise that Iran provided less assistance than we thought. In spite of all that, I'd rather be cautious and understate the case and say $50 million to $150 million.

Q. And what is your basis for that range of $50 million to $150 million?

A. Well, there's the study that Mr. Levitt did, another study that Israel's leading expert on terrorism, Ely Karmon, did under

my direction which my institute published in December a study about Hizbollah as well, and they provided detailed information about Iran's funding of Hizbollah in particular.

Now, Mr. Levitt has also done quite a bit of work for us under my direction about Iran's funding of Palestinian groups such as Hamas and Palestinian Islamic Jihad, and we had a very long monograph about that by Israeli's leading expert on Palestinian Islamic Jihad, Ruben Paz, which we ended up not publishing because the English wasn't good, and those studies provide detailed estimates of Iran's funding of those groups, that is to say, Hizbollah, Hamas, and Palestinian Islamic Jihad, and those be numbers would be in that range.

It's possible that Iran's supporting other terrorist groups in addition to that which could push the number higher, but as I say, I'd rather be cautious and stick to the 50 to $150 million figure.

Q. Do you have an opinion as to how much Iran expended on terrorist activities in the year 1996?

A. Yes, sir. In 1996 Iran's expenditures on terrorism were within that range of 50 to $150 million. Again, there's --

Q. And what is your basis for that?

A. Besides the studies that I just referred to, all of which refer to Iran's support for terrorism, not only presently but also in the past, there are also a variety of academic studies about Iran's support for terrorism which make reference to that.

For instance, there have been a number of terrorism experts who have testified before Congress on this issue.

Q. And, Dr. Clawson, do you know whether the Ministry of Information and Security and the Iranian Islamic Revolutionary Guard Corps are still engaging in terrorism today?

A. Oh, yes, sir. They are.

Q. And what is the basis for that testimony?

A. In December, I believe on the 19th, when I was in Israel I had lunch with Uri Lubrani, who was before the 1979 revolution Israel's de facto ambassador to Iran and is responsible for following for the Israeli government both Iran and Hizbollah's activities in Lebanon, and Mr. Lubrani and his large staff of people from Israeli intelligence and Israeli defense forces and I discussed in some considerable detail Iranian ongoing support for terrorist activities by Palestinians against Israel.

Q. Okay. Now, Dr. Clawson, if this court were to award punitive damages in order to deter Iran from engaging in further terrorist activities and we were to use the range figures that you just testified to, what multiple of that yearly figure do you think, given Iran's recent terrorist activities --

THE COURT: Would you rephrase the question, please, so you elicit Dr. Clawson's opinion rather than what Dr. Clawson thinks, please?

BY MR. ROULEAU:

Q. Dr. Clawson, do you have an opinion as to what multiple of

the yearly figure or the yearly range you just gave would act as a deterrent so that Iran would no longer engage in terrorist activities?

A. Yes, sir.

Q. And what is your opinion?

A. I would feel comfortable with something in the range of three to five times that as those expenditures. Indeed, I would say that in the Iranian press accounts about similar such court cases that have made close reference to how each court case compares to previous court cases, the focus has been on what's the dollar amount compared to the dollar amount in previous court cases.

And there have been -- how shall I put it -- detailed exercises trying to determine whether or not the courts are signaling a greater U.S. determination against terrorism or less determination against terrorism, and that is how these accounts have attempted to interpret the various actions even when I think that that's been quite clearly erroneous.

Q. And, Dr. Clawson, do you have an opinion as to whether --

THE COURT: Before you move on, would you please elicit what press accounts are the press accounts which Dr. Clawson just referred, and if you have these with you, would you please make sure they're marked and shown to Dr. Clawson so that he can identify them?

BY MR. ROULEAU:

Q. Dr. Clawson, with respect to your testimony you just gave as to the press accounts where they're watching from one judgment to another, can you specify which press accounts you're referring to and when those press accounts were made?

A. The Iranian press starts paying attention to this issue only once the payments start being made after Congress changed the law to permit what the Iranian press recounts is the payment for their money. I recognize that that's not what it is, but that's how it was described. And the issue --

Q. I'm sorry. When did that take place, if you know?

A. It was a couple of years ago, but I'm afraid I'd have to review my records to determine the exact date. And then it must have been more than a couple years ago, because in the summer o. 2001, after the re-election of the Iranian president and he reappoints his cabinet and the foreign minister is reappointed, there are a lot of press accounts in the Iranian newspapers about parliamentary debates in which the foreign minister's performance was attacked and his inability to stop these court cases was cited in particular.

And in addition to the press reports, I neglected to mention that I attended a lecture here in Washington sponsored by the American Iranian Council at which a lawyer who represents Iranian -- represents Iran before the U.S.-Iran claims tribunal in the Hague, when asked to speak about the issue of U.S.-Iranian financial disputes, chose to spend nearly all of

the time in his remarks about these court cases and the impact they were having on U.S.-Iranian relations.

MR. ROULEAU: Your Honor, we do not have those, and they are not marked as an exhibit.

THE COURT: Could you elicit what Dr. Clawson considered in forming the opinion that a multiplier of three to five times the budgeted expenditure for terrorism would be required to deter future acts of terrorism?

In other words, on what other than newspaper articles is the opinion based? And to the extent that Dr. Clawson has already said that he reads the newspaper articles or his interpretation of the newspaper articles is based upon his reading of nuance and implied meaning, what methodology he applied to the task of interpreting these articles to reach this opinion that he's just voiced.

BY MR. ROULEAU:

Q. Dr. Clawson, how did you arrive at the multiple of three to five times with respect to punitive damages?

A. I will certainly confess that when I first testified in these court cases I was quite uncomfortable with what precise multiple it would be, but I noted at that time that when Iran felt that it was -- and when the Iranian leaders said they were paying a high price in their relationships with Europe for their sponsorship of terrorism on European soil, that Iran backed off from terrorism in Europe because of the pressure that the

European governments applied after the Mykonos verdict and that I said that Iran had great talent in figuring out ways to comply with the exact letter of what it is that they were being asked to do while violating a spirit and that I was quite confident that if the purpose of these lawsuits is to deter Iran from engaging in terrorist attacks against American citizens and that if Iran were persuaded that the price were too high, it would back off from attacking American citizens, yet it would find other ways to advance its causes of reducing American presence in the region and embarrassing the American government by finding other ways to engage in terrorist attacks which we would find very upsetting.

So, for instance, now post U.S. occupation of Iraq, Iran may sponsor terrorist attacks in Iraq. Not something covered by this law, as my understanding, but still something that would embarrass U.S. foreign policy and deter us from our presence in the region or cause us to rethink our presence in Iraq.

So it was on that basis that I said I thought that the greater pressure we bear, the more likely it is that Iran would back down, and then a multiple of three to five would be a real price that Iran would have to pay and that they would therefore reconsider how they were doing their business to see if there wouldn't be other ways that they could accomplish their objectives while not crossing the specific line that we had just drawn.

That was for the initial cases. But ever since this matter has become something debated in the Iranian press and by Iranian officials, I have become much more concerned about the relationship between any one judgment and past judgments.

When I look at how the Iranians have overinterpreted any number of small actions the United States Government has taken in other fields in seeking to find some -- to read the tea leaves to find some indications as to whether the U.S. Government was taking a firmer stance against the Iranian policies to which the U.S. Government objects, or if the U.S. Government was taking a softer stance against those policies, and I've been concerned that if there were to be court judgments which had a lower multiple, Iranian leaders would interpret this as indicating that the United States was less concerned about the Iranian terrorism in the past, and that might be regarded as an indication that, well, the U.S. doesn't like the terrorism, but it's not going to take the kind of firm action that might lead Iran to decide this is something it must stop.

THE COURT: Does that mean that your opinion has changed during the course of the trials in which you've testified in this court about the same issue?

THE WITNESS: Correct, Your Honor. That is to say my opinion has been reinforced. That is to say what was initially an opinion that I felt some trepidation and explained to the courts that it was hard to know, now I would say that because of

the focus that the Iranians have placed upon the precedent that I am much more confident about the opinion than I was.

So my opinion has changed. What was previously a, as I explained to the Court, not a very firm opinion has now become quite a firm opinion. I had to say in the early cases that I thought this wasn't any exact science.

Now I have to say that the precedent issue has really become quite important in how the Iranians are going to interpret these decisions.

THE COURT: Is it still your opinion that this is an inexact science?

THE WITNESS: I would say that now the Iranians are looking in great detail at how much money is involved compared to previously. So it's become quite exact. They will look at the dollar figure very precisely compared to the previous dollar figure to see if there's been a dimunition.

While that may not be the issue that determines the Court's decision, I am concerned because of how the Iranians have reacted to any number of other U.S. Government actions which they have misinterpreted as signaling devices to Iran, I'm concerned that the Iranians would misinterpret any decision that -- as a signaling device about how much the U.S. Government cares about Iranian terrorism.

THE COURT: Is that concern a part of your opinion regarding the multiplier that would be required to deter future

acts of terrorism?

THE WITNESS: Yes, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, can you identify which Iranian newspapers report these types of cases you had mentioned earlier that these cases were talked about on the legislative floor and also reported about?

A. They would be both on the hard-line newspapers, the principal ones being the Keyhan and Etelaat, but also reformist newspapers which have since been shut.

And I would have to go back and dig up the names because those reformist newspapers operate under such restrictions that they would frequently close down and reopen under a different name. So I'm not sure that -- the name would change although the newspaper might actually be essentially the same staff producing the newspaper. The name would change regularly.

Q. And, Dr. Clawson, do you have an opinion as to whether a judgment awarded in these cases will have some impact on Iran and its dealings with the world, and more specifically, with the United States?

A. Yes, sir, it would.

Q. And what's the basis of that opinion?

A. The complaints in the Iranian parliament that I referred to earlier about the foreign minister's incompetence because he was not able to bring to an end these cases, among other matters,

and the fact that this Iranian lawyer for Iran who was also an Iranian citizen chose to concentrate on these court cases -- of all matters. That was not at all what the audience had anticipated that he would talk about.

MR. ROULEAU: Your Honor, Plaintiffs would offer Exhibit 27M as in Mary and 27N as in Nancy into evidence.

THE COURT: Plaintiffs' Exhibit 27M and Plaintiffs' Exhibit 27N will be admitted into evidence.

(Plaintiff Exhibit Nos. 27M, 27N received into evidence.)

MR. ROULEAU: Thank you, Your Honor. I have no further questions.

THE COURT: I do have one question, and if you have follow-up questions, Mr. Rouleau, you'll certainly have an opportunity to ask them.

Dr. Clawson, you've testified that you relied upon the statement prepared by former FBI Director Freeh, which was marked for identification and admitted, in fact, as Plaintiffs' Exhibit No. 23.

THE WITNESS: Yes, Your Honor.

THE COURT: An editorial or op-ed piece in *The Wall Street Journal*, Plaintiffs' Exhibit 25, and finally, Director Freeh's trial testimony in support of your opinion that the IRGC was involved in the Khobar Towers bombing.

Would you please review those three exhibits and identify

the portion of each of them which you took into account in forming that opinion?

THE WITNESS: Well, in the op-ed in the top of the second column just before the three stars, Mr. Freeh says that the entire operation was planned, funded, and coordinated by Iran security services, the IRGC and MOIS acting on orders from the highest levels of the regime in Tehran. So that's where he says it there.

He says it repeatedly in the testimony to the Court, as I recall that he was asked specifically about both the IRGC and the MOIS and whether they were involved. And let me look through the, if you'll pardon me for a moment, let me look through the October 8, 2002, testimony.

Yes. On page 33 there, the top of the page, the second sentence says, "The Ministry of Information and Security, MOIS, the Revolutionary Guard Corps, IRGC, were shown to be culpable for carrying out the operation," where he's referring, the operation was referring, the previous sentence makes clear, to the 1996 bombing at Khobar.

I'm not sure he makes other references in that last report. I thought there was one, but I don't see it. I think that's the only reference, that page 33 reference.

THE COURT: Now, in your testimony that you relied upon, the statements of former Director Freeh, do you mean that you saw the same evidence to which he referred and reached the

same conclusion or that you credit Director Freeh's statements?

THE WITNESS: I meant that I would credit Director Freeh's statements. Having been a U.S. Government employee myself with a security clearance, I know how difficult it is to get things like this cleared for publication, and so therefore I have great confidence that Director Freeh would not make such a statement in an offhand manner, or he would not be allowed -- would not get cleared to make a statement like this in an offhand manner, that it would be a painful process for him to get approval for such references.

THE COURT: Mr. Rouleau?

MR. ROULEAU: Yes, Your Honor. I have no further questions.

THE COURT: Are there any follow-up questions that you wish to ask?

MR. ROULEAU: No, Your Honor.

THE COURT: And I do have one final question of you, Mr. Rouleau. The predicate to several questions that you asked Dr. Clawson included the phrase "the Iranian government," or "the government of Iran."

May I ask you to through any questions that you wish to ask Dr. Clawson to ensure that the record is clear with respect to any entity or person in the government of Iran to which or to whom you refer. If your intention is to refer to any entity or individual rather than the government of Iran.

BY MR. ROULEAU:

Q. Dr. Clawson, when you testified earlier today with respect the government of Iran's involvement, or I would have referred to that as Iran's involvement in terrorist activities, what parts of the government or its agencies were you referring to when you said, yes, Iran was involved in terrorist activities?

A. I was referring to the IRGC and the Ministry of Information and Security and the National Security Council, which, as discussed in detail in both Mr. Buchta's account and in the German court report, was a body including those two agencies, the IRGC and the MOIS, as their operating arms but which also brought together other elements of the government's leadership in the decision-making process about what it is that those two operating arms, the IRGC and MOIS, should do.

So I was referring to the National Security Council as the decision-making body and the IRGC and the MOIS as the two operational agencies responsible for carrying out the decisions of the National Security Council.

MR. ROULEAU: Thank you.

THE COURT: Dr. Clawson, you testified that among the exhibits or among the items that you considered in formulating some of the opinions to which you've testified were Exhibit 27M and Exhibit 27N, which the Court has admitted.

Can you please point the Court to the portions of those two exhibits which form the basis of any of the opinions to which

you've testified?

THE WITNESS: Yes, Your Honor. The most important part would be the section about Iran in the overview of state-sponsored terrorism each year, so in Exhibit 24M, that's on pages 24 and 25.

BY MR. ROULEAU:

Q. Do you mean 27M?

A. I'm sorry, 27M. Thank you. It's on pages 24 and 25, and then in Exhibit 27N as in Nancy, that's page 23 and 24. Then, in addition, in the narrative about individual -- about -- let me see what the exact wording of the title is.

There's the Middle East Overview Section. There's usually discussion about Iran in the -- pardon me. I'm just checking because there's usually discussion of Iran in the Lebanon section.

Q. And, Dr. Clawson, I point out there's a table of contents.

A. Certainly, sir. I'm sorry. I'm just checking in the regional review section there's usually a mention of Iran in the Lebanon section. I don't know if that was true in these two years, but the state sponsor section is the overwhelming majority of what I relied on.

Other references in there and in the chronology at the back and in the section in the back where there's a description about individual terrorist groups where the -- for instance, in 27M on page 48 there's a description about Hizbollah which describes it

as being closely allied with and often directed by Iran.

And I suspect Iran -- I would also rely somewhat on the chronology which would probably make reference to Iran with regard to a couple of attacks, but I would have to search that to look. But it's the overview of state sponsorship that is the most important.

THE COURT: Mr. Rouleau, will you please, in order to ensure that the Court will be able to determine that the opinions of Dr. Clawson can be identified and distinguished from Dr. Clawson's references to the opinions or conclusions of others, would you please elicit the professional methodology and judgment which govern the opinions of Dr. Clawson so that the Court will be confident that it knows that Dr. Clawson has expressed opinions with respect to these matters and that you are not relying solely upon, for example, Patterns of Global Terrorism reports and accounts in the media in Bahrain or Iran or Saudi Arabia or Lebanon or Israel.

MR. ROULEAU: Certainly, Your Honor.

BY MR. ROULEAU:

Q. Dr. Clawson, are the items that you considered in forming your opinions today items reasonably relied upon and customarily and ordinarily relied upon by experts who study either the government of Iran, the Iranian economy, or Iran's sponsorship of terrorism?

A. Yes, sir.

Q. And in a broad and general sense, how does an expert such as yourself whose job it is to study the government of Iran, the Iranian economy, and Iran's terrorism -- support of terrorism arrive at its opinions and conclusions?

A. One evaluates the statements to see what is left out, what one might have expected to be in there but is not in there. One weighs it against all the other information and evidence that you may have -- strike the word evidence -- all the other information that you may have available. And one looks at the opinions of your professional colleagues and their reactions to the text.

One compares the statements made in one year to the statements made in previous and following years to know what kind of differences there are. One looks at the kind of reaction that these reports elicit from other governments from international press to try to determine the plausibility of the statements here.

There were a couple of years in which their statements made in Patterns of Global Terrorism that then sparked a vigorous scholarly debate and vigorous debates with some governments about the judgments they reached.

There was quite a brouhaha about it, and that would be one thing which would weaken your confidence. But if the weight of debate that takes place among scholars and in the press is not critical and in fact somewhat supportive and if the statements

that are made are rather what you would have expected from other accounts, you say, huh, okay. That doesn't matter. Seems to be the case.

So we look at these reports always with ideas about, well, what are you going to say about this? After a terrorist episode takes place, we often ask ourselves what will the next year's Patterns of Global Terrorism say about this episode? Will it say who is responsible? How is that going to be worded? Will it caveat statements about responsibilities? And we compare from one year to the next.

MR. ROULEAU: Thank you.

THE COURT: Dr. Clawson, in your evaluation of, for example, the Patterns of Global Terrorism reports, how do you now consider in forming opinions that you've expressed here in court information which was either inconclusive or to the contrary at the time the report was published?

For example, on page 16 of Exhibit 27N, the 1996 report, I see a reference in the column on the left which reads, "Several groups claimed responsibility." I won't read the entire final sentence of that paragraph which appears under Middle East Overview.

In forming the opinions that you've expressed here in court, how do you evaluate information closer to the time of the event which is inconclusive or to the contrary of the opinion that you've expressed now?

THE WITNESS: That's the kind of statement, Your Honor, that I just cited as an example of how cautious and careful this report is, and then I guess as a scholar you may be disappointed that they didn't feel there was enough evidence to come down definitively on one side or the other of that debate.

But since, unfortunately, the State Department doesn't then go back and say in subsequent reports its opinion about what happened five years back, then you have to start searching for statements by U.S. Government officials about what happened in previous years.

And, so, if there's nothing in this report -- nothing in this report for 1996 about what happened, let's say in 1986, and if there's an inconsistent statement made in the report of 1986 and you want to find out later what happened, you have to do that hard work of paying attention to every time somebody testifies and someone from the U.S. Government testifies in front of Congress or an intelligence committee or when they write an op-ed article and see if they're going to make some statement about the past because you're not going to have this kind of a detailed report issued.

I mean, there was one occasion when the State Department actually issued a report saying sort of like what had groups done in the previous decade, but they haven't done that for many, many years, and that was like years and years ago they did that. So it becomes a very difficult process.

If this year's report can't come to a conclusion, you're stuck. You gotta do hard work to pay attention in the future to see when the U.S. Government can come to a conclusion about it. There's not going to be any definitive report issued, and you just gotta pay attention to all the details at that point.

THE COURT: Mr. Rouleau?

MR. ROULEAU: I have no further questions, Your Honor.

THE COURT: Very well. Thank you, Dr. Clawson. You may step down, and you are excused.

THE WITNESS: Thank you, Your Honor.

(The witness steps down.)

REDACTED

ANNEX 114

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL A. BLAIS,	:	Civil No. 2003-285
Plaintiff,	:	
v.	:	
The Islamic Republic of Iran Iranian Ministry of Information Iranian Revolutionary Guard Corps John Does 1-99	:	Washington, D.C. Friday, May 26, 2006 11:02 a.m.
Defendants.	:	

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: The matter of Paul A. Blais versus The Islamic Republic of Iran, Iranian Ministry of Information and Security, the Iranian Revolutionary Guard Corps, John Does 1 through 99, Civil Action 2002-285. Mr. Gaston for the plaintiffs.

MR. GASTON: Good morning, Your Honor. May it please the Court, I'm Paul Gaston, and I'm appearing on behalf of plaintiffs in this case..

Your Honor, we premarked exhibits, and I have an extra copy that I have not yet handed out. To whom should I give them to?

THE COURT: My clerk.

MR. GASTON: Okay. Your Honor, I have a very brief opening. I would like to just set the stage for what we will hear today.

Today, we will hear the story of a young American whose life was irretrievably altered and severely damaged on June 25, 1996, by a terrorist attack sponsored, supported, and planned by the Islamic Republic of Iran and the Iranian Revolutionary Guard Corp.

First, we will heard testimony from Dr. Bruce Tefft, the former CIA intelligence officer with many responsibilities relating to Mideast terrorism and counter-terrorism.

He has remained active as a consultant in counter-terrorism who maintains top secret security clearances. He is allowed to testify only about matters that are supported in the public record and that are consistent with his classified knowledge.

He will offer expert testimony clearly linking the Islamic Republic of Iran and the IRGC to the attack on the Khobar Towers in 1996. He will demonstrate that there is ample evidence showing that high level Iranian officials in the IRGC took part in planning for the attack and in providing training, funds and operational .

Next, we will hear from Erik Kobylarz, an eminent neurologist and assistant professor of neurology and neuroscience at Weill Medical College of Cornell University in New York.

Dr. Kobylarz has conducted a careful review of Mr. Blais's medical records documenting his injuries and treatments since June of 1996, and has also personally examined Mr. Blais.

Dr. Kobylarz will describe Mr. Blais's severe brain injury caused by the Khobar Towers bombing, and his four months of hospitalization subsequent to the injury. He will offer an expert opinion that Mr. Blais's brain injury was severe, and had a devastating effect on his ability to perform the daily functions of living. He will describe

significant impairments and limitations, even today, nearly 10 years later, despite intensive therapy and medical care. He will express the opinion that Mr. Blais's severe brain damage and present impairments are a direct result of the Khobar Towers bomb blast.

Mr. Curtis Taylor is Paul Blais's stepfather, and has been since Paul was about six and a-half years old. He has been a constant, loving presence in Paul's life since he married Paul's natural mother, Mrs. Taylor, who is also going to be here today.

He will describe the devastating effect Paul's injury had on him and his family. He will describe how his emotions were torn in the first three days after the blast, when Paul was listed as unaccounted for, a term he knew usually meant dead.

He will describe how he left his job in Hampton, Virginia, to be by Paul's side during his long convalescence, first in Tampa, Florida, and then in North Carolina for over three years.

We will also hear from Paul Blais himself. His speech is slow, but he has learned to speak clearly once again, and he can be quite articulate.

He will describe what happened to him on June 25, 1996, and he will describe his long road back. He will talk bout his childhood dream of becoming a pilot, and his

successes in achieving a pilot's license and being just a few credits short of qualifying for a commercial pilot's license at the time of his injury.

Paul does not like to think of himself as disabled, and tends to minimize his injuries and limitations. He has not yet completely given up hope that some day he will fly again.

Mrs. Taylor, Paul's mother, will describe what the last 10 years have been like for her family and for her as Paul's primary care giver. She will compare the Paul she knew before the injury against the Paul after the injury.

A great American writer defined courage as grace under pressure. I believe that once the Court has heard the story these witnesses will tell, the Court will agree that Paul Blais, his mother and his father, exemplify that definition of courage.

Your Honor, I'd like to call Dr. Bruce Tefft to the stand.

BRUCE D. TEFFT, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. GASTON:

Q. Dr. Tefft, could you state your name and address for the record?

A. My name is Dr. Bruce Tefft, and I live in Leesburg, Virginia, 42579 Locketts Road.

Q. And you were formerly an officer with the Central Intelligence Agency; is that correct?
A. Yes, sir. I served from 1975 to 1995.
Q. Can you tell us some of the responsibilities you had there?
A. The primary one relating to this case was in 1985. I was assigned as one of five individuals to establish the CIA's counter-terrorism bureau, and I served there for two and a-half years. Since then, I've worked on terrorism matters, training people. I've trained some 12,000 state and local police officers and first-responders. I'm now an unofficial advisor to the New York Police Department's counter-terrorism and intelligence divisions, and that's pretty much it.
Q. And where are you currently employed?
A. With a company called Community Research Associates. It's an Arlington, Virginia company that provides training exercises and consultations to state and local governments, and to the Department of Homeland Security and Department of Justice and the U.S. Government on terrorism and natural disasters.
Q. Do you maintain security clearances, Dr. Tefft?
A. Yes. I have a top secret security clearance.
Q. Have you testified in similar cases and been qualified as an expert witness?

A. Yes, I have. In about six cases, I believe.
Q. Did you bring your resume with you today?
A. Yes. It's in the exhibits.
Q. Could I ask you to turn to Tab 1?
A. Yes.
Q. Is that your resume, sir?
A. Yes, it is.
MR. GASTON: Your Honor, I would like to offer Dr. Tefft's resume as Exhibit 1.
THE COURT: Received.
MR. GASTON: Thank you.
(Whereupon, Plaintiff's Exhibit Number 1 was marked for identification and admitted into evidence.)
BY MR. GASTON:
Q. If you look at page -- at the last page of your resume, it says that you have testified in a number of cases. Could you name those cases?
A. No, I can't.
Q. But if you look at it, perhaps --
A. Oh, I'm sorry. I'm sorry. Higgins versus Islamic Republic of Iran, Surette versus Islamic Republic of Iran, Steen versus Islamic Republic of Iran, Campuzano versus Islamic Republic of Iran, Welch versus Islamic Republic of Iran, and Holland versus Islamic Republic of Iran.
Q. And you have been qualified as an expert witness on

terrorism in each of those cases?
A. Yes, sir.
MR. GASTON: Your Honor, I'd like to offer Dr. Tefft as an expert on terrorism in this case.
THE COURT: We're delighted to have you.
THE WITNESS: Thank you, sir.
BY MR. GASTON:
Q. Dr. Tefft, let's clarify the basis of your testimony first. You know a lot of things from your security clearances and your time at the CIA, and you're not allowed to testify about those; is that correct?
A. No. And, in fact, I have to be very careful not to say anything to avoid getting into trouble for violating classifications, but I will -- because a lot of my work is dealing, for example, with the local police departments and people who do not have security clearances themselves, I have always been able to find the necessary information in open sources and the public record that I need to convey the -- for whatever purposes I'm talking to, and I certainly will not use or will not take any open source material that I know to be false from my classified knowledge. I'm not going to contradict myself in my own mind. So anything I say from open sources is not contradictory to what I know from classified.
THE COURT: Explain how you have the security

clearance now, because you have some contractual work?

THE WITNESS: Yes, sir. The CRA maintains a -- I got it reactivated. It kind of goes dormant when you're not actively involved, when you're no longer an employee, and it got reactivated when I was working with New York, which is up until about 2004, and then since then the company I work for has contracts with the Department of Justice and the Department of Homeland Security on counter-terrorism matters, so I'm permitted to keep it current.

BY MR. GASTON:

Q. Dr. Tefft, so what you are going to testify to today is all based on open source material?

A. Yes, sir.

Q. Okay. What do you know about the actual event that took place on June 25, 1996, at Dhahran.

A. Do you want me to start from the planning stages, or do you want the actual incident?

Q. I'd like you to describe first the actual incident.

A. Basically what happened was, about 10 minutes till 10:00 on the night of June 25th a gasoline tanker truck, a large gasoline tanker truck pulled up along side the perimeter wall of the Khobar Towers based in Dhahran, Saudi Arabia. The driver jumped out of the truck, ran into a waiting car, jumped into the car and sped off. Some of the security guards at the -- sitting on top of the open tower,

one of the residential barracks buildings next to the perimeter wall, spotted the car and started -- or the truck next to the perimeter wall and started to give warnings, and the truck exploded. Afterwards, the investigation determined it was about the equivalent of 20,000 pounds of TNT. The Defense Department said that was the largest non-nuclear explosion in the history of the world.

The explosives were concealed inside the gasoline tanker truck. The concealment was interesting. They actually had a hatch on the top where you normally would inspect the contents of the container. Underneath that they had a 50-gallon drum that was attached to the top of the hatch, so that if anybody open the hatch and look in the truck, they would see a gasoline filled drum, but they would not realize it was only 50 gallons and not 20,000 gallons, for example, that would normally be in the truck.

That's pretty much it in a nutshell.

Q. In the materials you consulted in preparation for this testimony, was there a diagram of what happened?

A. Yes. It's one of the exhibits as well. I'm not sure which.

(Whereupon, Plaintiff's Exhibit Number 2 was marked for identification.)

BY MR. GASTON:

Q. Could you look at Exhibit 2 and describe what that

is?
A. Oh, okay. Yes, that's exactly -- exactly it. The truck parked next to the perimeter wall. The diagram shows the large crater, 54 feet across that was caused. There's some photographs here as well. And then the air base towers, which was a residential barracks building where -- I'm not sure how many Air Force personnel were housed there, but I understand that 19 were killed and some 300 plus, nearly 400 were wounded in the explosion.
Q. And where is this diagram contained? Could you look at the first page?
A. This is a Department of State publication, from the Bureau of Diplomatic Security. They prepared this as part of their -- the Bureau of Diplomatic Security is responsible for the protection of embassies all around the world, so they made a study of this to enhance their application of lessons learned to other U.S. Government facilities.
Q. And this was something you were relying on in your preparation?
A. Yes, sir. It's a good illustration of what I knew had happened.
MR. GASTON: Your Honor, I would like to offer Exhibit 2 into evidence.
THE COURT: I'm sorry?
MR. GASTON: I'd like to offer Exhibit into

evidence.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 2, marked for identification, was admitted into evidence.)

BY MR. GASTON:

Q. Now, I know you've looked at a lot of sources and a lot of materials. Before I go into what some of those were, could you describe what you learned and what you know about the background and the planning for the attack?

A. Okay. As with most terrorist attacks of this size, the planning and preparation started at least two years prior to the actual attack. Probably it began in Tehran. The actual details of the attack and the discussion with the people who carried out the attack took place in the Iranian Embassy in Damascus, Syria, but that was -- obviously wasn't the initiation of the planning. It was done in Tehran and the Iranian Government.

By the time it advanced far enough to the stage where they were actually recruiting individuals to participate in the attack, and passing out false passports and funds, those in the meetings with the conspirators, the people who executed the attack, took place out of the Iranian Embassy in Damascus, Syria.

It was largely the brain child or the master mind behind it was the fellow named Brigadier General Ahmed

Sharifi, who was a very senior official in the Iranian Revolutionary Guard Corps, and he was at the time -- he's based in Tehran, but at the time he was doing the execution and planning of it, he was at the embassy in -- at the Iranian embassy in Damascus, Syria. He provided the -- again, I'd say he provided the passports, the paperwork, the money, in coordination with some Syrian government officials who actually escorted the plotters, the members of the gang, to an Iranian Revolutionary Guard Corps base in the Bakkah Valley of Lebanon under Syrian escort.

At that base, which was also shared by the Hizballah terrorist organization of Lebanon. The truck bomb was assembled, and all the explosives were put together, and then it was driven from the Bakkah Valley and from the Hizballah, the Iranian Revolutionary Guard Corps base to the Saudi border under Syrian government -- Syrian military escort. Then the -- then it was turned over to the Saudi Hizballah party terrorist organization, who drove on into -- down to Dhahran, Saudi Arabia, where the Khobar Towers' base is.

Q. Were there higher officials in the Iranian government involved?

A. Apart from Brigadier General Sharifi, who was sort of the, I supposed, executive officer, operations commander, the -- all of these types of operations are, first of all,

approved by the supreme leader of Iran, Iyatollah Khomeini. Under him -- he doesn't, obviously, work all the details. In addition to the Iranian Revolutionary Guard Corps, he used the Iranian Minister of Intelligence and Security, a fellow named Ali Fallahian. He was the Minister of Interior and Security (sic) for about four years, from 1993 to 1997. So by virtue of his position and his support, he would have been the intelligence security support for the operation.

His representative in Damascus was a man named Nurani, N-u-r-a-n-I. I don't have his first name here. It's somewhere in the exhibits here, but I don't have his first name. He was the MOIS representative at the embassy in Damascus.

Q. Has there been any sort of investigation by United States agencies as to who was responsible for this attack?

A. Yes. Both the military, obviously, investigated the incident and produced several reports, and then as a criminal justice matter, the FBI has responsibility and conducted a major investigation under Director Louis Freeh.

Q. And do you know what his conclusions were?

A. Basically, his conclusions were that this was carried out by the terrorist organization called Saudi Hizballah, which is a separate entity from the Lebanese Hizballah which we've heard about so much in the press. It's a smaller organization. It's a newer organization, formed about two

years before the bombing, in 1993, 1994 time frame. It was formed by the Iranian government, and the senior Iranian officials, including the people I've mentioned, were involved in the planning and preparation for the terrorist act, for the Khobar Towers attack.

Q. Is there any information available about who chose the target?

A. Not -- not beyond the fact of the -- that I'm aware of -- beyond the fact that is was originated in Tehran, in the Minister of Intelligence and Security, and then acting on the orders of the supreme leader of Iran, the Ayatollah, and using the agency of the Iranian Revolutionary Guard Corps which was already established in the Bakkah Valley and working with the Hizballah terrorists there. The actual details defining the operation and everything, we don't know yet.

Q. You mentioned the Iranian Revolutionary Guard Corps, which we sometimes refer to as the IRGC. Could you tell us a little bit more about that organization?

A. There's nothing really comparable in the world to the IRGC. It's a -- after the Iranian revolution in 1979, when the Shah of Iran was overthrown by Ayatollah Khomeini, within weeks of taking power in Iran, because they did not trust the Imperial Iranian Military, by his personal decree Khomeini established the Iranian Revolutionary Guard Corps

to protect the revolution as a sort of private militia, military force. It's grown to about 350,000 regular personnel. They've got their own army, navy, air force, parallel to the military, official Iranian military, plus they have a one million-man reserve in Iran. They have both domestic and foreign responsibilities.

Historically, I supposed the closest organization that they would compare to would be Nazi Germany's -- or the Nazi Party's SA organization, which was disbanded after Hitler came to power, but up to that point was the armed wing of the Nazi Party. This is the armed wing of the Mullahs, of the theocracy that rules Iran at the current time. There isn't really any other parallel existing in the world right now.

Q. Could you describe what the SA is as opposed to the SS?

A. The SS became an elite -- yes. The SA was the party militia, the party guard. It was made up, like the Iranian Revolutionary Guard Corps, of people who, perhaps, might have wished to become part of the military but were not suitable for military service. They were thugs, criminals and gangsters, and they certainly did not have the discipline of the regular military, which is why Hitler had them disband after he took power and could depend on the German Wehrmacht, and then in the German military they

created an elite force called the SS, which also had swore personal loyalty to Hitler as opposed to the German military's oath of loyalty to the State of German.

The Iranian Revolutionary Guard Corps's loyalty is to the Ayatollah, not to Iran. It's the Ayatollah, for the purpose of protecting the Islamic revolution that took place in Iran.

Q. So would you call it an instrumentality of the government, or quasi-instrumentality of the government, or a separate government?

A. It's parallel in the sense that it does parallel the regular military. It's very powerful since it operates under the direct control and authority of the Ayatollah. It's outside of the government to the degree that it's not ruled by any measure from parliament. There's nobody in the government, no ministry, nobody except the Ayatollah who controls it. Even the military does not control it. In fact, because they have the ear and the authority of the Ayatollah, they give orders to the military rather than vice versa if it comes to a conflict. The Revolutionary Guard Corps always wins in a bureaucratic turf battle or something, if you will. I call them -- because the Ayatollah is the supreme leader and is sort of part of the government, you can't say they're not part of the government, but they're more of an agency or a parallel. As

I said earlier, there's no comparison in the Western or international forms of government to this organization. In fact, there's no comparison to an Islamic republic outside of Iran either.

Q. Where do the Iranian Revolutionary Guard Corps receive their funding?

A. That's very interesting. Not from the parliament and not from the regular Iranian budget. They nationalized -- at the revolution time, the Ayatollah took all of the Shah, who was an emperor, royalty, they took all of the Shah's personal property, and they took all of his charitable organizations, such as the Pahlavi Foundation, for example, in New York City. They took all of the property and farms and factories of all of his generals, all of the middle class people who fled after the revolution, and they combined them into one sort of giant corporation, holding company if you will, that was controlled and it's solely the personal property of the Ayatollah and the Mullahs. Its operating budget is about the same as the operating budget of the government of Iran, but it's a parallel and it's not subject to governmental authority.

Q. So when the parliament dispenses budgetary consideration, this is not part of it?

A. No. No. This is totally independent of the regular budget. They don't -- they're not even a line item in the

official budget.
Q. Turning back for a moment to the investigation by the FBI of the Khobar Towers bombing, where do you find information about this investigation?
A. Louis Freeh has written some articles. He's given some press statements since he's retired from the government, and he -- and there's also the indictment and the press release that the FBI released about the indictment of some 13 individuals as a result of the FBI's investigation. They indicted a dozen, 13 individuals for participation. Plus, they interviewed six members of the Saudi Hizballah that the Saudi government had arrested and had in custody in Saudi Arabia.
(Whereupon, Plaintiff's Exhibit Number 3 was marked for identification.)
BY MR. GASTON:
Q. Could I ask you to turn to tab three?
A. Yes.
Q. Can you identify that document?
A. This is the -- this is the transcript of the trial between Frank Heiser and the Islamic Republic of Iran.
Q. And did former Director Freeh testify at that trial?
A. Yes, he did.
Q. And is this a transcript of his testimony?
A. Yes, it is.

Q. Does it appear to be?
A. Yes.
Q. Did you rely on this transcript?
A. Yes. It was interesting, the transcripts of the -- that become public that we can look at, as well as the things that he's written and the statements that he was making even as Director of the FBI. There's no contradiction in them. They all get the same story.
Q. He comes to the conclusion that this was --
A. He definitely said -- absolutely. He said it was the -- he came to the conclusion that senior officials in the Iranian government and the Iranian Revolutionary Guard Corps were responsible for the actions of the Hizballah people that carried out the Khobar Towers bombings.

MR. GASTON: Your Honor, I would like to move the admission of Exhibit 3 into evidence.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 3, marked for identification, was admitted into evidence.)

(Whereupon, Plaintiff's Exhibit Number 4 was marked for identification.)

BY MR. GASTON:
Q. I'd like to direct your attention to tab four, please, Dr. Tefft.
A. Okay.

Q. This is similar testimony, is it not?
A. Yes. It's another trial transcript from the Fran Heiser versus Islamic Republic of Iran case.
Q. This time the testimony is of Mr. Dale Watson. Who is Mr. Watson?
A. Now he's a private citizen. He's a consultant. He's a former senior FBI official under Louis Freeh. He was involved -- he was the FBI agent involved with the -- responsible for the correct investigation of the Khobar Towers incident.
Q. Have you reviewed his testimony?
A. Yes, sir.
Q. And what was Mr. Watson's conclusion?
A. He said exactly the same things that Freeh had. He elaborated a little bit on the nature of his cooperation with the Saudi government in interviewing the suspects that the Saudis had arrested as well, and spoke with the cooperation of the Saudi government. Basically, his conclusions were the same as Director Freeh's.
MR. GASTON: Your Honor, I would like to offer Exhibit 4 into evidence.
THE COURT: Received.
(Whereupon, Plaintiff's Exhibit Number 4, marked for identification, was admitted into evidence.)
(Whereupon, Plaintiff's Exhibit Number 5 was marked for

identification.)
BY MR. GASTON:
Q. Please look at tab number five. This appears to be an article published by former Director Freeh; is that correct?
A. Yes. This was published by the -- actually, it's been published in two places. One was in the Wall Street Journal, and this is the Saudi/US Relations Information Service, which is a Saudi government entity, kind of like the Voice of America.
Q. Does it contain any reference to the Khobar Towers bombing?
A. Absolutely. In fact, the whole article is about -- is entitled "Remember Khobar Towers" by Louis J. Freeh, and the whole article is about the attack and the connection between the attack and Hizballah and Iran's government and leadership, and it's also a description, a very general description of the investigation that the FBI conducted.
Q. And Director Freeh wrote in that article on June 25, 1996, "Iran again attacked America at Dhahran, Saudi Arabia." This is on the second page of that --
A. Yes, yes, "...exploding a huge truck bomb that devastated Khobar Towers and murdered 19 U.S. airmen," yes.
Q. And do you believe this source is reliable?
A. Oh, absolutely. The FBI, since 1985, when we

established the counter-terrorism center in the agency, at the same time President Reagan declared the FBI to be the premier -- the lead agency -- I'm sorry -- the lead agency in the U.S. Government for all investigation of terrorists incidents.

MR. GASTON: Your Honor, I offer Exhibit 5 into evidence.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 5, marked for identification, was admitted into evidence.)

BY MR. GASTON:

Q. Let me ask you, Director Freeh has been very up front about his conclusions, and some other people have been as well, but the United States Government, at least today, does not seem to have completely endorsed this conclusion as to who was behind the Khobar Towers bombing. Can you offer a suggestion why?

A. It's interesting. It's not a question of endorsing, it's more a question of not endorsing. The -- one of the reasons that Director Freeh, as well as some of us in the CIA in the counter-terrorism effort as well, is the entry and consideration of politics into what would otherwise be a simple investigation with clear cut conclusions. The problem is, since the revolution in 1979, every single U.S. Administration has been operating under the premise that

there is a possibility of bring Iran back from its extremism. So there is a disinclination to take any harsh actions or irreversible actions, such as war, against Iran.

If the government is forced or were to actually come out and confirm or endorse Director Freeh's, or any of our other observations or knowledge about Iranian involvement, obviously the pressure from the American public would require that the U.S. Government take some direct action against Iran like we did in Iraq, for example. Because they're trying to avoid this, you won't find any accusations, but there's no denials of what Director Freeh says, especially when you get them into specific court transcripts in cases carried out by the government against people that are involved with these types of things. These are a matter of record. Nobody -- Director Freeh, the FBI agents, investigators, nobody is lying to the Court about this stuff, but the political side of the various administrations is not going to do an undiplomatic thing that would force them into a corner and require them to take action that they're not ready to take.

(Whereupon, Plaintiff's Exhibit Numbers 7 and 7A were marked for identification.)

BY MR. GASTON:

Q. Well, you mentioned a court proceeding. Could you look at tab seven, and I think you will find there a press

release announcing indictments against certain individuals, and then I believe I have it marked as Exhibit 7, and Exhibit 7A is the actual indictment. Have you had a chance to review those documents?

A. Yes. Yes, I did, and this indictment is against some 13 members of the -- as they refer to it in the FBI press release, of the pro-Iranian Saudi Hizballah. Well, in the Middle East all of the Hizballah parties, all of the Hizballah terrorist organizations, the Party of God, every one of them Saudi Arabia, Bahrain, Lebanon and the other Gulf Coast is an Iranian proxy. They were set up by Iran to carry out terrorists actions in those countries in the hopes of overthrowing those governments and establishing another Islamic republic in these different countries. So to call it pro Iranian is true, but it doesn't go far enough. These are Iranian proxies as well, and this is against 13 members of the -- of the organization that they have identified through their investigation.

Q. So they referred to Iran in the indictment?

A. I believe when they are -- yes, I believe they do when they're talking about the -- meeting the -- the meetings in Damascus at the Iranian embassy.

Q. And I believe, if you look at the second page of the press release, around the middle paragraph, "In 1995, an Iranian military officer directed Al-Bahar and Al-Sayegh to

conduct surveillance on the Red Sea coast of Saudi Arabia"?
A. Yes.
Q. "During this time, Al-Mughassil told Al-Marhoun during a live-fire practice drill in Lebanon that he enjoyed close ties to Iranian officials who were providing financial support to the party, according to the indictment"?
A. Absolutely, yes.
Q. And the indictment bears that out?
A. Yes, sir.
MR. GASTON: Your Honor, I would like to offer Exhibits 7 and 7A into evidence.
THE COURT: My book doesn't have a 7A. Do you have it?
MR. GASTON: I'm sorry. It should. After tab 7, the first exhibit is Exhibit 7, which is the press release, and then I think four pages in is the first page of the indictment which should be 7A.
THE COURT: It's not in my book.
MR. GASTON: I'm sorry.
THE COURT: That's okay.
(Whereupon, Plaintiff's Exhibit Number 6 was marked for identification.)
BY MR. GASTON:
Q. I believe we skipped tab six, if I could redirect

your attention to that. That is a statement of Louis Freeh, former FBI director, before the Joint Intelligence Committees of Congress; is that correct?

A. Yes, sir. Yes, it is. Congress was another agency of the U.S. Government that also conducted its investigations into the Khobar Towers bombing as well, and they called Freeh and a number of other experts to testify about the case.

Q. And here he repeats his conclusions stated elsewhere?

A. Yes, sir.

Q. That Iran was responsible for --

A. Yes, sir; he does.

MR. GASTON: I'd like to offer Exhibit 6, Your Honor.

THE COURT: It's received.

(Whereupon, Plaintiff's Exhibit Number 6, marked for identification, was admitted into evidence.)

THE COURT: I see where Exhibit 7A is located. It isn't tabbed. The other material is in front of it.

MR. GASTON: I apologize, Your Honor.

(Whereupon, Plaintiff's Exhibit Numbers 7 and 7A, previously marked for identification, were admitted into evidence.)

BY MR. GASTON:

Q. Now, you didn't rely solely on Director Freeh in reaching your conclusion based on publicly available material, did you?
A. No. There's been a great deal of investigative reporting and books have been written about it, and congressional research services have done a study on it. There's a lot of information, and very little of it is contradictory. That's the interesting part. This is the -- these are the key points that there's pretty much no dispute over.
Q. Is there another expert in the field called Matthew Levitt that you're familiar with?
A. Yes, yes, yes. He's -- I consider him a senior expert to me. He's done a lot of research, and he's one of the people that's written a number of books on this. He's often called as a congressional expert witness as well.
(Whereupon, Plaintiff's Exhibit Number 8 was marked for identification.)
BY MR. GASTON:
Q. And if I could ask you to turn to tab eight in your book?
A. Okay.
Q. Mr. Levitt apparently testified before Congress and also wrote an article about his testimony; is that correct?
A. Yes. This is the article, "Iranian State Sponsorship

of Terror: Threatening U.S. Security, Global Stability, and Regional Peace."

Q. And does he also reach the conclusion that Iran was heavily involved in the Khobar Towers bombing?

A. Oh, definitely. He gives a great deal -- not a great deal, but he gives even more details than what Freeh, Watson, and the indictments talk about.

MR. GASTON: Your Honor, I'd like to offer Exhibit 8 into evidence.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 8, previously marked for identification, was admitted into evidence.)

BY MR. GASTON:

Q. The State Department publishes an annual review on terrorism, does it not?

A. Yes. It's called the "Patterns of Global Terrorism." It's a congressionally mandated, unclassified, open source review of terrorism since -- in every country and in every region around the world.

(Whereupon, Plaintiff's Exhibit Numbers 9 and 10 were marked for identification.)

BY MR. GASTON:

Q. And if you look at tabs nine and ten, can you tell us what those are?

A. Yes. These are the editions for 1996 and 1997.

Q. In 1996 and 1997, did the State Department conclude that Iran was a leading state sponsor of terrorism?
A. Yes, they do. In fact, I should clarify. These are the parts relating to Iran. This is not the whole report.
Q. Sure.
A. Yes, they do. In fact, the revolution in Iran took place in 1979. I these patterns of global terrorism have started coming out in 1982 and 1983, and every year, every single year, up to the current, present year, in the Iranian section Iran is identified as the premier or the leading state sponsor of terrorism in the world, in every single edition every year.
Q. Including 1996 and 1997?
A. Including 1996 and 1997.
Q. And those are the relevant excerpts in tabs nine and ten; is that correct?
A. Yes, sir.

MR. GASTON: I'd like to offer Exhibits 9 and 10 into evidence, Your Honor.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Numbers 9 and 10, previously marked for identification, was admitted into evidence.)

(Whereupon, Plaintiff's Exhibit Number 11 was marked for identification.)

BY MR. GASTON:

Q. Now, Exhibit 11, can you explain proposed Exhibit 11, what that is?

A. This is an open source -- it's a website. It's an organization called the Federation of American Scientists, and they have done a good deal of well researched on -- researched on all the different terrorists organizations in the world. They also do a similar thing on counter-terrorist agencies and intelligence services. This is their research on the Iranian Revolutionary Guard Corps. It tells the history, it tells the organization, it tells about the domestic and the foreign responsibilities. It provides all the background. It's a good summary.

Q. Do you believe it's accurate and --

A. Yes, sir, I do. And they do identify at the end of the -- at the end of the small article, they do identify their sources as well, which include the Library of Congress and other very reputable -- it's a good -- it's a good general coverage of it.

MR. GASTON: I would like to offer Exhibit 11 into evidence, Your Honor.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 11, previously marked for identification, was admitted into evidence.)

(Whereupon, Plaintiff's Exhibit Number 12 was marked

for identification.)
BY MR. GASTON:
Q. If I could ask you to look at source that you have relied up, an article in something called the Free Muslims Coalition?
A. Yes The Free Muslims Coalition is an interesting group. It's basically people who are Muslims and who have been exiled from different countries, including Iran, for being reasonable and rational, I suppose you could say. They do not subscribe to either terrorism or the requirement that Islam should conquer the world and that sort of thing. They also -- to maintain their credibility, they do a great deal of research, and they've very careful with the type of things they write. It's not propaganda at all. It's -- I would put it in the context of academic research.
Q. And this article also identifies as a primary sponsor of state terrorism?
A. Yes. Yes, a look at Iran's sponsorship of terrorists organization and, again, some of their resources they do cite both the Statement Department's patterns of global terrorism reporting, as well as congressional reporting and other information, other sources that can be cross checked and proved their accuracy.
Q. And they name certain high level officials in Iran, some of whom you mentioned, as being involved in the

planning of the Khobar Towers bombing?
A. Yes, they do. They specifically mention the director of the Ministry of Intelligence and Security, the intelligence minister, Ali Fallahian, who is still a very senior advisor to the Ayatollah in Iran now. He's on the Council of Experts, which is a sort of cabinet, National Security Council type of cabinet post that he's still in. And they talk about the Revolutionary Guard Corps and the work that they do with Hizballah in Lebanon and on terrorist issues as well.
MR. GASTON: Your Honor, I would like to offer Exhibit 12 into evidence.
THE COURT: Received.
(Whereupon, Plaintiff's Exhibit Number 12, previously marked for identification, was admitted into evidence.)
(Whereupon, Plaintiff's Exhibit Number 13 was marked for identification.)
BY MR. GASTON:
Q. Exhibit 13 appears to be an article by the Iran Press Service; is that correct?
A. Yes.
Q. What can you tell us about that article?
A. This is a -- this is a more current report about why Iran protects al-Qa'eda, and like the problems of the United States accusing Iran publicly and diplomatically of being

involved in Khobar Towers or the Beirut Embassy bombings or other terrorist incidents that we know they've been involved with.

In case anybody wondering this is -- this is where bin Laden has been since the Tora Bora fighting in Afghanistan. He's been in Iran. He's not in Afghanistan, he's not in Pakistan.

This is an article addressing why it's a -- given their history of supporting different terrorist groups against the West, why it's perfectly natural as well that they have combined or allied themselves with al-Qa'eda and they're protecting al-Qa'eda now, and they give some historic background, too.

Q. They use the 1996 Khobar Towers bombing in Saudi Arabia as an example, if you turn to the second page, the second full --

A. Yes, yes. In fact, again, they mention also the former Iranian Intelligence Minister, Ali Fallahian. They say the 1996 Khobar bombing in Saudi Arabia serves as an example of the past years of Iranian support and committing of terrorist activities through proxies.

General Sharifi, the Iranian Revolutionary Guard Corps operational leader, is mentioned in here, as well as one of the conspirators that's also in the indictment, Ibrahim al-Mughassil, who is a member of the Saudi

Hizballah.

Q. So you believe this article is relatively accurate?

A. Oh, it's very accurate. There's no contradictions here between any of the previous indictments or sources that are cited.

MR. GASTON: I would like to offer Exhibit 13 into evidence.

THE COURT: Received.

(Whereupon, Plaintiff's Exhibit Number 13, previously marked for identification, was admitted into evidence.)

THE COURT: Why is the popular wisdom that bin Laden is not in Iran, that he's in Pakistan or Afghanistan, if this is accurate?

THE WITNESS: Well, because if we don't want to admit that he's Iran, he's got to be somewhere, and we can't find him. Obviously, we can't find him, my point of view, because we're not looking where he's at. There's a lot of circumstantial -- well, not even only circumstantial information. We don't, obviously, have a great deal of intelligence resources in Iran. Most of that got lost and shut down after the revolution. But, for example, when the last videotape was done by bin Laden outdoors, there's a -- from my home state of Colorado, there's a university geology professor who recognized the rock formations as being in southeastern Iran. As soon as that was publicized, every

single video presentation since then has been indoors, with a gray blanket background. The last video that he put out standing behind a nice wooden lectern with all the modern studio facilities, if you will, he was dressed in Iranian cloth in his robes. It was not Saudi, like he normally was. And then there's just the simple fact that if he is in or was in Pakistan, or in the wilds of Afghanistan, in a mountain cave or something, how is he doing these studio quality productions on these videotapes and audiotapes, and how is it that we can't find him? We have troops on the ground in both those places.

His second wife, which is his favorite wife, his son, who he has designated as his heir, and his number two -- his deputy in al-Qa'eda, an Egyptian dentist named al-Zawahiri all have been positively identified as being Iran at various times. He has not been -- though there are not eyewitnesses saying that, it's all just sort of circumstantial evidence. But there's no evidence he's anywhere else either, and that's the other thing. So it's a combination of the two.

I believe -- I don't think I'm any type of genius or expert, and I think what I can see obviously the people in the government can see, and they do not want to publicly link Iran to al-Qa'eda because that would require us to take forceful action against them. You see how careful we are

even on the nuclear issues about dealing with Iran now. We don't -- Iran has always been the most powerful state in the region, and it's been the most advanced. When the Shah of Iran had essentially created a country that was the equivalent to, I don't know, a small European county -- Italy or something like that -- in terms of power, in terms of industrialization and that sort of that, and a lot of that has been lost after the revolution, but it's still the power in the area. It's much more powerful than Saudi Arabia, Kuwait, or even Iraq. If they hadn't -- they fought a ten-year war with Iraq that was pretty much a stalemate. A million people died on both sides. But if the Iranians had not conducted the revolution as the Russians did and decimated their army prior to World War II, the Iranians would have run over the Iraqis with no problem at all. But even so, they took on the fourth largest army in the world and fought it to a standstill.

I'm sure that the political reason is that we still hope that somehow we can be friends eventually with Iran, and we don't want to do anything irreversible.

BY MR. GASTON:

Q. Let me ask you a more general question. What is the purpose of a terrorist attack such as the one on the Khobar Towers?

A. The FBI has adopted a definition of terrorism as an

attack against civilians, non-combatants, for the purpose of -- obviously terrorizing -- but for the purpose of influencing a government to change its policies. Now, so, first of all, the strategic objective is to have the government of whoever citizens are being attacked to have them change whatever policy, like the Madrid training bombings, for example, changed its Spanish policy in Iraq, and they withdrew their troops where they have been supporting us.

The London training bombings was another effort to do the same thing, and the British did not cave to that type of pressure.

The Khobar Towers, the Marine Corps barracks bombing in Beirut, the embassy bombings in Beirut twice, all of these are efforts to cause enough pain and suffering to the population, to the -- you know, from the victims, families and the victims themselves if they're survivors, to put pressure on the host government, the U.S. Government, the British, or the Spanish Government to do whatever it is the terrorists are trying to accomplish.

So tactically, the immediate objective is to terrorize the victims and cause them to -- or to motivate them to pressure their government to do what the terrorists want.

THE COURT: To withdraw from Saudi Arabia?

THE WITNESS: Yes.

THE COURT: And here, to withdraw from Saudi Arabia, is what they were seeking to accomplish?

THE WITNESS: Absolutely. The true believing Muslims feel that the territory of Saudi Arabia is the holiest ground in Islam, and it is a great sacrilege to have non-Muslims traipsing -- especially non-Muslims troops traipsing about in Islam. In fact, when Saddam Hussein invaded --

THE COURT: Not just the religious sites?

THE WITNESS: No, no. It's the whole territory, absolutely. Yes, definitely, it's the whole territory.

When Saddam Hussein invaded Kuwait and it looked like he was going to move into Saudi Arabia, bin Laden came to the Saudi Government and said, "Listen, I have 15,000 trained fighters from the Afghan war. We beat the superpower, the Soviet Union, with them. I will defend Saudi Arabia against Iraq."

The king looked at the ragtag bunch of holy warriors, the mujahedeen, the holy warriors from Afghanistan, and he looked at the U.S. military, and they decided that they preferred to be protected by the U.S. military. That is when bin Laden lost his citizenship and started attacking the Saudi Government as well.

BY MR. GASTON:

Q. So one of the sort of incidental but immediate intents was to inflict pain and suffering on the victims and their immediate families?

A. Oh, absolutely. That way they are terrorized. That way they're motivated to stop the terror, to stop future incidents like this. And if it doesn't work, they'll do it again and again and again. That's as far in advance as they see, and then they hope that the victims, the survivors or their families will go back to their home county and pressure the government to do whatever it is -- in this case, yes, to withdraw from Saudi Arabia, get the U.S. troops out of Saudi Arabia.

Q. Or to make the other families, families of other servicemen too fearful to allow them to go to --

A. Absolutely. There's a lot of ancillary things like affecting moral, terrorism. That's one reason the terrorists choose bombs and explosives as opposed to usually attacking -- I mean, you would think if they were holy warriors and fighters and everything they would launch a frontal assault on a U.S. military unit. That's not the objective. The objective is to cause terror, to cause pain and suffering.

Q. What was the U.S. military doing in Saudi Arabia at that time in 1996?

A. We were on a -- this was following -- 1990 was the

first Gulf war. We were there enforcing the United Nations' no fly zone mandate over Iraq. This was an air force base, an air force facility, and obviously considerably behind enemy lines, but they were supporting the flight patrol over Iraq to make sure that the Iraqis did not reinitiate hostilities after the first Gulf war.

THE COURT: There were flights from this base?

THE WITNESS: Yes, yes. There were elements -- I think there were 2- or 3,000 air force personnel from different elements, from all over this country there. Now they've all been consolidated into a new air base, King Abdul Aziz Air Base, and much better protected. They were not anticipating attacks here. This was not on the front lines; this was considerably behind the lines, and it was -- they were not on the war footing, if you will.

BY MR. GASTON:

Q. And this was essentially a residential complex?

A. Well, what got hit, it was definitely -- it was a dormitory building. It was sort of a large apartment building. That was the -- in fact, we shared the base as well with the French and the British people too, and they also had dormitory facilities there, but we were the ones that were next to the wall where the -- we were the clear target. In fact, six months prior -- I'm not sure of the time. Some time prior to the actual bomb going off these

same people had tried to run a truck through the barrier, the perimeter wall, before, and they didn't destroy the truck, but they -- it would be like hitting the Jersey wall on the freeway. The truck bounced off. So that was why they did not try to drive this truck through; they just parked it next to it and hoped that the explosion would be powerful enough to hit across. But they were clearly targeting the American dormitory building because it was right next to the American building that they tried their previous penetration.

(Whereupon, Plaintiff's Exhibit Number 14 was marked for identification.)

BY MR. GASTON:

Q. Okay. Finally, I would like to ask you to you look at Exhibit 14, which is a report prepared just a few months after terrorist attack on the Khobar Towers. Did you have a chance to look at that?

A. Yes. This is the Downing Report. This was the first after action report by the air force itself to determine what went wrong. It talks about the history, it talks about why were there, it talks about all the security preparations, the security level and stance and what went wrong.

Q. They refer to this as a peacetime deployment?

A. Yes. It's a peacetime deployment, although they were

aware of some security issues, and the air force had actually requested, for example, that the perimeter wall be extended, be put further away from the buildings than it was, and because we were there -- again, we weren't occupying Saudi Arabia. We were there in a peacetime type deployment. The Saudis said, no, they didn't want to give us any more territory to make a bigger perimeter. We couldn't do anything about it, so we had to accept that. But, yes, it was very definitely not a war zone or war time deployment.

MR. GASTON: Your Honor, I would like to offer Exhibit 14 into evidence.

THE COURT: Received.

BY MR. GASTON:

Q. Finally, Dr. Tefft, is it your opinion, to a reasonable degree of certainty, that the Islamic Republic of Iran and the Iranian Revolutionary Guard Corps were responsible for the planning and supporting the attack on the Khobar Towers, including providing operational and financial support?

A. There's no question about it. It wouldn't have happened without the Iranian support. This is a very powerful, sophisticated bomb. Neither group, the larger, older Lebanese Hizballah, or the relatively new Saudi Hizballah could have pulled this off on their own. They

definitely had to have state sponsorship, and it was Iran. Too many people have said have identified the actual individuals who were -- who were doing the planning and organization. There's no question that it's Iran.

Q. Thank you.

THE COURT: Thank you very much. You may step down.

(Whereupon, the witness was excused.)

REDACTED

ANNEX 115

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Annex 115

EXECUTION OF JUDGMENTS AND FOREIGN SOVEREIGN IMMUNITY

*By James Crawford**

I. Introduction

The extent to which foreign sovereigns are entitled to immunity in municipal courts has attracted a vast literature, in recent years especially. The majority view now seems to be that immunity need not extend to commercial transactions entered into by the state, although the precise scope of this "exception" remains unsettled, and the role of international law in "extending" or "withholding" immunity has not yet, perhaps, been clearly analyzed. Indeed, it has been denied that there is any international law rule at all on the subject, a view that would presumably leave each state free to formulate, or negotiate, its own rule.

The purpose of this paper is not to reconsider this central issue but to examine the distinct, though related, question of the extent to which foreign sovereigns are by international law entitled to immunity from seizure of and execution against property pursuant to judgments of domestic courts. Four views of the matter would seem to be possible: first, that no measures of execution are permissible without the foreign sovereign's consent; second, that the immunity from execution is strictly correlative to immunity from suit, so that in those cases where the foreign sovereign is not immune from suit it is equally, and without further restriction, not immune from execution of any adverse judgment; third, that execution against a foreign sovereign is permissible, but in a more restrictive class of case than that in which it is liable to suit; and fourth, that there is no international law rule on the matter at all.

It will be suggested that an examination of case law, treaty and statutory provisions, state practice, and the literature supports the third view: that, while international law permits execution against the property of foreign sovereigns, there are distinct restrictions on such execution, apart from general restrictions on suit. An attempt will be made to outline these restrictions, particularly in the context of foreign government funds and those of central banks. Finally, a brief examination will be made of the, largely correlative, problem of prejudgment attachment of foreign state property or assets.

II. A Survey of Authority

There is a substantial, though rather diverse, body of authority dealing with the questions of execution against foreign state property. A brief review of this authority is necessary.

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MULTILATERAL TREATY PROVISIONS

There is yet no comprehensive multilateral treaty on state immunity, though the problem has been regulated functionally in a number of contexts, and in one important regional convention.

Arrest of and Execution Against State-owned Ships

The propriety of arresting state-owned ships (other than warships and other public ships) in aid of maritime claims is now well established.[1] Article 1 of the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships provides:

> Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.[2]

The liability to arrest of state-owned commercial ships is affirmed, by implication at least, in the 1952 Brussels Convention relating to the Arrest of Sea-going Ships.[3] It is also expressly contemplated by Article 21 of the Geneva Convention on the Territorial Sea of 1958, which applies to government ships operated for commercial purposes the general rules applicable to innocent passage of merchant ships in Articles 18 to 20 of the Convention. Article 20 provides that the qualified prohibition from execution of arrest of merchant ships engaged in innocent passage through the territorial sea is "without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil

[1] It is proposed to deal only with arrest in the exercise of civil jurisdiction in ports, roadsteads, and internal waters. *Cf.* Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, Art. 20(1) & (2). The distinction is not sufficiently attended to in the Brussels Convention relating to the Arrest of Sea-going Ships, 1952, 159 BRIT. FOREIGN & ST. PAPERS [BFSP] 368.

[2] 1 LNTS 199, [1980] Gr. Brit. TS No. 15 (Cmnd. 7800). Article 2 subjects such ships to the same "rights of action and procedure" as private ships. Article 3 exempts ships of war and other ships used exclusively on "Government and non-commercial service"; these are exempt from "seizure, arrest or detention by any legal process" (including actions in rem). There are approximately 23 parties to the Convention and its Protocol of 1934.

[3] *Supra* note 1. The Convention deals with "sea-going ships" in general. Article 2 provides for liability to arrest in respect of a "maritime claim," but Article 3 allows arrest of any sister ship owned by the same "person," and "person" is defined to include "Governments, their Departments, and Public Authorities" (Art. 1(3)). In ratifying the Convention, both Yugoslavia and the United Kingdom reserved the right not to apply it to "warships or to vessels owned by or in the service of a State." In this respect as well, the 1952 Convention is remarkably sweeping. *See also* the 1940 Montevideo Treaty on International Commercial Navigation Law (7 M. HUDSON, INTERNATIONAL LEGISLATION 460 (1941)), adopting a more restrictive, but not prohibitive, rule. The Treaty never came into force.

proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."[4]

The International Law Commission proposed that, by Article 21, these powers of execution and arrest be extended to state-owned commercial vessels since the rules of the 1926 Brussels Convention "followed the preponderant practice of States"; however, the dissent of the Soviet and Yugoslav members of the Commission was recorded.[5] Several states parties to the 1958 Convention have made reservations with respect to these provisions, on the ground that immunity extends to all government ships irrespective of use; a similar number of states have objected to these reservations.[6]

The European Convention on State Immunity of 1972[7] reserves the question of claims relating to state-owned ships, on the basis that the matter is regulated already by these general conventions.

Other Cases of Arrest and Execution

The European Convention is the only multilateral convention in force directly regulating the general issue of state immunity from execution. Article 23 prohibits all "measures of execution or preventive measures against the property of a Contracting State" outside its territory in the absence of express waiver. However, the value of this provision as support for an equivalent customary rule is limited, for several reasons.

First, the Convention does not purport to be a codification of general international law.[8] It does not in terms embody any distinction between governmental and commercial transactions,[9] but was intended to state a

[4] Geneva Convention on the Territorial Sea and Contiguous Zone, *supra* note 1. Virtually identical provision is made in Articles 28–32 of the UNCLOS Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/Rev.3 (1980), *reprinted in* 19 ILM 1131 (1980). And *see generally* T. K. THOMMEN, LEGAL STATUS OF GOVERNMENT MERCHANT SHIPS IN INTERNATIONAL LAW (1962); Vitányi, *L'Immunité des navires d'Etat*, 10 NETH. INT'L L.R. 33–61, 156–177 (1963).

[5] Report of the International Law Commission on its 8th session, 11 UN GAOR, Supp. (No. 9) 22, UN Doc. A/3159 (1956). For the ILC debates, see [1954] 2 Y.B. INT'L L. COMM'N 73–75; 1 *id.* at 157–59; [1955] 1 *id.* at 140–42; [1956] 1 *id.* at 207–11.

[6] Reservations have been made by Bulgaria, Byelorussia, Czechoslovakia, the German Democratic Republic, Hungary, Mexico, Romania, the Ukraine, and the USSR. Objections to the reservations are maintained by Australia, Denmark, Fiji, Japan, Madagascar, the Netherlands, Portugal (the Mexican reservation only), Thailand, Tonga, the United Kingdom, and the United States.

[7] European Convention on State Immunity, May 16, 1972, [1979] Gr. Brit. TS No. 74 (Cmnd. 7742), Art. 30. *Cf. also* the Brussels Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, 57 AJIL 268 (1963), Art. X(3) (phrased in terms of waiver)

[8] *Cf.* Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. 254, 283 (1973); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 335 (3d ed. 1979). The same is no doubt true of the Inter-American Convention on Private International Law (the Bustamante Code) of 1928 (86 LNTS 246), which never came into force. Articles 333–339 enunciate a general rule of immunity from both jurisdiction and execution, including civil and commercial cases, excluding only real or mixed actions where a "foreign contracting State or its head has acted as an individual or private person" (Art. 335).

[9] *Cf.* Art. 24, which allows extension by declaration (vis-à-vis another declaring state) of further exceptions from immunity "to the extent that its courts are entitled to entertain pro-

minimum degree of immunity from the jurisdiction of foreign courts whose judgments would be entitled to recognition (and, if available under local law, enforcement) in the courts of the defendant state.[10] Moreover, parties to the Convention expressly agree to give effect to foreign judgments against them (subject to limited exceptions).[11] There is, of course, no equivalent machinery under the general law. And, third, immunity from execution can itself be displaced by mutual declarations made under Article 26, in respect of "proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person."

A few other multilateral conventions deal with the matter in a peripheral or ancillary way. The First World War peace treaties contained a provision disentitling the defeated party in each case from relying on "any rights, privileges or immunities of sovereignty" in international trade.[12] More significantly, Article 3(1)(a) of the Rome Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft of 1933 exempts from precautionary attachment ("*saisie conservatoire*") "aircraft assigned exclusively to a Government service, the postal service included, commerce excepted."[13] The Convention deals only with prejudgment attachment,[14] but attachment in aid of execution would appear to be an a fortiori case.[15]

On the other hand, Article 55 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States[16]

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ceedings against States not party to the present Convention," but stipulates that such declarations are "without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta iure imperii*)." *Cf.* Art. 27(2). Of the four parties to the Convention, two (Belgium and the United Kingdom) have made such declarations.

[10] *Cf.* Preamble, Arts. 21 and 22.

[11] Arts. 20 and 21. *See generally* Knierim, *Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity*, 12 COLUM. J. TRANSNAT'L L. 130 (1973); Sinclair, *supra* note 8, at 273–76; Krafft, *La Convention européenne sur l'immunité des Etats et son protocole additionnel*, 31 ANNUAIRE SUISSE DE DROIT INT'L 11, 20–23 (1975); Wiederkehr, *La Convention européenne sur l'immunité des Etats du 16 mai 1972*, [1974] ANNUAIRE FRANÇAIS DE DROIT INT'L 924, 936–38.

[12] Treaty of Versailles, June 28, 1919, Art. 281 (Germany); Treaty of St.-Germain, Sept. 10, 1919, Art. 233 (Austria); Treaty of Neuilly, Nov. 27, 1919, Art. 161 (Bulgaria); Treaty of Trianon, June 4, 1920, Art. 216 (Hungary); Treaty of Sèvres, Aug. 10, 1920, Art. 268 (Turkey, unratified).

[13] 192 LNTS 289. As at September 1979, there were 22 parties to the Rome Convention.

[14] *Cf.* Art. 2. The 1952 Brussels Convention contains a somewhat similar restriction; *supra* note 1, Art. 1(2).

[15] Art. 30 of the Paris Air Navigation Convention of Oct. 13, 1919, 112 BFSP 931, provides: "All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention." By contrast, the Chicago International Air Transport Agreement of Dec. 7, 1944, 171 UNTS 387, Article 3(a), excludes all state aircraft from the Convention. The Warsaw Convention for the Unification of Certain Rules relating to International Transportation by Air, 1929 applies expressly to carriage performed by the state, but makes no reference to immunity questions; TS No. 876, 137 LNTS 11, Art. 2. And *cf.* the restricted reservation allowed by Article 26 of the Hague Protocol, 1955, 478 UNTS 371.

[16] 17 UST 1270, TIAS No. 6090, 575 UNTS 159.

merely reserves questions of "immunity of any foreign State from execution," pursuant to awards under the Convention, to the law of the state where enforcement of the award is sought. Since that question was controversial, "the intention was not to modify the existing law on State Immunity," nor, indeed, to state what that law is or should be.[17]

BILATERAL TREATY PROVISIONS

There is quite frequent reference in the literature to the large number of bilateral treaties dealing with foreign state immunity, and in particular with immunity from execution.[18] However, no very detailed analysis of the bilateral treaty practice has yet been attempted: in fact, the United States treaties, which are usually cited in this context, provide less convincing support for a restrictive position than does the far more extensive treaty practice of the Soviet Union.

Pre-1945 Treaties

In the interwar years, the Soviet Union concluded a number of treaties with other European states, for the most part regulating the activities of the Soviet Trade Delegation in concluding commercial transactions in the other state. Ten such treaties have been located. Although their form and content vary significantly, the Treaty of Commerce of June 2, 1927 with Latvia may be taken as an example. Article 5(7) of that Treaty stated:

> Juridical acts carried out by the Commercial Delegation in Latvia which bind the Union of Socialist Soviet Republics and also the economic results of the said acts, shall be dealt with in accordance with Latvian law and shall be subject to Latvian jurisdiction. Nevertheless, in view of the liability assumed by the Union of Socialist Soviet Republics under paragraph 6 of the present Article in respectof transactions effected by the Commercial Delegation, recourse shall not be had either to judicial measures of a preventive character or to administrative measures affecting the property of the Commercial Delegation and its branches.
>
> The execution by attachment of judgments which have acquired legal force shall not be admitted in the case of property belonging to the Commercial Delegation where such property is intended, in accordance with the general rules of International Law, for the exercise of the sovereign rights of the State, or for the official activities of the Commercial Delegation.[19]

[17] 2 ICSID, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES. DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 428 (1968). For the *travaux préparatoires* of Art. 55, see *id.* at 177, 242, 304, 343–48, and 424–31. *Cf. also* the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38. Despite the assumption to the contrary in *Ipitrade International S.A. v. Federal Republic of Nigeria* (465 F.Supp. 824, 826 (D.D.C. 1978)), it is doubtful whether states themselves count as the "persons . . . physical or legal" to whom the Convention applies.

[18] *Cf.* Claim against the Empire of Iran Case (Federal Republic of Germany, Federal Constitutional Court, 1963, 16 BVerfGE 27 (1964)), 45 ILR 57, 73–75 (1972), per Wagner V.-P.

[19] 68 LNTS 321.

By Article 6, separate Soviet state enterprises, whose transactions were not guaranteed by the Commercial Delegate, were subjected independently to "Latvian jurisdiction and to the execution of judgments by attachment," without limitation.

Most of the other treaties concluded at this time contained similar provisions:[20] in all but one case,[21] Soviet state property was expressly made liable to final execution in respect of guaranteed transactions (though in six of the treaties, interim attachment was excluded).[22] Property used for diplomatic, consular, or other sovereign functions was variously stated to enjoy "the protection of customary international law,"[23] or that "extended under international law to the property of other friendly governments,"[24] or to be immune from execution "according to the general rules of international law."[25] But only two of the treaties regulated the immunity of the parties on a mutual basis.[26]

Post-1945 Treaties

Since 1945, the treaty practice has been both more widespread and more diverse. A very few treaties involve either an express waiver[27] or a non-waiver[28] of immunity with respect to specific transactions, but most, rather

[20] Treaties of the USSR with: Norway (1921), 7 LNTS 293; Austria (Ukrainian SSR also a party) (1921), 20 LNTS 153; Denmark (1923), 18 LNTS 15; Germany (1925), 53 LNTS 85; Sweden (1927), 127 BFSP 923; Greece (1929), 131 BFSP 480; Britain (1934), 137 BFSP 188; and Belgium and Luxembourg (1935), 173 LNTS 169.

[21] USSR-Italy, Treaty of Commerce and Navigation, Feb. 7, 1924, 120 BFSP 659. The Treaty (Art. 3, para. 4) excludes interim attachment "in consequence" of the Trade Delegation's assumption of responsibility for the transactions. But the Treaty is ambiguous on the question of final execution. The Corte di Cassazione interpreted the Treaty to confer absolute immunity from execution (Russian Trade Delegation in Italy v. de Castro (1935, [1935] FORO. IT. I, at 240), 7 ANN. DIG. PUBLIC INT'L L. CASES [hereinafter cited as ANN. DIG.] 179, 180–82 (1940), but it is not clear that this was intended. For other Italian cases on the Trade Delegation, see 9 ANN. DIG. 247–49 (1942).

[22] Treaties with: Norway, *supra* note 20, Art. 4(1) (a qualified undertaking only); Denmark, *supra* note 20, Art. 3(1) (to similar effect); Italy (*see* note 21); Latvia, *supra* note 19, Art. 5(7); Greece, *supra* note 20, Art. 7(4); Belgium and Luxembourg, *supra* note 20, Art. 14.

[23] Treaty with Austria, *supra* note 20, Art. 12.

[24] Treaties with: Norway, Art. 4(2); Denmark, Art. 3(4); both *supra* note 20.

[25] Treaties with: Germany, *supra* note 20, Art. 7; Latvia, *supra* note 22, Art. 5(7); Sweden, *supra* note 20, Art. 6. The treaty with Greece, *supra* note 20, simply has "jouissant d'extra-territorialité"; Art. 7(5); that with Great Britain, *supra* note 20, "necessary for the exercise of the rights of State sovereignty or for the official functions of the diplomatic or consular representatives"; Art. 5(8). On the earlier limited Soviet-British Agreement of March 16, 1921 (114 BFSP 373), see Fenton Textile Assoc. Ltd. v. Krassin, (1922) 38 T.L.R. 259 (C.A.).

[26] Those with Norway and Denmark, *supra* note 20.

[27] *E.g.*, U.S.-the Netherlands, Exchange of Notes concerning Nonassertion of Sovereign Immunity from Suit in respect of Air Transport Enterprises, June 19, 1953, 4 UST 1610, TIAS No. 2828, 212 UNTS 249; U.S.-Italy, Agreement on the use of Italian Ports by the N.S. *Savannah*, Nov. 23, 1964, 15 UST 2155, TIAS No. 5699, 532 UNTS 133, Art. VIII, para. 2.

[28] *E.g.*, U.S.-Australia, Treaty concerning Maritime Claims and Litigation, March 8, 1945, 5 Bevans 159, Art. V; U.S.-Italy, Exchange of Notes relating to the Offshore Procurement Program, March 31, 1954, 5 UST 2185, TIAS No. 3083, Art. 12(a). The latter is one of a number of similar treaties dealing with "offshore procurement."

than dealing with a prior immunity assumed to exist, purport to state the *extent* of state immunity *inter partes*; almost without exception these contain extensive restrictions on immunity, including immunity from execution. The post-1945 treaties fall into three classes: those made with the United States, those (more numerous) with the Soviet Union, and a few to which neither the United States nor the Soviet Union is a party.

United States Treaties. Between 1948 and 1956 the United States negotiated 14 Treaties of Friendship, Commerce and Navigation containing a provision dealing with reciprocal immunity; 11 of these treaties came into force. A representative example is Article XVIII(3) of the United States-Nicaraguan Treaty of Friendship, Commerce and Navigation of January 21, 1956:[29]

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

This provision, it must be said, is less helpful than might at first appear: in particular, it applies only to those "government agencies and instrumentalities" which can be described as separate "enterprises." Some of the treaties do not include the term "government agencies and instrumentalities" and are probably even more restrictive.[30] Apparently, the United

[29] 9 UST 449, TIAS No. 4024, 367 UNTS 3. The other ten treaties in force are with: Italy, Feb. 2, 1948, Art. 24(6) (TIAS No. 1965, 79 UNTS 171); Ireland, Jan. 21, 1950, Art. 15(3) (206 UNTS 269, 1 UST 785, TIAS No. 2155); Greece, Aug. 3, 1951, Art. 14(5) (224 UNTS 279, 5 UST 1829, TIAS No. 3057); Israel, Aug. 23, 1951, Art. 18(3) (5 UST 550, TIAS No. 2948, 219 UNTS 237); Denmark, Oct. 1, 1951, Art. 18(3) (12 UST 908, TIAS No. 4797, 421 UNTS 105); Japan, April 2, 1953, Art. 18(2) (4 UST 2063, TIAS No. 2863); Federal Republic of Germany, Oct. 29, 1954, Art. 18(2) (7 UST 1839, TIAS No. 3593, 273 UNTS 3); Iran, Aug. 15, 1955, Art. 11(4) (8 UST 899); the Netherlands, March 27, 1956, Art. 18(2) (8 UST 2043, TIAS No. 3942, 285 UNTS 231), and Korea, Nov. 28, 1956, Art. 18(2) (8 UST 2217, TIAS No. 3947, 302 UNTS 281). The three unratified treaties were with Uraguay, Nov. 23, 1949, Art. 18(5) (96 Cong. Rec. 375 (1950)); Colombia, April 26, 1951, Art. 18(2) (97 Cong. Rec. 6500 (1951)); and Haiti, March 3, 1955. Art. 18(2) (101 Cong. Rec. 8914 (1955)).

[30] Only the treaties with Italy, Ireland, and Greece do not include the term. In its amicus curiae brief in *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran* (610 F.2d 94 (2d Cir. 1979)), the State Department stated that "It is the view of the United States that the treaty waiver [in the Iranian Treaty of 1955] does not apply to the property of the Contracting States as such and of their non-commercial agencies and instrumentalities, but that it applies only to the property of publicly owned or controlled commercial or business enterprises of the Contracting States" (cited by J. R. Stevenson & J. Browne, *United States Law of Sovereign Immunity Relating to International Financial Transactions*, in INTERNATIONAL FINANCIAL LAW: LENDING, CAPITAL TRANSFERS AND INSTITUTIONS 85, 102 (R. S. Rendell ed. 1980). If this is an accurate interpretation of the more extensive U.S. treaty provision, it shows just how limited that provision is. But earlier U.S. decisions have taken a much more sweeping view of the extent of the waiver in the Iranian Treaty, without considering the implications of the term "enterprise": *see, e.g.*, Irving Trust Co. v. Government of Iran, 85 F.R.D. 135 (E.D. La. 1980); Behring Int'l Inc. v. Imperial Iranian Air Force, 475 F.Supp. 383, 390 (D.N.J. 1979). In the latter case the Iranian Air Force was held, without argument, to be an "enterprise," a

States discontinued the practice of inserting such clauses in 1958, "at the request of the Attorney General because it made defense of suits against the United States abroad more difficult."[31] The extent to which the United States had resiled from its earlier position is clear from the much more limited clause in the (unratified) Trade Agreement with the Soviet Union of October 18, 1972, which refers only to "private natural and legal persons of the United States."[32]

Although this treaty practice affords some support for a restrictive doctrine of immunity, including immunity from execution, that support should not be overstated. Half of the treaties were negotiated before the "Tate letter" of 1952, which marked the formal U.S. change of position on the general question of immunity from jurisdiction (but not, as will be seen, from execution). At no stage, therefore, were these provisions consistent with the expressed U.S. view of the general law. As one commentator has suggested, the commercial treaty provision and the Tate letter "were designed for different purposes."[33] Nor are the reasons for abandonment of the commercial treaty provision encouraging.

Soviet Union Treaties. Rather more persuasive, and certainly more numerous, is the group of Soviet treaties, 29 of which have been located.[34] All but four are Trade Delegation treaties, along lines rather similar to those pre-1945 treaties referred to already. However, closer analysis reveals three distinct drafting models.

The first, which may be described as the "French treaty model," is a development of the pre-1945 provisions. In the case of transactions not guaranteed by the Soviet Trade Delegation in the country in question, jurisdiction and execution are limited to the particular state trading agency, and its property. On the other hand, in the case of guaranteed transactions, final execution may be levied against "all State property" within the jurisdiction, with the exception of property that is "intended solely for the exercise . . . of the political and diplomatic rights" of the Soviet Union. This exemption is stated to be "in accordance with international practice." In all cases, interim attachment and execution against Trade Delegation property are excluded.[35]

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most unlikely conclusion. A little more caution was shown in *American Int'l Group, Inc. v. Islamic Republic of Iran* (493 F.Supp. 522, 525–26 (D.D.C. 1980)), but not much, since the court treated the waiver as extending to Iran itself, as "inseparable" from its insurance enterprise. On the problem of waiver of prejudgment attachment by the treaty, see *infra* note 252.

[31] F. A. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, in 3 YALE STUDIES IN WORLD PUBLIC ORDER 1, 80 n.114 (1976). *Cf.* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 615 (1968).

[32] 67 DEP'T STATE BULL. 595, Art. 6(2) (1972).

[33] Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, ASIL, 55 PROC. 89, 92–93, 104–05 (1961).

[34] By a search of the indexes to vols. 1–750 of the *United Nations Treaty Series.* The list is certainly not comprehensive.

[35] Agreements of this kind have been made with France (1951), 221 UNTS 79; Denmark (1946), 8 UNTS 218; Japan (1957), 325 UNTS 35; Federal Republic of Germany (1958), 346 UNTS 71; Ghana (1961), 655 UNTS 171; Brazil (1963), 646 UNTS 277; and Belgium (1971),

The second may be described as the "Italian treaty model."[36] In these cases, there is usually no express reference to jurisdiction over or execution with respect to separate state trading organizations (though the matter is standardly covered by implication in the head treaty to which the Trade Delegation provisions are annexed). In the case of guaranteed transactions, execution is expressly restricted to "goods and claims outstanding to the credit of the Trade Delegation"; thus, no general exclusion of execution against property used for diplomatic or "sovereign" purposes is required. In all cases, interim orders against the Trade Delegation are excluded. Interestingly, in a few cases (all treaties with socialist bloc countries) the immunity provisions are mutual.[37]

The third group, the "United Arab Republic treaty model," combines elements of the first two. Express provision is made for jurisdiction and execution pursuant to unguaranteed transactions with separate state trading organizations, similar to that in the French treaty model. But transactions by the relevant Soviet Trade Delegation are dealt with as in the Italian treaty model: final execution is limited to the "goods and claims" of the Trade Delegation, and interim orders against it are either expressly, or by very clear implication, excluded.[38]

There remain various rather miscellaneous Soviet treaties. The restricted provisions in the unratified Trade Agreement of 1972 with the United States have been referred to already: the Agreement covers only the "foreign trade organizations" of the Soviet Union.[39] The 1965 Trade Representation Protocol with Cyprus makes the usual provision for unguaranteed transactions of separate state trading organizations, but (apart from an express assumption of responsibility by the Soviet Union for Trade Representation transactions) completely fails to deal with jurisdiction and execution in respect to such transactions.[40]

Of more interest are two merchant navigation agreements with the United Kingdom. Although clauses relating to merchant shipping are common to most trade agreements, usually no express provision for immunity from

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UN No. 12657, as to which see Verhoeven, *Immunity from Execution of Foreign States in Belgian Law*, 10 NETH. Y.B. INT'L L. 73, 75–76 (1979). The effect of the Protocol of June 14, 1961 with Togo (though it is not in this form) is similar, or even more extensive, since it allows execution against "all State property of the U.S.S.R. in Togo" without the customary qualification; 730 UNTS 187.

[36] Agreements with: Italy (1948), 217 UNTS 181; Finland (1947), 217 UNTS 3; Bulgaria (1948), 217 UNTS 97; Switzerland (1948), 217 UNTS 87 (though transactions with separate state trading instrumentalities are expressly reserved); Lebanon (1954), 226 UNTS 148; Austria (1955), 24 UNTS 289; German Democratic Republic (1957), 292 UNTS 75; People's Republic of China (1958), 313 UNTS 135; Albania (1958), 313 UNTS 261; Democratic People's Republic of Vietnam (1958), 356 UNTS 149; Democratic People's Republic of Korea (1960), 399 UNTS 3.

[37] Agreements with: German Democratic Republic, People's Republic of China, Albania, Democratic People's Republic of Korea, *supra* note 36.

[38] Agreements with: Romania (1947), 226 UNTS 79; Hungary (1947), 216 UNTS 247; Czechoslovakia (1947), 217 UNTS 3; United Arab Republic (1956), 687 UNTS 221; Iraq (1958), 328 UNTS 118; Yemen (1963), 672 UNTS 315.

[39] *Supra* note 32.

[40] 673 UNTS 25.

arrest of state-owned merchant ships is made, and no very clear implications on the point can be drawn. These two agreements are exceptional in this respect. Article 16 of the Treaty on Merchant Navigation of April 3, 1968 provides:

> (1) The judicial authorities of one High Contracting Party shall not entertain any civil proceedings arising out of a claim of the master or a member of the crew of a vessel of the other High Contracting Party relating to wages or to a contract of service without first giving notice to the consular officer of the Party, and shall decline to entertain the proceedings if the consular officer objects.
>
> (2) Without prejudice to the provisions of paragraph (1) of this Article, the judicial and administrative authorities of one High Contracting Party shall not, except at the request or with the consent of the competent consular officer, exercise jurisdiction or intervene (as the case may be) in respect of any matter occurring on board a vessel of the other High Contracting Party, including, provided that it is justifiable under the law of the former High Contracting Party, the detention on the vessel of any person. These authorities may, however, exercise any civil jurisdiction which is not excluded by the provisions of paragraph (1).[41]

The very limited exclusion of local civil jurisdiction is taken much further by the Protocol to the Treaty on Merchant Navigation of March 1, 1974.[42] Article 1 of the Protocol provides for the exercise of civil jurisdiction in matters concerning the operation of any vessel engaged in commercial service, including carriage of passengers and cargo, "in accordance with the normal legal procedures applicable . . . in cases of a private character." Article 2 prohibits the seizure of state-owned ships and cargoes in execution of any judgment or approved settlement under Article 1; in return, the defendant state "shall . . . take the necessary administrative measures to give effect to such a judgment or settlement." But Article 3 provides only that the parties "shall take measures to minimize the possibility" that state-owned ships will be arrested in civil proceedings. Since arrest in an action in rem is part of the procedure by which the court's jurisdiction is established, it is clear that even this rather unusual provision does not prevent the arrest of a state commercial ship in an action in rem, though it does exclude forcible execution of any resulting judgment against the ship so arrested.[43]

Third State Treaties. There seem to be comparatively few treaties regulating sovereign immunity between states other than those concluded by the Soviet Union and the United States. Five such treaties, however, should be referred

[41] [1972] Gr. Brit. TS No. 67 (Cmnd. 5008).

[42] [1977] *id.* No. 104 (Cmnd. 7040) (*in force* June 15, 1977).

[43] The limitations on section 10 of the State Immunity Act, 1978 (UK) required by the Protocol are effected by the State Immunity (Merchant Shipping) (U.S.S.R.) Order, 1978 (S.I. 1978, No. 1524). Somewhat similar provision is made by the USSR-Netherlands Agreement on Commercial Shipping of May 28, 1969, discussed by Voskuil, *The International Law of State Immunity, as Reflected in the Dutch Civil Law of Execution*, 10 NETH. Y.B. INT'L L. 245, 266–68 (1979). *See also* the different provisions of four merchant shipping treaties referred to by Boguslavsky, *Foreign State Immunity: Soviet Doctrine and Practice*, *id.* at 167, 173–74.

to. An Exchange of Notes of 1958 subjects commercial transactions of the Romanian Commercial Agency in Iraq to Iraqi jurisdiction, but execution is limited to "the goods, debts and other assets of the Commercial Agency directly relating to the commercial transactions concluded by it."[44] This provision seems to create a general fund of the Agency's commercial assets for the purposes of execution, so that the Exchange of Notes is comparable in effect to the United Arab Republic treaty model, the third category of Soviet treaties described above.

Two Czechoslovakian treaties provide for a comprehensive subjection of state nationalized enterprises to local jurisdiction; no express reference is made to execution.[45]

Much more comprehensive—probably the most explicit and extensive bilateral treaties in this field—are several Swiss trade and payments agreements with Eastern European countries. For example, Article 13 of the Agreement with Czechoslovakia provides:

> Sequestration of the property of the Swiss Confederation by the Republic of Czechoslovakia or of the property of the Republic of Czechoslovakia by the Swiss Confederation may only be ordered in relation to claims in private law having a close connection to the country in which the property is located.
>
> Such close connection shall exist in particular, where a claim is governed by the law of the country in question, where its place of performance is there or where it is bound up with a legal relationship which came into being or is to be arranged in this country or finally when a provision exists for the local courts to exercise jurisdiction.
>
> If a creditor directs a claim against a body corporate belonging to one of the two countries, in particular against state enterprises, the central bank, nationalized enterprises, national enterprises or enterprises engaged in external trade, only that property owned by the body corporate in its own right can be subjected to sequestration if it is located in the other country and not the property of the state concerned, nor that of its central bank or any third corporate body.[46]

[44] 405 UNTS 263 (para. 3). The Notes further provide that separate Romanian commercial organizations are directly and exclusively responsible for their own transactions, "in accordance with the norms of the international Commercial Private Law" (para. 4).

[45] Poland-Czechoslovakia, Treaty of Commerce, July 4, 1947, 85 UNTS 212; Japan-Czechoslovakia, Treaty of Commerce, Dec. 15, 1959, 383 UNTS 277.

[46] Treaty on Trade, Nov. 24, 1953, [1954] ROLF 745, cited by J.-F. Lalive, *Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State*, 10 NETH. Y.B. INT'L L. 153, 164 (1979). This agreement was maintained in force by a further agreement of May 7, 1971, [1971] ROLF 855, Art. 1. Similar agreements were made with Poland (June 25, 1949, [1949] *id.* at 832), Hungary (June 27, 1950, [1950] *id.* at 612) and Romania (Aug. 3, 1951, [1951] *id.* at 827). These have been replaced by new agreements to somewhat similar effect. In one case the longer formula of the earlier treaties is maintained (Hungary, Oct. 30, 1973, [1973] *id.* at 2661, Protocol, Art. 5), but in the three others a more abbreviated form, similar to para. 3 of Art. 13 of the Czechoslovakian Treaty, is used; Bulgaria, Nov. 23, 1972, *id.* at 598, Art. 9; Romania, Dec. 13, 1972, *id.* at 609, Exchange of Notes; Poland, June 25, 1973, *id.* at 1790, Art. 4. In an official comment, the Swiss authorities state that these clauses

> have their origins in the acts of nationalization which occurred in the Eastern states after the Second World War and triggered numerous seizures, in Switzerland, of property

Conclusions[47]

Caution is needed in drawing from this treaty practice implications for the general law. Treaties such as these may simply constitute waivers of an immunity to which the state would otherwise be entitled, rather than a statement of the position under that law. On the other hand, the bulk of the treaty practice is expressed in terms not of waiver but of ambit; taken as a whole, it provides little or no support for the view that international law requires a general immunity from execution of judgments against foreign state property. It is ironic that the Soviet Union, formerly a supporter of absolute immunity, should provide more convincing support for a restrictive position (especially in relation to execution) than the fluctuating United States treaty practice. In particular, the references in the pre-1945 treaties[48] and in six of the later Trade Delegation treaties[49] to a partial immunity from execution of property, which, "according to the general rules of international law" or "in accordance with international practice," is "required for the exercise of sovereign rights or . . . intended for the use of diplomatic or consular representatives in their official capacity," indicate advertence to the general international law position (in other words, *opinio juris*); such advertence cannot be inferred from the U.S. treaties.

ATTEMPTS AT CODIFICATION OF SOVEREIGN IMMUNITY

Sovereign immunity has been the subject of a number of official and unofficial attempts at codification. Draft Convention III of the Harvard Research in International Law provides for local orders or judgments, in matters where the defendant state is not immune from jurisdiction, to be enforced against immovable state property (other than diplomatic or consular property), or property used in connection with any "industrial, commercial, financial or other business enterprise" of the state in which private persons may engage.[50] Separate corporate instrumentalities controlled by the state are not entitled even to this degree of immunity.[51] Although these

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belonging to foreign states, particularly of state-owned enterprises. These clauses accord with the practice of the Federal Court concerning the seizure of foreign state property. . . .

But this does not advert to the differences between the treaty provisions of 1972–1973.

[47] This survey has dealt only with treaties explicitly regulating state immunity. Many general provisions in commercial and legal cooperation treaties are capable of being interpreted as having this effect: *e.g.*, France-Cameroon, Legal Convention, Nov. 13, 1960, 741 UNTS 119, Art. 35 (execution "in civil and commercial matters"). The same may be true of most-favored-nation clauses. Whether such provisions have this effect may well depend on the general law, the object of inquiry here.

[48] *Supra* notes 20–22 and 25.

[49] *Supra* note 35.

[50] Draft Convention III, Competence of Courts in Regard to Foreign States, 26 AJIL Supp. 451, Art. 23 (1932). Punitive orders may not be so enforced (*ibid.*). In addition, proceedings in rem may be instituted against state property where the state is not immune in respect of the substantive claim; Art. 13.

[51] Art. 26, referring to "such juristic persons as corporations or associations for profit separately organized by or under the authority of another State, regardless of the nature and extent of governmental interest therein or control thereof."

proposals were supported by an extensive citation of authority,[52] the authorities were then rather inconclusive, and it may be doubted to what extent Draft Convention III reflected the general law at the time.

The Institut de Droit International discussed state immunity at its 1954 session, and resolved that attachment of or execution against foreign state property (where the state is not immune from substantive jurisdiction) is prohibited if the property is used for "governmental" purposes distinct from any economic undertaking.[53]

The American Law Institute's *Restatement of Foreign Relations Law* suggests that state "property whose primary use is connected with" commercial activity outside the territory of the state "may be attached for the purpose of initiating such a proceeding, and may be subject to further measures of enforcement where it is determined that the claimant is entitled to the property."[54] This is a more restrictive formulation of liability to execution (as distinct from attachment *ad fundandam jurisdictionem*); the Institute left open the question of the legitimacy of execution generally against state commercial property, although it referred to some of the case law favoring the broader view.[55]

The International Law Commission has recently taken up the question of "Jurisdictional Immunities of States and their Property," which has been on its provisional agenda since 1949. However, its initial approach, at least, has been exploratory and cautious to a degree. In particular, for the time being, it has set aside the question of immunity from execution.[56]

MUNICIPAL STATUTE LAW

The most important legislation in this field (and the only legislation that articulates a general position on the permissibility of execution against foreign state property) is the United States Foreign Sovereign Immunities Act, 1976, and the UK State Immunity Act, 1978. These Acts, and in particular their provisions for execution and attachment, have been fairly extensively discussed elsewhere; the purpose of this account is to analyze their contribution to the general law of immunity, rather than once more to describe their provisions in detail.

[52] 26 AJIL Supp., *supra* note 50, at 689–714.

[53] 46 ANNUAIRE DE L'INSTITUT DE DROIT INT'L 301–02, Art. 5 (1954). For debate, see *id.* at 200–20. The five resolutions adopted by the Institut are by no means explicit: proceedings against foreign states and instrumentalities are allowed "whenever the grounds of the action do not involve an act of State" (Art. 3; *cf.* Art. 1), but "act of State" is nowhere defined. For the *travaux*, see the report by Lemonon, 44 *id.* at 5–136 (1952). Discussions in the International Law Association have so far been inconclusive; *see* ILA, REPORT OF THE 45TH CONFERENCE, LUCERNE 210–32 (1953). The matter is again on the Association's agenda. *See also* the views of the Afro-Asian Legal Consultative Committee (1960), in M. WHITEMAN, *supra* note 31, at 572–74.

[54] RESTATEMENT (2D) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§68–69 (1965).

[55] *Id.* at 209. For a review of authority, see *id.* at 215–18.

[56] Report of the International Law Commission on its 31st session, 34 UN GAOR, Supp. (No. 10) 513, UN Doc. A/34/10 (1979). *Cf.* Reuter's comments during the debate; [1979] 1 Y.B. INT'L COMM'N 211.

The Foreign Sovereign Immunities Act provides certain rather extensive exceptions to the immunity from attachment and execution of property of a foreign state.[57] The Act proclaims Congress's view that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."[58] There are, however, differences in the treatment of property of the foreign state itself, as distinct from its agencies or instrumentalities. Only state property actually "used for the commercial activity upon which the claim is based" is liable to execution, whereas *all* property of a foreign state agency or instrumentality is liable to execution in respect of a claim to which the agency or instrumentality is not immune.[59]

The position under the UK State Immunity Act is somewhat broader. Section 13 of the Act provides in part:

> (2) Subject to subsection (3) and (4) below—
>
> (*a*) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (*b*) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (4) Subsection (2)(*b*) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—
>
> (*a*) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or
>
> (*b*) the process is for enforcing an arbitration award.[60]

[57] Sections 1609–1611 of the Act (28 U.S.C. §§1330, 1602–1611).

[58] 28 U.S.C. §1602.

[59] Section 1610(a)(2) and (b)(2); and *see* the express exclusions from execution in §1611. On the execution provisions of the U.S. Act, see Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 AJIL 399, 409–13 (1977); del Bianco, *Execution and Attachment under the Foreign Sovereign Immunities Act of 1976*, in 5 YALE STUDIES IN WORLD PUBLIC ORDER 109–46 (1978); Weber, *supra* note 31, at 20–26, 43–45; R. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 61–65 (1978). And *cf.* Note, *The Problem of Execution Uniformity under the Foreign Sovereign Immunities Act of 1976 and Federal Rule of Civil Procedure 69*, 12 VALPARAISO U.L.R. 569 (1978). For the Act's exclusion of prejudgment attachment, see *infra* note 252.

[60] Section 13(3) of the Act (c. 33) provides for waiver of immunity from execution. Separate instrumentalities are only immune in respect of acts "done . . . in the exercise of sovereign authority" where the state itself would also be immune; §14(2). In that case, the execution provisions of section 13 apply. It follows that, in respect of acts done other than "in the exercise of sovereign authority," none of the property of separate instrumentalities is entitled to immunity, irrespective of the purpose for which it is held. On the execution provisions of the 1978 Act, see Delaume, *The State Immunity Act of the United Kingdom*, 73 AJIL 185, 194–99 (1979); R. Higgins, *Execution of State Property: United Kingdom Practice*, 10 NETH. Y.B. INT'L L. 35, 47–52 (1979). For the position of central banks, see *infra*, text to notes 234–38.

Originally, the State Immunity Bill provided for a general immunity from execution except in actions in rem in respect of commercial ships and their cargoes. This was in line with Article 23 of the European Convention,[61] but was stringently criticized in the House of Lords by the opposition spokesman and by Lords Denning and Wilberforce.[62] The Lord Chancellor, defending the immunity, stated: "It is . . . generally accepted that States do not take coercive action against each other or their property. It is not a good thing; it is something to be discouraged. The U.S. Act contains . . . many safeguards and only allows execution in limited circumstances."[63] But in response to criticism, amendments were introduced that substantially extended the restrictions to both jurisdictional immunity and immunity from execution.[64] The result was to allow execution against state commercial property to satisfy any final judgment in respect of which the state was not immune.[65] There is no requirement (comparable to that in the U.S. Act) that the claim arise out of the use of that property. In the House of Commons, the Solicitor-General stated that the new clause 13 "removes immunity from execution to the full extent to which we believe it is permissible to do so under current international law and practice."[66] Clearly enough, the Government's position on execution changed markedly during the debate. In respect of nonparties to the European Convention, the Act now goes *further* than the United States Act of 1976.[67]

In a number of European countries, enforcement against foreign state property is prohibited by statute except with the consent of the government of the forum. The implication is that execution is not prohibited in all cases, an implication that has, on the whole, been accepted and developed by the courts of those countries.[68]

MUNICIPAL CASE LAW

The problem of execution against foreign state property has been considered in a large number of decisions of municipal courts, particularly in

[61] *Supra*, text to note 8.

[62] 388 PARL. DEB., H.L. (5th ser.), cols. 61 (Baroness Elles), 67 (Ld. Wilberforce), 70–74 (Ld. Denning) (1978).

[63] *Id.* at col. 76 (Ld. Elwyn-Jones L.C.). [64] 389 *id.*, cols. 1501–11, 1520–30 (1978).

[65] But parties to the European Convention are generally excluded, pursuant to its terms; §13(4)(a). For recognition in the United Kingdom of Convention judgments and settlements, see §§18 and 19.

[66] 949 PARL. DEB., H.C. (5th ser.), cols. 410–11 (Archer) (1978).

[67] In personam enforcement is excluded, as are measures of specific enforcement; §13(1) and (2). For interim enforcement, see *infra*, text to notes 244–52.

[68] *See, e.g.*, the Italian Law No. 1263, July 15, 1926 (*infra* note 127). *Cf.* the Greek, Swiss, and Soviet legislation cited by S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 349 (1959). On the Swiss wartime legislation, see also 1 RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC 354–60, 381–87 (1975). On the Greek law, see the decision of the Athens Court of Appeal, No. 1690 of 1949, 3 REV. HÉLLENIQUE DE DROIT INT'L 331 (1950). For the Yugoslav Law on Enforcement Procedure, 1978, Art. 13, see Varady, *Immunity of State Property from Execution in the Yugoslav Legal System*, 10 NETH. Y.B. INT'L L. 85, 89, 94–95 (1979). For the Soviet law (absolute immunity unless the Soviet state authorities order otherwise on grounds of reciprocity), see Boguslavsky, *supra* note 43, at 170–71.

Western Europe. In a sense, these decisions constitute the primary body of authority on the question; on the other hand, their impact on the general international law position raises rather acute difficulties. Before these are discussed, a succinct account of the case law is necessary.

European Case Law

In many European jurisdictions, the assumption in the 19th- and early 20th-century cases was that international law required a general immunity from execution against foreign state property,[69] no matter what the rule was on substantive jurisdiction. This was the position consistently taken by the French courts, from a decision of the Cour de Cassation in 1849, throughout the 19th century, and (with less consistency) until the 1960's.[70] In Germany, the Royal (Prussian) Court for the Determination of Jurisdictional Conflicts, in *Von Hellfeld v. Russian Government* (1910), agreed: in the absence of submission to the jurisdiction, execution was excluded except in respect of claims to real property within the jurisdiction.[71] The prewar Czechoslovakian Supreme Court upheld execution against local real property owned by foreign states, but in terms that did not indicate any broader exception.[72] The Italian Corte di Cassazione, in 1935, appears to have acted on the view that, while immunity from jurisdiction was restricted, immunity from execution should be absolute.[73] The Brussels Court of Appeal, in 1933, held that any form of attachment of state property, final or interim, was excluded;[74] so did the Vienna District Court of Appeal in 1952.[75] The Court of Appeal of Amsterdam, admittedly in a wartime case (1942), argued that the impossibility of execution against foreign states supported their general immunity from jurisdiction.[76] And, again in wartime, two decisions of the Swedish Supreme Court involving foreign state-owned ships seem to have

[69] With the possible exception of state-owned commercial ships; *cf.* the decisions of Sir Robert Phillimore in *The Charkieh,* (1879) L.R. 4 A. & E. 59, and *The Parlement Belge*, (1879) 4 P.D. 129. The latter decision was reversed by the Court of Appeal ((1880) 5 P.D. 197), but on the ground that the ship there was public property of the state destined to public use.

[70] For the earlier French cases, see 9 ANN. DIG. 242 (1942). Twentieth-century cases supporting a general immunity from execution include: Spanish State & Bank of Spain v. Banco de Bilbao (1937), [1938] S. Jur. II 23, 8 *id.* at 229 (Rouen, C.A.) (1941); Officina del Aceite v. Domenech (1938), [1939] D.P. II 65, 70, 9 *id.* at 239 (Aix, C.A.); Socifros v. U.S.S.R. (1938), [1939] D.P. II 65, 66, *id.* at 236 (Aix, C.A.); and Aget v. French State & Spanish State (1939), Gazette du Palais, June 29, 1939, 11 *id.* at 144 (Perpignan, Civ. Trib.) (1947). To the contrary, cf. the rather strange (wartime) decision of the Civil Tribunal of the Seine, Russian Trade Delegation v. Société Française Industrielle et Commerciale des Pétroles (Groupe Malopolska) (1940), [1940] D. heb. 68, 9 *id.* at 245.

[71] 5 AJIL 490 (1911).

[72] Enforcement of International Awards (Czechoslovakia) Case (1928), 4 ANN. DIG. 174 (1931); *also reported in* 64 J. DROIT INT'L 394 (1937).

[73] Russian Trade Delegation in Italy v. de Castro (1935), [1935] Foro It. I 240, 7 ANN. DIG. 179 (1940).

[74] Brasseur et Cie v. Republic of Greece (1933), 59 J. DROIT INT'L 1088 (1932), 6 ANN. DIG. 164 (1938). For other Belgian decisions to similar effect, see Verhoeven, *supra* note 35, at 76–77.

[75] Garnishee Proceedings against Occupant (Austria) Case (1952), 19 ILR 211 (1957).

[76] Weber v. U.S.S.R. (1942), 11 ANN. DIG. 140 (1947).

assumed that immunity from execution should be quite general (unless governed by treaty).[77]

Since 1918, this relatively constant jurisprudence has gradually been eroded. It seems that now no European jurisdiction clearly adheres to absolute immunity from execution.

The Swiss Cases.[78] Swiss courts, in particular the Federal Tribunal, were the first to adopt a restrictive rule of immunity from execution: the doctrine evolved in a series of cases after 1918 not only is interesting in itself, as a reconciliation of the conflicting considerations, but also seems to have strongly influenced the terms of the Swiss treaties, which have been referred to already.

The *Dreyfus* case (1918) involved the provisional sequestration by Swiss bondholders of assets of the Austrian Minister of Finance, against the repayment of unredeemed Austrian bonds, which was due to be made in Switzerland in Swiss francs. The Federal Tribunal upheld the sequestration on the basis that no unqualified principle of immunity from jurisdiction was generally admitted; therefore, with respect to obligations of a private law nature that were to be performed in Switzerland, "the State may be sued (and submitted to provisional measures such as sequestration) before Swiss courts at least as the forum most closely connected with the contract, if not also as a result of submission to the jurisdiction."[79] Here the suggestion of waiver or election, and the assumption that enforcement is correlative to jurisdiction, combined to bring about an extension of local competence. The suggestion that Austria would not be immune from final execution if it defaulted on its bonds was qualified only by the requirement of a close connection with the jurisdiction.

These elements have been affirmed, and more clearly articulated, in a series of decisions of the Federal Tribunal (all but one involving foreign state bonds). In *Greek Republic v. Walder*, the Federal Tribunal refused to uphold the Greek Government's submission of complete immunity from execution, but distinguished *Dreyfus* on the ground that there was no sufficient jurisdictional nexus here.[80] In *Sogerfin S.A. v. State of Yugoslavia*, sequestration orders against Yugoslavian bank credits were upheld as having the force of *res judicata*, since the defendant state had failed to appeal the orders within the time allowed by Swiss law. The rule prohibiting execution against state property was not so peremptory or absolute as to render the seizure void ab initio: "according to the practice of the Swiss Federal Tribunal the immunity of foreign States is not of this absolute nature where public loans are concerned."[81] Moreover, the Government's failure to appeal the orders within the time allowed amounted to a form of submission.

[77] *The Rigmor* (1942), 37 AJIL 141 (1943), 10 ANN. DIG. 240 (1945); Russian Trade Delegation v. Carlbom (No. 2) (1944), 12 *id.* at 112 (1949). And *see* E. W. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 47–49 (1933).

[78] *See* Lalive, *supra* note 46, at 153–62.

[79] Austrian Minister of Finances v. Dreyfus, 44 ATF I 49 (1918), in 1 RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC 352, 353 (1975).

[80] (1930), 58 BGE I 237, 5 ANN. DIG. 131 (1935).

[81] (1938), 61 Semjud. 327 (1939), 10 ANN. DIG. 232, 234 (1945).

This jurisprudence[82] was considered and affirmed in *Kingdom of Greece v. Julius Bär & Co.*[83] (on facts very similar to *Walder*'s case), in *United Arab Republic v. Dame X*,[84] where precise designation of funds to a public purpose was required to secure immunity from attachment of those funds, and in *Italian Minister for State Railways v. Beta Holdings S.A.*,[85] where Italian Government shares in a company established by intergovernmental arrangement to replenish rolling stock in European state railways were held immune from seizure, since they were "administrative assets" "set aside for a public function assumed by the Italian State."[86] Finally, in *Banque Centrale de la République de Turquie c. Weston Cie. de Finance et d'Investissement S.A.*,[87] assets of the Turkish Central Bank in Zurich were seized in another bond repayment claim. The Federal Tribunal upheld the sequestrations, in accordance with its by now well-established doctrine, and without regard to the purposes to which the Central Bank assets were being, or intended to be, put.

To summarize, Swiss doctrine allows the attachment of assets of a foreign state or foreign state instrumentality,[88] in respect of claims of a private law nature, where those claims have a sufficiently close connection with the jurisdiction (for example, where payment is required by the contract to be made in Switzerland), and provided that the assets in question have not been definitively set aside for diplomatic, consular, or other "public" purposes.

The (West) German Cases.[89] Although the Royal Court for the Determination of Judicial Conflicts had adhered to absolute immunity from jurisdiction in 1910,[90] its position was modified to some extent by a willingness to find a waiver of that immunity by the setting aside in advance of some fund out of which claims were to be satisfied. Thus, the same court, in the *Turkish Purchases Commission* case,[91] held that, while contractual submission to the jurisdiction did not entail submission to execution,

> in individual cases a foreign State or its representative may be deemed by its conduct to have submitted to the specific jurisdiction of German courts even in the matter of enforcement. This took place in the present case. . . . The only purpose of the banking account . . . was to satisfy the claims of German private firms. This being so, the Commission must be held as having impliedly agreed to measures of execution by German courts in regard to the banking account opened by it.[92]

[82] Applied by lower courts in two decisions reported as State Immunity (Switzerland) (No. 1) Case (1937), 37 BIZR 319 (1938), 10 ANN. DIG. 230 (*cf.* 8 *id.* at 246 (1941)), and State Immunity (Switzerland) (No. 2) Case (1939–40), 39 BIZR 318 (1940), *id.* at 235, both decisions of the Superior Court of Zurich. The latter decision was affirmed by the Federal Tribunal.

[83] (1956), 82 ATF I 75 (1956), 23 ILR 195 (1960).

[84] (1960), summarized in 55 AJIL 167 (1961).

[85] An unreported decision of 1966, now in 31 ANNUAIRE SUISSE DE DROIT INT'L 219 (1975).

[86] *Id.* at 225.

[87] (1978), 104 ATF Ia 367, 35 *id.* at 143 (1979).

[88] There is no clear suggestion in the cases of a distinction between state and instrumentality assets, *but cf.* Lalive, *supra* note 46, at 156.

[89] *Generally see* Seidl-Hohenveldern, *State Immunity: Federal Republic of Germany*, in 10 NETH. Y.B. INT'L L. 55–72 (1979), with references to the earlier German literature.

[90] Von Hellfeld v. Russian Government, 5 AJIL 490 (1911).

[91] (1920), [1921] J.W. 773, 1 ANN. DIG. 114 (1932).

[92] 1 ANN. DIG. at 115. And *see The Ice King* (1921), *id.* at 150 (Reichsgericht).

These earlier cases have been displaced, in West Germany, by decisions applying, though with careful qualifications, the restrictive rule of immunity to execution as well as jurisdiction. The Landgericht of Stuttgart, in a decision of September 21, 1971, held that there could be no execution against state funds used for public purposes, and presumed that a general bank account in the name of the state was so used.[93] However, the assumption was that, in the absence of some element of public purpose, execution against the funds would have been possible. More cavalierly, the District Court of Frankfurt, in a case concerning the Central Bank of Nigeria, treated immunity from jurisdiction and execution as strictly correlative. The court said:

> The restrictive immunity of the foreign state which applies to a suit on a debt in Germany applies also to the petition for a preliminary attachment which is sought by the petitioner. . . . *If exercise of jurisdiction is permissible, attachment on the local assets of a foreign state is also admissible.* Only those assets which are dedicated to the public service of the state are exempted from forcible attachment and execution. In the present case, petitioner's attachment seeks to reach respondent's cash and securities accounts, i.e., assets which are not "in the public service" of the respondent. . . . A possible use of these assets in the future to finance state business cannot serve to establish their present immunity.[94]

The potential conflict here has been resolved by the decision of the Federal Constitutional Court of December 13, 1977,[95] which is by far the most comprehensive and authoritative discussion of the problem in the case law. The case involved the attempted seizure, in execution of a default judgment against the Republic of the Philippines for unpaid rent, of funds in two bank accounts in the name of the Philippine Embassy. The accounts were used at least partly for general Embassy purposes. The Court held that it was bound by Article 25 of the West German Constitution to apply general international law in deciding the question. After a very full examination of the authorities, it concluded unanimously that

> there is no sufficiently general practice, supported by the necessary *opinio juris*, to establish a general rule of customary international law prohibiting the State of the forum absolutely from compulsory execution against the assets of a foreign State situated in the State of the forum. A number of States, in their judgments, legislation or treaty practice, do not exclude security and execution measures against foreign States, at least not when such measures are based upon activities of the foreign State which are *iure gestionis*, and when such measures are taken against assets which do not serve governmental purposes.

[93] No. 129 in DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS IM JAHRE 1971, at 389–93 (1973).

[94] Non-resident Petitioner v. Central Bank of Nigeria (Decision of Dec. 2, 1975), 16 ILM 501, 503 (1977) (emphasis supplied).

[95] *In re* Republic of the Philippines, 46 BVerfGE 342 (1977), *reprinted in* 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 242 (1978); for a summary, see 73 AJIL 295, 305, 703 (1979).

> The attitudes of these States are of such weight that there can be no question of a general practice pursuant to international law which prohibits compulsory execution, whatever the requirement of generality of a practice before it can become the basis of a rule of customary international law.[96]

However, this general conclusion was subject to specific exceptions recognized by international law: in particular, property used for diplomatic purposes was immune, and the court could not investigate, without impermissible interference in the domestic affairs of the state and its Embassy, what proportion of the bank accounts was used for nonimmune purposes.[97] The attempted attachment of the funds was accordingly void.

The French Cases.[98] With one notable, but controversial, exception,[99] French case law before 1945 clearly favored a general immunity from execution, even in cases where there was no immunity from jurisdiction.[100] Postwar decisions seem to have modified this position substantially, but for a number of reasons the present law is by no means clear.

In *Procureur-Général c. Vestwig*,[101] the Norwegian Government, acting as "agent" for a Norwegian citizen, Robertson, had placed money belonging to Robertson in a French bank account held in its own name. Apparently, this was done at the request of Robertson, and of a co-contracting French company, in order to safeguard the funds in view of the German occupation of Norway. A number of Robertson's creditors sought to attach the funds, judgment was given, but the Norwegian Government claimed immunity from final execution. The Cour de Cassation held that, in the circumstances, Robertson remained entitled to the funds, which meant that their seizure was not directed against the state. The state, in holding the funds, was acting only as a private law agent, "sans recourir à l'exercise d'une parcelle de puissance publique."[102] Execution against the fund was accordingly upheld.

[96] 38 ZaöRV at 275.

[97] *Id.* at 279–83. *Cf.* at p. 282:

> for the authorities executing a judgment to insist that without its consent the parent State should disclose the existence of the past, present or future purposes of assets in such an account would constitute an intervention in matters which are exclusively the domain of the parent State, contrary to international law.

Authentication of the diplomatic purposes of the account by the defendant state would be conclusive (*ibid.*). For further comment, see *infra* note 229.

[98] *See also* Paulsson, *Sovereign Immunity from Execution in France*, 11 INT'L LAW. 673 (1977).

[99] U.S.S.R. v. Association France Export (1929), [1930] S. Jur. I 49, 5 ANN. DIG. 18 (1935), 56 J. DROIT INT'L 1042 (1929), where the Cour de Cassation held that the Soviet Trade Delegation's activities were only "acts of commerce entirely distinct from the principle of State sovereignty," and allowed an interim attachment against the delegation's assets.

[100] *See* cases cited at note 70 *supra*. On the earlier case law, see also 3 RÉPERTOIRE DE LA PRATIQUE FRANÇAISE EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC 191, 206, 210–12, 235 (1965).

[101] (1946), 73–76 J. DROIT INT'L 1 (1952).

[102] *Id.* at 3. *Cf.* the not dissimilar issue at stake (in the context of domestic state immunity) in Bank voor Sheepvaart en Handel v. Administrator of Hungarian Property, [1954] A.C. 584 (which went the other way).

Although decided on very special facts, *Procureur-Général c. Vestwig* showed at least some tendency to restrict immunity from execution.[103] But lower courts continued to act on the basis of a "privilège d'immunité d'exécution qui est absolu,"[104] despite criticism on the part of commentators.[105] In two cases in 1969 and 1971, the Cour de Cassation effectively, though cryptically, reopened the question. *Englander c. Statni Banka Ceskoslovenka* involved final execution against funds held by the Banque Commerciale pour l'Europe du Nord in the name of the Czechoslovakian State Bank. The Court of Appeal granted immunity, basing itself on the risk that the attachment might affect assets used for state (as distinct from State Bank) purposes.[106] The Cour de Cassation quashed the decision: the mere risk of detriment to state property was not sufficient to justify conferring immunity. Further inquiry was necessary, and the case was remitted to a lower court.[107]

In rather sharp contrast, in *Clerget c. Représentation Commerciale de la République démocratique du Vietnam*,[108] the plaintiff attempted to execute a default judgment for salary and damages under a contract of employment as director of mines, by attaching funds held by the Banque Commerciale pour les Pays de l'Europe du Nord for the account of the Democratic Republic of Vietnam and its Foreign Trade Bank. The Court agreed that immunity from execution, as a matter of "comity," was not of a general or absolute character, since the execution had to be examined by reference to the nature of the assets sought to be seized, and could be justified if no direct impact on the "diplomatic activities" of the defendant state was established. It followed that, in failing to investigate whether the assets were of commercial origin, the lower court had not adequately justified its deci-

[103] The Cour de Cassation has been criticized for allowing execution against a general governmental account; even if the government was acting as Robertson's agent, the funds were not segregated. *See* Castel, *Immunity of a Foreign State from Execution: French Practice*, 46 AJIL 520, 524–25 (1952). The criticism does not seem warranted. The Court stressed that the money was held in a special account "au profit de Robertson" pursuant to specific agreements with creditors to this effect. At least, the funds seem to have been distinctly traceable.

[104] Rossignol c. Etat Tchécoslovaque (1949), 73–76 J. DROIT INT'L 4, 5 (1952) (where the Tribunal Civil de la Seine held that immunity from execution extended to real property within the jurisdiction, the subject of the action, even though it was used for private law purposes); Soc. Bauer-Marchal et Cie. c. Ministre de Finances de Turquie (1965), 54 REV. CRITIQUE DROIT INT'L PRIVÉ 565 (1965) (where the Court of Appeal of Rouen held the Turkish Minister of Finances immune from interim and final attachment of funds in an action on Ottoman bonds; *see* the critical note by Y.L., *id.* at 568).

[105] In *République sociale fédérale de Yugoslavie c. Société européenne d'études et d'entreprises* (1971) (98 J. DROIT INT'L 131 (1971)), the Tribunal de Grande Instance de Paris, acting *ex parte*, pointed out that waiver of immunity from jurisdiction did not entail waiver of immunity from execution, but granted exequatur to an arbitral award on the basis that this was merely a preliminary to execution, not execution itself (at pp. 132–33). The decision was affirmed on appeal (Paris, Cour d'appel, 1975) (103 *id.* at 136 (1976)), but overturned on other grounds by the Cour de Cassation (June 14, 1977) (105 *id.* at 864 (1978)). Neither court referred to the immunity from execution point.

[106] (1966), 93 J. DROIT INT'L 846 (1966), 47 ILR 157 (1974).

[107] (1969), 96 J. DROIT INT'L 923 (1969) (*but see* Kahn's criticism, *id.* at 924–27).

[108] (1971), 99 *id.* at 267 (1972), *aff'g* the Paris Court of Appeal (1969), 74 REV. GÉNÉRALE DROIT INT'L PUBLIC 522 (1970), 52 ILR 310 (1979).

sion. Nonetheless, the Cour de Cassation upheld the lower court's decision, on the ground that the funds could not be attached, even to enforce payment of a private law obligation, since "their origin and their destination" had not been determined.

The two decisions, apparently contradictory, are by no means easy to interpret. In particular, in *Clerget* the Cour de Cassation, while criticizing the lower court for failing to investigate the origin and destination of the assets, seems to have upheld the plea of immunity for want of just such information. It has been suggested that the cases are distinguishable because assets of a separate instrumentality (such as Statni Banka Ceskoslovenka) will be presumed not to be immune as in use for public purposes unless the contrary is shown; whereas the reverse presumption applies to assets of the state itself.[109] But on this view, Clerget was deprived (as the Cour de Cassation held, wrongfully) of any opportunity to adduce such proof. It may be that in the circumstances, the Court was prepared to hold that no such proof could have been forthcoming. But an alternative interpretation might be that what was required was proof that the assets were set aside for use *by the Vietnam Foreign Trade Bank*; such proof not being forthcoming, it was to be presumed that the assets were held by the state itself and were thus absolutely immune.[110] Clearly enough, whether modern French law adheres to absolute immunity for state, as distinct from state instrumentality, assets, depends on which view is taken.[111]

The only subsequent decision of the Cour de Cassation, though supporting the position taken in *Englander* with regard to separate state enterprises, does little to settle this central question. In *Caisse algérienne d'assurance vieillesse des non-salariés c. Caisse nationale des barreaux français*,[112] an Algerian pension fund (CAVNOS), which had taken over the rights and liabilities of a preindependence private fund (CBA), was sued by a French fund subrogated to the rights of French contributors to the preindependence fund. Its assets having been attached, the Algerian fund pleaded immunity from execution on the ground that its functions were of a public service character. The Cour de Cassation upheld the lower court: it found that the funds at the disposal of CAVNOS were distinct from those of the Algerian state and concluded that CAVNOS was not entitled to immunity.

[109] P. Lagarde, cited by Paulsson, *supra* note 98, at 677.

[110] A third possibility, suggested by Bourel (67 Rev. Critique Droit Int'l Privé 534, 538 (1978)), is that the Court applied a "practical disturbance" rule, according immunity on the basis that the attachment would seriously affect the foreign state and thus endanger the forum state's relations with it. It is difficult to see how a court could judge such matters, or why a principle of immunity should depend on the susceptibility of the particular defendant. For rejection of a somewhat similar argument, see the *Philippines* decision of the Federal Constitutional Court, 38 ZaöRV at 284.

[111] The decision of the Tribunal de Grande Instance of Paris in *Braden Copper Co. c. Groupement d'Importation des Métaux* (1972, 12 ILM 182 (1973)) does not help to clarify the problem. The court allowed an interim attachment of funds of the Chilean Copper Corp. (a separate state instrumentality), but reserved the question of final execution (*id.* at 189). *See also* Paulsson, *supra* note 98, at 677–79.

[112] Decision of Dec. 7, 1977, 67 Rev. Critique Droit Int'l Privé 532 (1978).

The decision has been criticized for failing to consider whether CBA's assets, in the hands of CAVNOS, were distinguishable from the latter's general assets devoted to the public purpose of payment of social security benefits.[113] The point, however, was expressly referred to by the Court in its outline of the arguments, and cannot be assumed to have been overlooked. Consistently with *Englander*, the Court seems to have held that property of separate instrumentalities not exclusively engaged in public functions is presumed not to be immune from seizure.[114] If so, this leaves the question of central government immunity from execution very much open.

Two later cases in lower courts, both *ex parte* decisions involving state funds, should also be noted. In *Procureur de la République c. S.A. Ipitrade International*, orders had been made that in effect garnisheed money due to the Federal Republic of Nigeria, in respect of a commercial claim. The First Vice-President of the Tribunal de Grande Instance de Paris postponed vacating these orders solely on the ground that a subsequent agreement settling the dispute between the parties constituted a waiver of Nigeria's immunity from execution.[115] Reference was made to the "absolute character of immunity from execution enjoyed by the Federal Republic of Nigeria." The willingness of the court to find a waiver of immunity only partly offsets this underlying assumption.

In *Procureur de la République c. Société Liamco*,[116] money owed to the Libyan Arab Republic and a number of Libyan state instrumentalities (including the Central Bank of Libya) was garnisheed in satisfaction of an arbitral award for some U.S. $80 million arising from the disputed termination of a LIAMCO oil concession by Libya. Interestingly, Libya and the Central Bank sought to set aside the orders on the ground of the absolute immunity from execution of foreign states, but the 11 other state instrumentalities involved sought the order on the ground that the arbitral award, made against the Libyan state only, was not opposable to them. The Tribunal de Grande Instance de Paris, acting on the motion of the Procureur de la République, vacated all the attachments. The tribunal said:

> Given that . . . no distinction can presently be made between the funds affected by an activity of sovereignty or public service and those resulting only from economic or commercial activities of private law, it is evident that . . . the mere invocation of the privilege, based upon domestic and international public order, is enough to justify lifting the attachments. . . .[117]

It was therefore not necessary to consider the argument of nonopposability raised by the separate instrumentalities. At the same time, the tribunal ordered an investigation into the nature, destination, and use of the assets of the instrumentalities involved, to enable it to determine whether these

[113] P. Bourel, *id.* at 536–39.

[114] This is not inconsistent with a theory of functional immunity (*cf.* the decision of the Cour de Cassation of May 19, 1976, Blagojevic c. Banque du Japon, 66 *id.* at 359 (1977)), but it does depend on a degree of personalization of instrumentalities also criticized by Bourel.

[115] (1979), 106 J. DROIT INT'L 857 (1979). [116] *Id.* at 859.

[117] *Id.* at 861.

were not immune from execution and might be available to meet claims against the Libyan Arab Republic. The tribunal's willingness to order such an inquiry may well have been a response to the criticism of the Paris Court of Appeal, in *Clerget*, for failing to do so. At the same time, lifting the attachments was consistent with *Clerget* in that no present indication was available that the state funds had been set aside for nonimmune purposes. Indeed, it is not clear whether state funds could ever have been attached in this claim,[118] or whether the tribunal intended only to leave open the possibility of attachment of instrumentality funds. The ambiguity present in *Englander* and *Clerget* remains unresolved.

To summarize, French law allows the attachment of assets of separate state instrumentalities unless these assets are themselves set aside for immune purposes or can be shown to be inextricably mixed with assets that are. In the case of state funds, it is still uncertain whether execution will ever be permitted: though the weight of doctrine favors the possibility, the jurisprudence is by no means so clear. At any rate, attachment will only be possible against assets or a separate fund shown to be clearly devoted to nonimmune purposes.

Other European Jurisdictions. The tendency since 1945, in cases from other European jurisdictions, has been to reject absolute immunity from execution, though in no other jurisdiction does the case law approach that of Switzerland, West Germany, and France in extent or depth of analysis. In the Netherlands, the Hague Court of Appeal held in 1968 that liability to execution is (subject to the exemption of "public service assets") correlative to liability to jurisdiction;[119] this reasoning was supported, rather cavalierly, by the Supreme Court in 1973.[120]

Although earlier Belgian decisions tended to support general immunity from execution, the Tribunal Civil de Bruxelles, in *Socobelge v. Greek State* (1951), rejected a Greek claim to immunity from execution: garnishee orders against Greek State debts were upheld as an interim measure, pursuant to a claim under an arbitral award that had not yet become enforceable before Belgian courts.[121] The Tribunal Civil emphasized that the Belgian Government would accept the competence of Greek courts in similar circumstances, so that reciprocity required similar Greek subjection to the jurisdiction here. The view that immunity from execution was only limited had "steadily been gaining ground" since 1885.[122] As it happened,

[118] Libya and its Central Bank claimed absolute immunity from execution. Libya also vigorously protested to France against the attachments, as the tribunal noted; *id.* at 860.

[119] N. V. Cabolent v. National Iranian Oil Co. (1968), 9 ILM 152 (1970). For an Iranian case (1963) arising from the award here, see *id.* at 1118. The decision perhaps assumes absolute immunity, but the reasoning is expressed to be on other grounds.

[120] Société Européenne d'Etudes et d'Entreprises v. Socialist Federal Republic of Yugoslavia (Sup. Ct. 1973), in 5 NETH. Y.B. INT'L L. 290 (1974), *aff'g* Hague C.A., 4 *id.* at 390 (1973). *See further* Kingdom of Morocco v. Stichting Revaliditie Centrum "de Trappenberg" (Amsterdam D.C. 1978), 10 *id.* at 444–45 (1979); Voskuil, *supra* note 43, at 270–89.

[121] (1951), 18 ILR 3 (1957). For earlier cases, see *supra* note 74.

[122] *Id.* at 6. *See also* Suy, *Immunity of States before Belgian Courts and Tribunals*, 27 ZAÖRV 660, 684–92 (1967); P. de Visscher & J. Verhoeven, *L'Immunité de juridiction de l'Etat étranger*

the funds in question were part of Marshall Plan aid to Greece, and as a result of U.S. pressure the matter was settled out of court.[123] The few later decisions have also tended to a similar conclusion, but with no more detailed or substantial consideration of the problems, and there has been no decision of the Cour de Cassation.[124]

The Austrian Administrative Court, in 1954, upheld in principle the administrative confiscation of state commercial property (though the confiscation was quashed on the facts). The court made no reference to execution of civil judgments, but the possibility of distinguishing that problem from administrative confiscation gains no support in the reasoning, and, indeed, seems unsupportable.[125] And in *Neustein v. Republic of Indonesia* (1958), the Supreme Court, while lifting an injunction over Indonesian property, pending further inquiries, stated:

> the mere fact that the bank account was held by the Republic of Indonesia through the legation thereof, does not necessarily lead to the conclusion that . . . the account serves exclusively for the exercise of the sovereign rights (representation abroad) of a foreign State, and could not possibly constitute assets serving private law purposes.[126]

This clearly implies that "private" assets might be liable to execution.

Finally, the Italian Corte di Cassazione, in 1963, upheld the constitutionality of the law of 1926, which prohibits interim attachment or final execution against foreign state property unless either that foreign state does not (according to the Ministry of Justice) grant reciprocal treatment to Italian state property, or the Ministry of Justice specifically approves. Article 10 of the Italian Constitution provides that Italian legislation must conform to generally recognized rules of international law. The Court held that the possibility, envisaged by the law, of execution against foreign state property, did not contravene Article 10, since "in the legislation and in the jurisprudence and doctrine of different countries, there is no agreement in the

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dans la jurisprudence belge et le projet de convention du Conseil de l'Europe, in L'IMMUNITÉ DE JURIDICTION ET D'EXÉCUTION DES ETATS. A PROPOS DU PROJET DE CONVENTION DU CONSEIL DE L'EUROPE. ACTES DU COLLOQUE 35–71 (Bruxelles, Institut de Sociologie, 1971); Verhoeven, *supra* note 35.

[123] *Cf.* Bachrach, *Sovereign Immunity in Belgium,* 10 INT'L LAW. 459, 465 (1976).

[124] *See* Szczesniak v. Backer et consorts, [1957] Pasicrisie belge II, at 38 (Brussels C.A.); N. V. Filmpartners, [1971] *id.* III, at 80; Université nationale de Zaïre v. Vigneron et S.A. Banque belgo-congolaise, [1975] *id.* III, at 1. Verhoeven, *supra* note 35, at 84, concludes that "recent decisions tend to limit immunity to property intended for use in the general interest, although it is too early to draw definite conclusions from isolated judgments."

[125] Soviet Distillery in Austria Case (1954), 9 VwGH(F) 5 (1954), 21 ILR 101 (1957). This followed *Dralle v. Republic of Czechoslovakia* (1950) (5 ÖJZ 341 (1950), 17 ILR 155 (1956)), reestablishing for Austrian courts the principle of restrictive immunity from jurisdiction. *But cf.* the decision of the District Court of Appeal of Vienna in the *Garnishee Proceedings against Occupant (Austria) Case* (1952) (8 ÖJZ 21(1953), 19 ILR 211 (1957)), apparently holding that restrictive immunity was not applicable to proceedings for the execution of judgments.

[126] Decision of Aug. 6, 1958, cited by Seidl-Hohenveldern, *State Immunity: Austria,* in 10 NETH. Y.B. INT'L L. 97, 107–08 (1979). To similar effect is a dictum of the Supreme Court in a decision of Feb. 10, 1961; 84 JB 43 (1962), 40 ILR 73, 78 (1970).

approaches to, or systems for, exempting from interim attachment or execution assets of foreign States which are not set aside for functions related to the exercise of sovereignty."[127] The only qualification to this bold assertion of constitutionality was that decisions of the Ministry should be subject to review by the competent judicial or administrative organs pursuant to Article 113 of the Constitution; only one paragraph of the law, which purported to exclude such review, was struck down. The Court did not discuss whether such review would be available only to the private party affected by a declaration of reciprocity or by a refusal of authorization to proceed to execution, or whether it would also be available (on international law grounds implied or imposed by Article 10) to a foreign state against whose property permission to execute had been given. Condorelli and Sbolci suggest that the courts have the power to determine "the conformity of Government decisions with international law, thus setting bounds to the unrestricted monopoly of power which the 1926 Law had sought to confer on the Government," and that they could exercise this power at the instance of either the foreign state or the private party. But no challenge has yet succeeded, despite the vagueness or inaccuracy of many of the decrees issued under the 1926 law.[128]

The United States Cases

The provisions of the Foreign Sovereign Immunities Act of 1976 allowing execution against foreign state property in certain circumstances have been described already.[129] For U.S. courts, those provisions effectively conclude the general issue of restrictive immunity from execution. However, it is becoming clear that there are a number of defects in the 1976 Act, which give the courts considerable opportunity to develop the law.[130] What is important here is the extent to which they are doing so by reference to perceptions of general international law. But first the earlier United States decisions on immunity from execution must be considered.

United States Case Law Before 1976. From an early stage, U.S. courts adhered to a quite general immunity from jurisdiction, even in cases where

[127] Amministrazione del Governo brittanico, Republico Ministero, Commune di Venezia c. Guerrato (decision of July 4, 1963), in 46 RIVISTA DIRITTO INTERNAZIONALE 451, 456 (1963). For the 1959 decision of the Tribunal of Venice referring the matter to the Corte Costituzionale, see 28 ILR 156 (1963). *See further* Condorelli & Sbolci, *Measures of Execution against the Property of Foreign States: The Law and Practice in Italy,* 10 NETH. Y.B. INT'L L. 197 (1979); Gori-Montanelli & Botwinik, *Sovereign Immunity—Italy,* 10 INT'L LAW. 451 (1976). On the reciprocity requirement under the 1926 law, see Condorelli & Sbolci, *supra*, at 218–23; Bernardini, *La Reciprocità rispecto agli atti Executive e Cautelari contro Stati esteri,* 43 RIVISTA DIRITTO INTERNAZIONALE 449 (1960).

[128] Condorelli & Sbolci, *supra* note 127, at 224–28. For example, a decree of March 3, 1978 certifies reciprocity in relation to the United States without mentioning the Act of 1976! *See* the Note by Sbolci, 61 RIVISTA DIRITTO INTERNAZIONALE 949 (1978); Condorelli & Sbolci, *supra*, at 218, 223.

[129] *Supra*, text to notes 57–59.

[130] *See especially* Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery,* ASIL, 74 PROC. 49 (1980); Brower, Bistline, & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice,* 73 AJIL 200 (1979).

commercial or trading transactions were involved.[131] In some cases this position was adopted independently; in others, as a result of executive suggestion.[132] As a concomitant, the courts recognized as a rule of international law a general immunity from execution. Thus, waiver of immunity from jurisdiction did not constitute waiver of immunity from execution, for which a distinct submission was required.[133] From this strict position the courts never formally departed, although a considerable degree of ingenuity was sometimes shown in distinguishing execution against state property from the case at hand.[134] The well-known Tate letter of 1952, marking the change in the Executive's position to one of restrictive immunity from jurisdiction, made no reference to problems of execution,[135] but it soon became clear that the State Department intended a sharp distinction to be drawn between the two: immunity from execution remained general, despite restrictive immunity from jurisdiction. This was the position taken by the Department, and accepted by the courts, in *New York & Cuba Mail S.S. Co. v. Republic of Korea*,[136] and in *Weilamann v. Chase Manhattan Bank*.[137] This distinction attracted some adverse comment, but it was adhered to by the courts, both independently and as a matter of deference to executive suggestion.[138] It is true that qualifications were introduced by way of further

[131] The Schooner Exchange v. M'Faddon, 11 U.S. 116 (7 Cranch) (1812); Berizzi Bros. v. S.S. *Pesaro*, 271 U.S. 1088 (1926).

[132] *E.g., Ex parte* Republic of Peru, 318 U.S. 578 (1943).

[133] Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d. Cir. 1930). Also affirming immunity from execution, Bradford v. Chase Nat'l Bank, 24 F.Supp. 28 (S.D.N.Y. 1938). On the *Dexter & Carpenter* case, see Bishop, *International Law—Sovereign Immunity—Waiver—Execution*, 29 MICH. L.R. 894 (1931); Jessup & Deák, *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen et al.*, 25 AJIL 335 (1931); Kuhn, *Immunity of the Property of Foreign States against Execution*, 28 *id.* at 119 (1934).

[134] Cases of "ingenuity" included: Mexico v. Rask, 118 Cal. App. 21 (1931) (possessery lien over Mexican patrol boat for repairs allowed); Lamont v. Travellers Insurance Co., 281 N.Y. 362 (1938) (distribution of fund between private parties; *held*, Mexican claim to fund did not preclude distribution unless fund shown to be held for Mexico rather than bondholders); National City Bank of New York v. Republic of China, 348 U.S. 356 (1954) (unrelated counterclaim against Government allowed).

[135] 26 DEP'T STATE BULL. 984 (1952).

[136] 132 F.Supp. 684 (S.D.N.Y. 1955); noted by Zilber, *International Law—Sovereign Immunity—Seizure of Property under Restrictive Immunity Doctrine*, 54 MICH. L.R. 1008 (1956). Metzger, *Immunity of Foreign State Property from Attachment of Execution in the USA*, in 10 NETH. Y.B. INT'L L. 131, 136 (1979), criticizes the State Department, which "erroneously supposed" immunity from execution to be a rule of international law.

[137] 192 N.Y.S. 2d 469 (1959), and *see* M. WHITEMAN, *supra* note 31, at 709–26; Griffin, *Execution against the Foreign Sovereign's Property: The Current Scene*, ASIL, 55 PROC. 105 (1961); Delson, *Applicability of Restrictive Theory of Sovereign Immunity to Actions to Perfect Attachment*, *id.* at 121.

[138] *See* Loomis v. Rogers, 254 F.2d 941, *cert. denied*, 359 U.S. 928 (1958) (rule described as "well-established"); Et Ve Balik Kurumu v. B. N. S. Int'l Sales Corp., 204 N.Y.S.2d 971, 980–82 (1960); Stephen v. Zivnosenska Banka, Nat'l Corp., 222 N.Y.S.2d 128 (1961), *aff'd*, 235 N.Y.S.2d 1 (1962); State of Florida, *ex rel.* National Inst. of Agrarian Reform v. Dekle, 137 So.2d 581 (1962); National Inst. of Agrarian Reform v. Kane, 153 So.2d (1963); Hellenic Lines Ltd. v. Embassy of South Viet Nam, Commercial Div., 275 F.Supp. 860 (S.D.N.Y. 1967); New York World's Fair 1964–1965 Corp. v. Republic of Guinea, 159 N.Y.L.J. 15 (1968), *summarized in* 63 AJIL 343 (1969) (immunity granted notwithstanding contrary State Department suggestion).

exercises in "judicial ingenuity." For example, immunity from execution could no longer be asserted once the property had been sold, even if the resulting fund remained in the hands of the court.[139] Claiming, without reservation, particular property that had already been arrested or attached amounted to waiver of immunity from execution *against that property* in any counterclaim arising in the case.[140] But these were relatively minor qualifications of a general position which was maintained until the passage of the 1976 Act.

Case Law Under the Foreign Sovereign Immunities Act. Despite a growing body of case law on the 1976 Act, there has, not surprisingly, been no tendency to question the extent of restrictive immunity from execution it established. The problems so far have been of a discrete kind: for example, the jurisdictional ambit of the Act,[141] the extent of waiver of jurisdiction by previous treaties,[142] and the problem of waiver of prejudgment attachment.[143] The courts have accepted the Act's clear intention to exclude in rem and quasi in rem jurisdiction,[144] despite criticism of that exclusion.[145] But no very clear pattern of decision has yet emerged.[146]

British and Commonwealth Cases

The earlier history of sovereign immunity from execution in British courts closely parallels that in the United States. A quite general doctrine of immunity was adopted extending both to actions in personam and in rem, whether or not related to commercial or "private law" transactions. In a few cases, similar ingenuity was shown in excluding from immunity funds in the control of the court, or property to which the foreign state's title was manifestly defective.[147] Nonetheless, the basic rule was strict: it was canonically stated by Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina*, where he referred to

> two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his

[139] United States v. Harris & Co. Advertising Inc., 149 So.2d 384 (1963).

[140] Flota Maritima Browning de Cuba S.A. v. M. V. Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964), *aff'g* 218 F.Supp. 938 (D. Md. 1963). *Cf. also* Three Stars Trading Co. v. Republic of Cuba, 222 N.Y.S.2d 675 (1961) (warrant of attachment of debts issued to obtain jurisdiction; question of immunity deferred); Stephen v. Zivnosenska Banka, Nat'l Corp., 222 N.Y.S.2d 128 (1961) (attachment maintained pending judicial determination of ownership of disputed property).

[141] *See* cases cited *infra* at note 197.

[142] *See* cases cited *supra* at note 30 and *infra* at note 218.

[143] *See* cases cited *infra* at note 252.

[144] Jet Line Services Inc. v. M/V Marsa el Hariga, 462 F.Supp. 1165 (D. Md. 1978); Geveke & Co. Int'l, Inc. v. Kompania Di Awa I Elektrisidat Di Korsou N.V., 482 F.Supp. 660 (S.D.N.Y. 1979).

[145] Smit, *supra* note 130, at 64–66.

[146] For execution against mixed funds, see *infra*, text to notes 227–33.

[147] As to the former, see Larivière v. Morgan, (1872) L.R. 7 Ch. App. 550, *aff'd*, (1875) L.R. 7 H.L. 423. As to the latter, Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia, [1955] A.C. 72 (P.C.).

> will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.[148]

As a result, the courts required a clear submission to execution against state property (though whether an unequivocal submission to the substantive jurisdiction of the court amounted to submission to execution was never conclusively settled[149]). Nor would they allow proceedings directly relating to state property, between third parties.[150]

On the other hand, at no stage was the distinction between jurisdiction and execution as clearly drawn as in the United States cases. Moreover, the courts were not subject to the regime of executive suggestion, and the question of applying restrictive immunity at least to actions in rem against state commercial ships was left open by the House of Lords.[151] In *The Philippine Admiral*, the Privy Council applied the restrictive theory to actions in rem, with the result that the arrest and eventual sale of state commercial ships in execution of judgment became possible, without any further jurisdictional restriction.[152] That left the more general problem of actions in personam: when, in *Trendtex Trading Corp. v. Central Bank of Nigeria*,[153]

[148] [1938] A.C. 485, 490. Among earlier decisions, see the cases cited *supra* at note 69. And *see* Higgins, *supra* note 60, at 35–41.

[149] That a separate waiver from execution was required was established for the (cognate) law of diplomatic immunity by *In re* Suarez, [1917] 2 Ch. 131. Submission as a defendant was held not to amount to waiver of immunity with respect to property involved in the action; Vavasseur v. Krupp, (1878) 9 Ch. D. 351. *Cf.* also South African Republic v. La Compagnie France-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190. In *Duff Development Co. v. Government of Kelantan* ([1924] A.C. 797), consent to arbitration was held not to constitute a waiver of immunity from the jurisdiction of the courts to enforce the resulting award: the House of Lords left open the position of an execution pursuant to a submission to the jurisdiction of the courts (*see* per Viscount Cave at 810; Viscount Finlay at 819; Lord Dunedin at 821; Lord Sumner at 830). Lord Carson dissented on the point (at 834–35). In *Compania Naviera Vascongado v. S.S. Cristina* ([1938] A.C. 485, 517), Lord Maugham described the point as "not yet settled." But it is likely to have been decided in the same way as *In re Suarez* (subject, of course, to interpretation of the terms of the waiver or submission).

[150] U.S.A. v. Dollfus Mieg et Cie S.A., [1951] 1 All E.R. 572.

[151] Compania Naviera Vascongado v. S.S. *Cristina*, [1938] A.C. 485, in which Lords Thankerton (at 496), Macmillan (at 498) and Maugham (at 519–23) reserved the correctness of *The Porto Alexandre*, [1920] P. 30, to that effect. Lords Atkin (at 490) and Wright (at 512) thought the matter settled.

[152] [1976] 2 W.L.R. 214, [1976] 1 All E.R. 78, [1977] A.C. 373, noted 47 BRIT. Y.B. INT'L L. 365 (1974–75). The decision was followed by Robert Goff J. in *1° Congreso del Partido*, [1978] 1 All E.R. 1169, [1978] Q.B. 500. Neither in England nor in Commonwealth jurisdictions where Privy Council decisions are applied, therefore, is *The Porto Alexandre* ([1920] P. 30) still good law.

[153] [1977] W.L.R. 356, [1977] 1 All E.R. 881, [1977] Q.B. 529, noted in 48 BRIT. Y.B. INT'L L. 353 (1976–77).

the Court of Appeal purported to extend the restrictive theory of immunity to such actions, following what it perceived to be the changed international law on the matter, the question of immunity from execution was distinctly exposed for the first time in a Commonwealth court.

Trendtex involved not final execution but an interim ("Mareva") injunction restraining the removal from the jurisdiction of funds in a Central Bank account.[154] These funds were stated to be "part of the external reserves of Nigeria."[155] In view of the formidable earlier authority denying the competence to seize state property, the point was rather glossed over in the Court of Appeal. Lord Denning M.R. said only that the question depended "on precisely the same grounds" as liability to suit.[156] Shaw L.J. thought seizure a "reasonable corollary" of maintaining the action.[157] Stephenson L.J. (who dissented on the general immunity point) found the problem more difficult: he alone referred to some of the contrary authority, although he did not, in the end, dissent on the injunction.[158] Possibly, this aspect of the decision should be explained not as upholding execution of *state* funds but as based on the finding that the Central Bank was not a state department or agency.[159] But this is by no means clear, and in any event the status of the Central Bank and the title to funds in its keeping were by no means the same thing.

Subsequent cases have also involved Mareva injunctions rather than final execution. For example, in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, it was argued that seizure of Central Bank assets was contrary to international law, but no general argument as to immunity from seizure or execution was maintained.[160] It seems that, having earlier treated immunity from execution as a reflex of absolute immunity from jurisdiction, the Court of Appeal has continued to make the same assumption under the new regime of restricted immunity.

Trendtex Trading Corp. v. Central Bank of Nigeria, in its bold extension of restricted immunity to actions in personam, has not yet been considered in any Commonwealth jurisdiction.[161] Dicta in several cases in the Canadian Supreme Court indicate that it may well adopt the same view, and the

[154] On the Mareva injunction, see *infra* note 249.

[155] [1977] Q.B. at 572.

[156] *Id.* at 561.

[157] *Id.* at 580.

[158] *Id.* at 572.

[159] Higgins, *supra* note 60, at 41.

[160] [1979] 2 Lloyd's L.R. 277. *See further infra*, text to notes 234–38.

[161] Donaldson J. at first instance in *Uganda Co. (Holdings) Ltd. v. Government of Uganda* ([1979] 1 Lloyd's L.R. 481) rejected *Trendtex* as *per incuriam*, though for reasons that are not entirely convincing (*cf.* 50 BRIT. Y.B. INT'L L. 218 (1979)); Higgins, *The Death Throes of Absolute Immunity: The Government of Uganda Before the English Courts*, 73 AJIL 465 (1979). The Court of Appeal rejected his decision, so far as it was based on this point, in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria* ([1979] 2 Lloyd's L.R. 277). And *cf. Planmount v. Republic of Zaire* ([1980] 2 *id.* 393). If Lord Wilberforce's comments are representative of the views of his fellow Lords of Appeal, the House of Lords would not have overruled the *Trendtex* case; *see* INTERNATIONAL LAW ASSOCIATION, STATE IMMUNITY: LAW AND PRACTICE IN THE UNITED STATES AND EUROPE (Proceedings of Conference held on November 17, 1978) at 25. Unfortunately, both *Trendtex* and *Hispano Americana* were settled before reaching the House of Lords.

Quebec Court of Appeal has actually done so.[162] In addition, two South African courts have accepted the *Trendtex* rule in actions in personam. Both cases involved attachment of property *ad fundandam jurisdictionem*: in neither, despite a fairly thorough review of Anglo-American authority, was it suggested that seizure of and execution against property stood on any different basis than amenability to suit.[163] It is no doubt still open to the House of Lords, or the Privy Council, to overrule *Trendtex* on this point by applying a rule of absolute immunity at least to seizure of property and execution and reaffirming the earlier authorities. In view of developments such as the State Immunity Act, 1978, it is rather unlikely that they would now do so (unless they could be persuaded that international law does, after all, require such a general immunity).[164]

Other Jurisdictions

Very few decisions of courts of other jurisdictions seem to have been reported: the virtual restriction of the case law to European and Anglo-American countries is a marked, and troublesome, feature of the practice. The few decisions that have been reported are not in themselves particularly helpful. The Commercial Court of Alexandria, in 1943, upheld execution proceedings against property of a state commercial enterprise, but the decision cannot be assumed to represent the modern law of Egypt.[165] The Supreme Court of Argentina in 1958 treated a submission to the jurisdiction as entailing submission to subsequent execution, but the decision is equivocal since it concerned the service of a writ of execution rather than the forcible seizure and sale of property.[166] Japanese courts have adopted the absolute immunity rule, but since the leading decision of the Court of

[162] The Quebec decision is Zodiak Int'l Products Inc. v. Polish People's Republic, 81 D.L.R.3d 656 (1977) (in which no question of execution arose). The other Canadian cases are Flota Maritima Browning de Cuba S.A. v. Republic of Cuba, [1962] Can. S. Ct. 598; Government of the Democratic Republic of the Congo v. Venne, 22 D.L.R.3d 699 (1972); Harold W. M. Smith v. U.S. Securities and Exchange Commission, (1976) 12 Ont.2d 244 (though in all three, the transaction was held to be immune).

[163] The cases are Inter Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Mocambique, [1980] 2 S. Af. L.R. 111 (T.P.D.), per Margo J. at 124–25, followed by the Eastern Cape Division in Kaffraria Property Co. (Pty.) Ltd. v. Government of the Republic of Zambia, [1980] 2 S. Af. L.R. 709. This is in line with earlier South African dicta: *see* Lendalease Finance Co. (Pty.) Ltd. v. Corporation de Mercadeo Agricola, [1976] 4 S.A. 464 (A.); Prentice Shaw & Schiess Inc. v. Government of the Republic of Bolivia, [1978] 3 S.A. 938 (T).

[164] Since this article was written, this assessment has been confirmed by the House of Lords in *1° Congreso del Partido* ([1981] 3 W.L.R. 328). There have been no substantive decisions reported so far on the 1978 Act (which is not retrospective). On the position of central banks under the Act, see *infra*, text to notes 234–38. For interim injunctions, see *infra* note 251.

[165] Egyptian Delta Rice Mills Co. v. Comisaria General de Abastecimentos y Transportes de Madrid (1943), 55 Bull. Leg. & Jur. Egypt. 114 (1942–1943), 12 ANN. DIG. 103 (1949). *Cf.* also the dicta to this effect of the same court in a case in 1951, cited by J.-F. Lalive, *L'Immunité de juridiction des Etats et des organisations internationales*, 84 RECUEIL DES COURS 205, 278 (1953 III).

[166] Government of Peru v. S.A. Sociedad Industria Financiera Argentina SIFAR (1958), 240 F. Corte Suprema 93, 26 ILR 195 (1963).

Cassation in 1928, none of the cases has involved a clearly commercial transaction.[167]

The most that can be said is that there is no body of municipal case law in opposition to the case law of the jurisdictions already discussed.[168] The effect of this remains to be assessed.

Assessment

Considerable caution is needed in assessing the effect of these municipal decisions on the international law of sovereign immunity from execution. International law is a law between, rather than within, jurisdictions, and municipal courts necessarily play only a subordinate role in the international lawmaking process. Moreover, the reasoning in some of the cases is not particularly thorough or consistent: one can detect in at least a few jurisdictions an approach that first accords limited immunity from jurisdiction by denying any connection with the more sensitive problem of execution, then extends limited immunity to execution on the grounds of its intimate relation with jurisdiction! There is a tendency, for example in the earlier Swiss cases, to overstate the strength or consistency of the support for restrictive immunity, or to treat generally supported rules as negated by a few contrary instances. Similarly, while the difficulties of distinguishing acts *jure imperii* from acts *jure gestionis*, or public from private use of property, are generally admitted, no very convincing analysis of the basis for such distinctions is offered. And support for restrictive immunity is largely confined to the courts of Western Europe and (only very recently) the United Kingdom: before 1976, United States courts generally failed to adopt an independent position in the matter.

On the other hand, whatever the position may have been in 1918, or in 1955, now there is little in the way of clear decisional authority contradicting restrictive immunity from execution. There is no denying the general tendency of the case law towards a restrictive position, in relation to both jurisdiction and execution. And, although municipal decisions may only be "subsidiary means" for determining international law,[169] in this context they have a particular importance. For immunity issues characteristically, primarily, arise in municipal courts: the immunity rule is *about* their role in deciding cases involving foreign states.[170] Whatever the rule of immunity,

[167] *See* Matsuyama & Sano v. Republic of China (1928), 7 Dai-han Minroku 1128; and Kirobe, *Immunity of State Property: Japanese Practice*, 10 NETH. Y.B. INT'L L. 233, 233–39 (1979). He predicts that Japanese courts would now permit "the exercise of jurisdiction if the case related to commercial activities" (at p. 244).

[168] There have been no decisions of Thai courts, but Sucharitkul suggests that they would adopt a rule of restrictive immunity at least from jurisdiction; Sucharitkul, *Immunity from Attachment and Execution of the Property of Foreign States: Thai Practice*, 10 NETH. Y.B. INT'L L. 143 (1979); also in 22 MALAYA L. REV. 185 (1980).

[169] Statute of the International Court of Justice, Art. 38(1)(d) (a position shared with decisions of *international* courts and tribunals).

[170] Note that Sucharitkul, the ILC's special rapporteur on Jurisdictional Immunities of Foreign States and Their Property, treats municipal decisions as synonymous with "State practice"; *see, e.g.*, his Second Report, UN Doc. A/CN.4/331, at 17 (1980).

it imposes itself on a municipal court as a direct, in a sense self-executing, responsibility. The same cannot be said, for example, for rules about expropriation of foreign property, or the use of force in international relations. An assessment of the international law of immunity that ignored the context in which the question primarily arises would be of little value.

A second characteristic is that the question arises in a context where, at least generally speaking, the principle of territoriality of jurisdiction—itself a principle of international law—operates, and must be displaced by some clear countervailing rule. Unless international law does otherwise require, foreign state assets and claims, properly within the jurisdiction, are presumed to be subject to municipal competence. In view of what amounts to an onus of proof, and of the substantial practice now supporting restrictive immunity, it is not surprising if municipal courts conclude that no such (general) countervailing rule exists.

Municipal case law would be less significant if it proceeded only by reference to domestic considerations, to the needs of local litigants. In contrast with some of the literature, this is not a characteristic of the cases, which almost invariably attempt to determine, and to apply, the international law rule. Such decisions are more than brute facts: they are assessments of the general law. International law is not simply an unwieldy album of single instances, but a rationalization of practice in the light of authority; in other words, a more or less structured exercise of reason. To the extent that the cases provide convincing reasons for restricting immunity, their assessments will be influential in determining the law. But, of course, that determination must take account of other elements, and in particular, state practice and doctrine.

OTHER STATE PRACTICE

Much of the "state practice" in this area occurs in the context of claims to immunity before municipal courts by states or state instrumentalities. Willingness to claim immunity is an indication of a position, but it may be based on the view that the particular transaction is *jure imperii*, or it may be adopted for immediate litigious purposes. Argument before a court is only state practice in a restricted or secondary way.

On the other hand, vigorous diplomatic protests have sometimes been made in cases of attachment of state property,[171] and it is clear that the question of execution is a very sensitive one. The United States support for absolute immunity from execution did not change until 1976. The United Kingdom Government actually changed its position during the passage of the State Immunity Bill through Parliament.[172] The French Government still apparently adheres to general immunity, as does the Soviet Union

[171] *E.g.*, the Libyan protest in the *LIAMCO* case (*supra* note 118), and the U.S. protest at the seizure of Marshall Plan funds in the *Socobelge* case (Bachrach, *supra* note 123). *Cf.* also the observations of the West German Government before the Federal Constitutional Court in the *Philippines* case, 38 ZAöRV 251 (1978). But the Government nonetheless concluded that only restrictive immunity from execution was required; *id.* at 251–52.

[172] *Supra*, text to note 66.

(though its treaty practice is not consistent with that view).[173] No comprehensive account of the practice can be given, but it seems clearly to be conflicting and still far from unanimous.[174]

DOCTRINE

Although the literature is of uneven quality, the predominant view, especially in recent years, favors restrictive immunity from execution for the same reasons and to much the same extent as restrictive immunity from jurisdiction.[175] A number of commentators are equivocal or reserved,[176] but only a very few adhere to absolute immunity from execution.[177]

[173] *Supra*, text to notes 19–26, 34–43. And *see* Boguslavsky, *supra* note 43, who does not mention the contrary treaty practice.

[174] For earlier Swiss practice, see 1 RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC 340–436 (1975) (covering the years 1914–1939). The modern Swiss view (restrictive immunity from execution) is stated in a Government opinion of 1976, published in 33 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 163 (1977). On UK practice, see Higgins, *supra* note 60, at 52–54. The position of Eastern European states is interesting in this context. Yugoslavia seems to favor absolute immunity from execution (as distinct from jurisdiction), but this is subject to reciprocity, and in any event the point is not clear; Varady, *supra* note 68, at 91–95. The German Democratic Republic clearly does support absolute immunity in principle, but this is mitigated by a marked manipulation of waiver, especially in the case of separate instrumentalities but also of immunity from execution; F. Enderlein, *The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice of the German Democratic Republic*, 10 NETH. Y.B. INT'L L. 125 (1979).

[175] Apart from works already cited, writers in favor of restricted immunity from execution include: Van Praag, *La Question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent*, 16 REV. DROIT INT'L & LEGISLATION COMPARÉE 100, 129–37 (1935); H. Lauterpacht, *The Problem of jurisdictional immunities of foreign States*, in 3 COLLECTED PAPERS 315, 318, 338–40 (1951); García-Mora, *The Doctrine of Sovereign Immunity of States and its Recent Modifications*, 42 VA. L. REV. 335, 354–59 (1956); Note, *Sovereign Immunity—Waiver and Execution: Arguments from Continental Jurisprudence*, 74 YALE L.J. 887–918 (1965); Note, *Collection of a Foreign Nation Debt by Attachment of an International Bank Loan*, 69 COLUM. L. REV. 886 (1969) (though the argument must be regarded as extremely doubtful in relation to IBRD loans); Venneman, *L'Immunité d'exécution de l'Etat étranger*, in L'IMMUNITÉ DE JURIDICTION ET D'EXÉCUTION DES ETATS, *supra* note 122, at 119; Dumon, *id.* at 181; Ripple, *Sovereign Immunity vs. Execution of Judgment: A Need to Reappraise our National Policy*, 13 BOSTON C. INDUS. & COM. L. REV. 369 (1971); Triggs, *Restrictive Sovereign Immunity: The State as International Trader*, 53 AUSTL. L.J., pt. I, 244, pt. II, 296, 299–301 (1979); Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 NETH. Y.B. INT'L L. 3, 17–32 (1979). *Cf.* also Schroer, *On the Application of State Immunity from Enforcement Measures to International Organizations*, 30 REV. EGYPTIENNE DROIT INT'L 76 (1974). For a survey of earlier practice relating to real property, see E. Loewenfeld, *Some Legal Aspects of the Immunity of State Property*, GROTIUS SOC'Y, 34 TRANS. 111 (1949).

[176] *E.g.*, I. BROWNLIE, *supra* note 8, at 343–44; Lalive, *supra* note 165, at 272–81 (though favorable to the developing restrictive rule). In his standard monograph (*supra* note 68, at 347–50), Sucharitkul seems to favor restrictive immunity from execution; *but cf.* the cursory and negative treatment in *Immunities of Foreign States before National Authorities*, 149 RECUEIL DES COURS 87, 122–23 (1976 I). *Cf.* also sources cited *supra* at note 167.

[177] To this effect, Freyria, *Les Limites de l'immunité de juridiction et d'exécution des Etats étrangers*, 40 REV. CRITIQUE DROIT INT'L PRIVÉ 449, 465–69 (1951) (with hesitation); D. H. N. Johnson, *The puzzle of sovereign immunity*, 6 AUSTL. Y.B. INT'L L. 1, 2–3 (1974–75); Note, *Execution of Judgments against the Property of Foreign States*, 44 HARV. L. REV. 963 (1931); Boguslavsky, *supra* note 43, at 167–71 (with references to other Soviet literature).

III. The International Law Rule

THE CENTRAL PROBLEM OF RESTRICTIVE IMMUNITY

The purpose of this article is to elucidate the rule of immunity from execution, but this cannot be achieved entirely in isolation from the central problem of immunity from jurisdiction. Clearly, if the latter immunity is general, so is the former: immunity from execution may be available on a wider basis than immunity from jurisdiction, but it has never been suggested that it is any *less* available.

In fact, there are reasonably good grounds for treating a rule of restrictive immunity from execution as, in principle at least, *entailed* by restrictive immunity from jurisdiction (though this does not exclude the possibility of further, more precise, exceptions from execution). The basic jurisdictional distinction in international law is between jurisdiction to prescribe and to enforce.[178] It has never been suggested that, in their activities within the territory of a state, foreign states operate outside the local law.[179] Jurisdictional immunities relate to the power of the forum not to prescribe, but to enforce its rules. To exercise substantive jurisdiction over a foreign state is not to prescribe the rule, it is to apply it, with the consequence that the matter becomes *res judicata*, that the substantive claim of the state (as plaintiff or defendant) is, under the local law, definitely disposed of.[180] This may not have the same obvious effect as attachment, seizure, or sale, but within the framework of the established dichotomy it is still an exercise of the jurisdiction to enforce. In other words, if jurisdiction to enforce is conceded at this first level, it should be presumed to continue at the level of implementing the order of the court (subject to any specific or "positive" exceptions that may exist). It would be a strange jurisdiction to enforce which could only be fully exercised in favor of one of the parties; which (in a case adverse to a foreign state) could only be exercised on condition that it not be made effective. To this extent, restrictive immunity from execution (with whatever qualification) is, in the words of the International Court,[181] an "inherent" or "entailed" rule, once a restrictive jurisdictional rule has been estabished.

The central problem of restrictive immunity from jurisdiction can be stated in few words. There is general agreement that in some situations international law requires the immunity of a foreign state from local jurisdiction. There is a considerable body of opinion that in other cases (variously described as "commercial," "*jure gestionis*," or "private law" transactions) immunity is not required. Yet it is frequently denied that international law

[178] *Cf.* 2 D. P. O'Connell, International Law 602–03 (2d ed. 1970). Similarly, F. A. Mann, *The Doctrine of Jurisdiction in International Law* (1964), in Studies in International Law 1 (1973), distinguishes "legislative" from "enforcement" jurisdiction.

[179] Sucharitkul, Second Report, *supra* note 156, at 12. The same is true, of course, for diplomatic and other immunities.

[180] Some judgments also have a law-prescribing effect, but for present purposes this is subsidiary.

[181] North Sea Continental Shelf Cases, [1969] ICJ Rep. 3, 29–32.

contains, or even can contain, criteria for distinguishing immune from nonimmune transactions.[182] The incoherence needs no demonstration. Either drawing the distinction is referred to the discretion of the forum (in which case the immunity rule disappears), or the validity of any such distinction is denied on a priori grounds, in which case the exception disappears.[183] Alternative approaches, based on reciprocity or assimilation with the immunity of the forum state, lead to unsatisfactory subjectivity,[184] and have attracted virtually no support. In particular, the "assimilationist" approach ignores the real differences between the forum state and the foreign state, as has often been noted.[185]

Now, there is no good reason why international law could not specify the grounds for distinguishing immune from nonimmune transactions, but it is significant that the distinction in each jurisdiction tends to be drawn, to some extent at least, in terms indigenous to the forum, terms that are often hardly susceptible to translation. The difficulties Anglo-American courts have had with restrictive immunity may be explained, in part at least, by the absence of any developed distinction between "private" and "public" law,[186] or *acta jure imperii* and *acta jure gestionis*, in these jurisdictions. To illustrate, the term "*jure gestionis*" is quite often mistranslated as "commercial transactions." The (nonexclusive) distinction between "governmental" and "commercial" transactions, sometimes employed, in this and other contexts, in common law jurisdictions, has its own difficulties.[187]

The better view, surely, is that while international law allows a measure of discretion to municipal courts or legislatures in prescribing the distinction between immune and nonimmune transactions, this distinction is a limited or controlled one, in the sense that municipal courts may not exercise jurisdiction in matters where immunity from local jurisdiction is required. As in other areas where international law regulates the application of municipal law to cases with foreign elements, it prescribes a minimum, not

[182] *See, e.g.*, Claim against the Empire of Iran Case (1963), 16 BVerfGE 27 (1964), 45 ILR 57, 80 (1972); repeated by the German Federal Constitutional Court in its *Philippines* decision of Dec. 13, 1977, 38 ZaöRV at 278, where the Court stated that "the classification of a State's function (according to the legal nature of the act) as governmental or non-governmental must be determined according to current domestic law, as international law does not, as a rule, include criteria for such a delineation." Similarly, Article 3 of the resolution of the Institut de Droit International (*supra* note 53) stated that "la question de savoir si un acte n'est pas de puissance publique relève de la lex fori." And *cf.* Seidl-Hohenveldern, *supra* note 89, at 65–66.

[183] I. Brownlie, *supra* note 8, at 330–31 and references. Similarly, Ushakov, [1979] 1 Y.B. Int'l L. Comm'n, at 213.

[184] As Condorelli and Sbolci amply demonstrate in their analysis of practice under the Italian law of 1926; *supra* note 127, at 218–23, 230–31.

[185] The approach was advocated by Lauterpacht in 1951 (*supra* note 175, at 315–73), but has been generally rejected. A rule of reciprocity would be no better since it would not avoid the need for an initial or underlying approach. *Cf.* I. Brownlie, *supra* note 8, at 340.

[186] For a recent critique of the distinction in English law generally, see Harlow, *"Public" and "Private" Law: Definition without Distinction*, 43 Mod. L. Rev. 241 (1980).

[187] But Sucharitkul, in his Second Report, proposes a (circular) definition of "trading or commercial activity"; *supra* note 170, at 14, 16.

a maximum, standard.[188] What has been lacking in the literature so far is any very clear account of the fundamental considerations by reference to which this discretion is controlled. In particular, though it is commonly assumed that a single distinction is involved, no less than three separate considerations may be found. This is not the place for a full analysis, but briefly, these seem to be as follows:

(1) There are certain transactions which international law, as an autonomous system of law, purports to govern as between the parties. In a sense, in those cases international law is the proper law of the transaction. For example, questions of the validity or termination of a treaty, or the location of an international boundary, are matters that international law integrally governs. These can be contrasted with the cases where international law merely sets standards of (minimum) performance for municipal law systems, for example, in areas of human rights or the protection of aliens. (The distinction is rather like that between self-executing and non-self-executing rules, familiar in other contexts.) In these ("non-self-executing") contexts, international law operates not integrally but at one remove.

Now, of course, the sovereign immunity rule is a choice-of-forum rule rather than a choice-of-law rule (it would be no excuse, for example, if in an immune transaction a municipal court applied international law to a foreign state). But it is not often emphasized that international law contains its own, fundamentally important, choice-of-*forum* rule—that is, the rule that states are not subject to compulsory process without their consent.[189] That rule cannot be restricted to compulsory process in an *international* forum: categorization of a tribunal as "municipal" rather than international should not, in such cases, matter. Indeed, if anything, the derogation from equality is greater in a municipal forum, where the defendant state lacks the usual safeguards provided in international courts. If a matter is integrally governed by international law, it is governed by a legal system which contains that choice-of-forum rule, and municipal courts, if they are to act consistently with international law, must accord immunity to a foreign state in proceedings involving it in respect to such matters.[190]

(2) A second, less obvious, consideration is to be found in the notion of "domestic jurisdiction." The term is ambiguous, but in this context it refers to those transactions—usually, transactions within the community of a particular state—which international law refers exclusively to the competence of that state. Typical examples are the conferral of nationality on persons sufficiently connected with the state, the disposition of armed forces within the jurisdiction, and the exercise of legislative power over nationals resident

[188] It is accepted that the forum may accord a *more* extensive immunity than that required—even an absolute or general immunity. It would not be a denial of justice to refer a private litigant, in cases involving a foreign state, to the courts of the foreign state or to another forum with a closer connection to the transaction. In this sense, state immunity is a *lex specialis* to the *lex generalis* of the minimum standard of treatment in municipal courts.

[189] Described by the International Court in the *Western Sahara* Advisory Opinion ([1975] ICJ REP. 12, 23) as a "fundamental rule, repeatedly reaffirmed in the Court's jurisprudence."

[190] This rule only protects states (or their agents or organs). There is no prohibition preventing a municipal court, if it has access to international law, from applying it to determine questions arising between private parties.

within the state. The exercise of ordinary civil jurisdiction over private persons and companies is not such a matter, at least where some "transnational" element is involved, since in such cases civil jurisdiction may be exercised in the courts of different states in accordance with their rules of private international law. Although such matters might (apart from any international minimum standard) be "domestic" vis-à-vis an international forum such as the United Nations, they are not exclusive to a particular jurisdiction. There is no rule that private transactions are to be governed exclusively by the law of the state of nationality.

The point is that, where a particular transaction is positively referred to the jurisdiction of a state, then neither international bodies nor foreign courts can intervene in the transaction, at least in a case where the state is involved as party but possibly in other cases as well.[191] In a distinct way, international law requires immunity in such cases no less than in the first category. The two categories, taken together, help to reconcile the state immunity rule with the equally important exhaustion of local remedies rule—a reconciliation that, as Brownlie has pointed out, is necessary to the coherence of the law in this area.[192]

(3) Finally, international law probably requires that a court not exercise jurisdiction over a case having no significant connection with the forum, without the defendant's consent. The nature and extent of this jurisdictional requirement, or, indeed, whether it applies to civil trials at all, are controversial,[193] but obviously enough, any such requirement must apply to the exercise of jurisdiction over a foreign state. Whether, in this latter case, some closer or more direct connection is required than for ordinary civil proceedings is also unclear. The European Convention goes to some pains to spell out the necessary, relatively close, jurisdictional connection (though in the context of a regime for recognition and enforcement of decisions).[194] The same closer connection is required, as we have seen, in Swiss case law and treaty practice.[195] The Foreign Sovereign Immunities Act also embodies

[191] For an example of this category, cf. Buck v. Attorney-General, [1965] Ch. 745. To similar effect is the reference to the principle of permanent sovereignty over natural resources, in International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F.Supp. 553 (C.D. Cal. 1979): "In determining whether the activities of the OPEC members are governmental or commercial in nature, the court can and should examine the standards recognized under international law. . . ." *See* Lagod, Note, 13 VAND. J. TRANSNAT'L L. 835 (1980).

[192] I. BROWNLIE, *supra* note 8, at 324, 333. And *see generally* the discussion at 321–44, to which the writer is indebted.

[193] *Cf.* Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 170–77 (1972–73), *with* Mann, *supra* note 164, at 127 *ff*. But Akehurst seems to concede (at p. 177) that state immunity cases may constitute an exception to his suggested rule that there is no international law limit on the exercise of civil jurisdiction. In addition to the authorities cited by Akehurst, see I. BROWNLIE, *supra* note 8, at 298–99; L. HENKIN, R. C. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW 420–25 (2d ed. 1980), agreeing with Mann and Akehurst, respectively. And for a recent U.S. restatement, see Zenith Radio Corp. v. Matsushita Electric Indus. Co., Ltd., 494 F.Supp. 1161 (E.D. Pa. 1980).

[194] *Supra* note 7.

[195] *See supra* note 46, and text to notes 79–88. On this problem, see also Lalive, *supra* note 46, at 162–64. On the position in the Federal Republic of Germany, see Seidl-Hohenveldern, *supra* note 89, at 71–72.

the "minimum contacts" requirement of due process, which, though a domestic constitutional requirement, is underpinned by many of the same considerations as the suggested international law rule.[196] Indeed, the jurisdictional links required under section 1605(2), in the absence of waiver, are "much narrower" than with many long-arm statutes: "there must be a close connection between the cause of action asserted, and the jurisdictional facts on which it is based."[197]

The UK Act, following in this respect the European Convention, includes various requirements of jurisdictional connection that are more restrictive than the ordinary jurisdictional requirements of the forum. But there are several important exceptions: the ordinary jurisdictional requirements of the forum apply to a "commercial transaction entered into by the State" (section 3(1)(a)) and to an action relating to a state-owned commercial ship (section 10). In the latter respect the Act follows the European Convention; in the former it does not.[198] Whether some closer connection was required at common law was also a matter of dispute in the English cases.[199] It is not necessary for present purposes to go into the question in more detail; at least, the principle at stake is clear enough.

EXECUTION AGAINST FOREIGN SOVEREIGNS: A GENERAL RULE?

It is suggested, then, that a defensible theory of restrictive immunity from jurisdiction can be elaborated along these lines. Exactly how the distinction

[196] *See, e.g.*, Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

[197] Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284, 1295–96 (S.D.N.Y. 1980). The court went on to hold that the "direct effect" limb of section 1605(2) required a substantial direct effect not present on the facts; *id.* at 1297–1300. A large number of cases have dealt with these jurisdictional requirements, with rather divergent results. Thus, failure to compensate the U.S. owner of property expropriated in Iran was held a direct effect (American Int'l Group v. Islamic Republic of Iran, 493 F.Supp. 522 (D.D.C. 1980)); as was the injury to plaintiff's reputation of a libel printed in the USSR and published in the United States without the defendant's knowledge or control (Yessenin-Volpin v. Novosti Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978)). *But cf.* Upton v. Empire of Iran, 459 F.Supp. 264 (S.D.N.Y. 1978), *aff'd*, 607 F.2d 494 (1979); Harris v. VAO Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979) (consequences of injuries suffered to U.S. citizens abroad not "direct"). And *see also*: Carey v. National Oil Corp., 453 F.Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979); East Europe Domestic Int'l Sales Corp. v. Terra, 467 F.Supp. 383 (S.D.N.Y. 1979); Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo, 485 F.Supp. 490 (E.D. Wis. 1980); Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F.Supp. 621 (S.D.N.Y. 1980); T. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980); Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, 497 F.Supp. 893 (S.D.N.Y. 1980).

[198] *See also* §9 (arbitrations). And *cf.* Higgins, *supra* note 60, at 41–46 for the legislative history of §3(1)(a).

[199] A connection requirement was formulated by Lord Denning in *Rahimtoola v. Nizam of Hyderabad* ([1958] A.C. 379, 422), and applied by him in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan* ([1975] 1 W.L.R. 1485) (decided by Lawton and Scarman L.JJ. on grounds of general immunity). But in *1° Congreso del Partido* ([1978] Q.B. 500), Robert Goff J. thought that there was "no international consensus on the requirement of territorial connexion," at least with respect to the "arrest of an ordinary trading ship" (at pp. 534–35). On this point the Court of Appeal agreed ([1980] 1 Lloyd's L.R. 23, 30, per Lord Denning M.R.). It does not, of course, follow that a court will necessarily exercise this jurisdiction, if it holds that it is *forum non conveniens*; *The Jupiter* (No. 2), [1925] P. 69; *The Atlantic Star*, [1974] A.C. 436.

between immune and nonimmune transactions is drawn will vary, and does in fact vary, between one state and another. Domestic legal concepts, such as "private law" (*privatrecht, droit privé*) may incorporate the requirements, in particular, of the first two principles outlined above. The categories *acta jure gestionis/imperii* may be employed to the same effect. Common law systems, which share neither of these categories, may have more difficulty: there is an inherent danger, in particular, in using terms such as "tort" to define amenability to jurisdiction, since many acts indisputably of a "public law" nature, or *jure imperii*, will also constitute "torts."[200] The need for careful drafting is obvious, but so long as the principles outlined above are not infringed, the municipal system will be consistent with international law. The point is that the international law requirement of immunity from local jurisdiction is not an arbitrary or isolated one, but is to a considerable extent entailed by established principles of general international law.[201] For present purposes it is enough to assume that restrictive immunity exists, and can be justified, in this way.

On this assumption, the question becomes whether international law requires general or absolute immunity from execution against state (or state instrumentality) property. That it could do so by a rule established through "positive law processes" is clear; on the other hand, as has been pointed out, restrictive immunity from execution is the more natural or likely consequence of restrictive immunity from jurisdiction. And in fact, as the survey undertaken in this article shows, the substantial weight of modern authority rejects any such positive prohibition of execution, supporting instead a restricted form of immunity. Important factors tending to this conclusion are the bilateral treaty practice, in particular the Soviet treaty practice with its advertence, in a number of cases, to the general international law position;[202] the codifications prepared by private and official bodies;[203] a considerable body of statutory law;[204] the case law at least of European jurisdictions;[205] and the substantial weight of juristic opinion.[206] General acceptance of the arrest of state commercial vessels adds considerable analogical support: a distinction between state-owned ships and other state property could only be an arbitrary one.[207] It is significant that the few modern treaties denying the possibility of execution against state property—in particular, the European Convention on State Immunity of 1972 and the British-Soviet Protocol

[200] The problem was identified by O'Connell in ILA, *supra* note 161, at 13, a passage cited by Waller L.J. in *1° Congreso del Partido* ([1979] 2 Lloyd's L.R. at 584). It is exemplified by the facts of *Letelier v. Chile* (488 F.Supp. 665 (D.D.C. 1980)). *Cf.* also Perez v. The Bahamas, 482 F.Supp. 1208 (D.D.C. 1980) (the incident referred to by O'Connell).

[201] Excluded for present purposes are questions of seizure of state property in time of war, and related issues of reprisals and sanctions. It was on the basis of reprisal that the court in *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., et al.* (502 F.Supp. 120 (S.D.N.Y. 1980), 19 ILM 1298, 1312–27 (1980)) acted in allowing prejudgment attachment of Iranian assets. *Contra*, E.-Systems Inc. v. Islamic Republic of Iran, 491 F.Supp. 1294, 1302–03 (N.D. Tex. 1980).

[202] *Supra* notes 25 and 35.

[203] *Supra*, text to notes 50–56.

[204] *Supra*, text to notes 57–68.

[205] *Supra*, text to notes 69–128.

[206] *Supra*, text to notes 175–77.

[207] As the Privy Council conceded in *The Philippine Admiral*, [1977] A.C. at 402–03.

of 1974 on Merchant Shipping—contain compensatory provisions for implementation of local judgments obtained against the state, and in any event do not preclude attachment of state property without qualification.[208] The claim to immunity, in these two cases, is not a generally applicable one.

RESTRICTIONS ON EXECUTION AGAINST FOREIGN STATES

It may be concluded, then, that international law contains no general rule prohibiting execution of domestic judgments against foreign states. But the practice supports what general principle would suggest, a number of restrictions upon such execution.

Enforcement in Personam

Enforcement of judgments against foreign state officials presents practically insuperable difficulties. The head of state and his entourage, and diplomatic and (with respect to their official functions) consular personnel are, in general, immune from civil process;[209] it is hard to envisage circumstances in which this "remedy" would be available in practice. In the case of separate agencies or instrumentalities of a foreign state, the matter may be different, although in many cases the major administrative officers are likely not to be present within the forum.

Execution Against State Property

This is, of course, the way execution of judgments against foreign states will normally be attempted. Several distinct issues arise.

Cases in Which Substantive Jurisdiction is Founded on Waiver. It is clear law that sovereign immunity can be waived by the appropriate official of the foreign state. However, it is also clear that waiver of immunity from jurisdiction does not per se entail waiver of immunity from execution of any resulting judgment; for that a separate waiver is required. This rule seems to have been established at common law,[210] and is adopted by the U.S. Foreign Sovereign Immunities Act,[211] the UK State Immunity Act,[212] and the European Convention on State Immunity.[213] It is also the rule applied in the analogous context of diplomatic and consular immunity.[214]

[208] *Supra*, text to notes 8–11 and 41–43.

[209] Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95, Art. 31; Vienna Convention on Consular Relations, 1963, 596 UNTS 262, Art. 43. On the position of a foreign head of state, cf. 7 BRITISH DIGEST OF INTERNATIONAL LAW 96–120 (1965); State Immunity Act, 1978 (UK), §20.

[210] *Supra* note 149.

[211] 28 U.S.C. §1610(a)(1) and (b)(1). Unlike waiver of immunity from prejudgment attachment, this waiver may be implied. But the Act, in distinguishing waiver of jurisdictional immunity from waiver of immunity from execution, does not encourage the argument that the former entails or implies the latter. Nonetheless, in *Birch Shipping Corp. v. Embassy of Tanzania* (Misc. No. 80–247 (D.D.C., Nov. 18, 1980)) it was held that submission to arbitration in the United States entailed waiver of immunity from execution of the resulting award.

[212] Section 13(3).

[213] *Supra* note 7, Art. 23.

[214] Vienna Convention on Diplomatic Relations, *supra* note 209, Art. 32(4); Vienna Convention on Consular Relations, *supra* note 209, Art. 45(4).

The point is expressly accepted in Sompong Sucharitkul's Second Report on Jurisdictional Immunities of States and Their Property:

> It is clear that while "jurisdiction" covers "execution", the immunities of States from one are entirely distinguishable and separate from the other. Thus, waiver of immunity from jurisdiction does not imply consent or submission to measures of execution. Similarly, the court of the territorial State may in a given situation decide to exercise jurisdiction in a suit against a foreign State on different grounds, such as the commercial nature of the activities involved, the consent of the foreign State, voluntary submission, or waiver, but will have to reconsider and re-examine the question of its own competence when it comes to execute the judgment so rendered. It will be seen that at a later stage of execution, the immunities attributable to State property will vary with further distinctions to be made of the types of State property which may or may not be susceptible to measures of execution.[215]

The proposition that waiver of immunity from jurisdiction does not entail waiver of immunity from execution is thus well established.[216] It is also acceptable in principle. A state not subject to local jurisdiction might reasonably be prepared to have a dispute settled by the courts and to comply with any resulting judgment, without subjecting itself to the risk of losing control over important assets through attachment or execution. In any event, under a regime of restricted immunity the problem of waiver is greatly reduced. A state is much less likely to concede foreign jurisdiction over acts strictly *jure imperii*. Similarly, the pressure, sometimes evident under the older doctrine, to manipulate waiver to achieve an erratic form of restrictive immunity disappears.[217] Reduced to its proper dimensions, waiver should become a problem of drafting and construction rather than policy.[218]

Diplomatic and Consular Immunities. Clearly, execution is not available against property or persons to the extent that they are protected by diplomatic or consular immunity.[219]

[215] Sucharitkul, *supra* note 170, at 15. Despite its caution, the passage suggests an approach to immunity from execution consistent with that advocated here.

[216] Bouchez, *supra* note 175, at 21–25 agrees, though he is critical of the rule. Earlier accounts of waiver include Dickinson, *Waiver of State Immunity*, 19 AJIL 555 (1925); Waring, *Waiver of Sovereign Immunity*, 6 HARV. INT'L L. CLUB J. 189 (1964–65).

[217] *Cf.* Enderlein, *supra* note 174.

[218] As Weinstein D.J. said in *Harris v. VAO Intourist Moscow* (481 F.Supp. 1056, 1058 (E.D.N.Y. 1979)), implicit waivers by the performance of commercial conduct are not consistent with the 1976 Act. But problems of waiver have continued to arise, in some cases with disconcerting results. In *Iputrade Int'l S.A. v. Federal Republic of Nigeria* (465 F.Supp. 824 (D.D.C. 1978)) the court seems to have held that a waiver of immunity from Swiss jurisdiction entailed a waiver from U S. jurisdiction to enforce the Swiss award. This decision was criticized in *Verlinden B.V. v. Central Bank of Nigeria* (488 F.Supp. 1284, 1300–02 (S.D.N.Y. 1980)), but was followed in rather different circumstances in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahurya* (482 F.Supp. 1175, 1178 (D.D.C. 1980)). On another point, see *In re . . . Amoco Cadiz* (491 F.Supp. 161 (N.D. Ill., E.D. 1979) (suing as plaintiff deemed waiver of sovereign immunity in respect of separate actions arising from same facts)). On the problem of waiver of immunity from prejudgment attachment, see *infra* note 252. *See also supra* note 211.

[219] Vienna Convention on Diplomatic Relations, *supra* note 209, Arts. 22, 30; Vienna Convention on Consular Relations, *supra* note 209, Art. 31 (a more restricted immunity). For discussion, see the *Philippine* decision of the German Federal Constitutional Court, 38 ZaöRV

State-owned Commercial Ships. As has been seen, there is a considerable body of authority, international as well as domestic, permitting the attachment of foreign state-owned commercial ships in actions relating to the ship, without any further jurisdictional restrictions than the presence of the ship within a port, roadstead, or the internal waters of the forum.[220] If international law allows a state to exercise civil jurisdiction over matters arising out of the commercial use of a state-owned trading ship, then it seems likely that it also allows that jurisdiction to be enforced by the arrest of and execution against such a ship. This would be so irrespective of whether any more general immunity from execution is required or recognized.[221]

Warships and Other Public Ships. By contrast, the immunity from civil arrest or execution of warships and other (noncommercial) public ships is well established.[222]

State Property Used for "Public Purposes." A substantial body of practice supports the proposition that state property or funds set aside for purposes that would be immune from jurisdiction (if a dispute arose concerning the use of the property or funds for those purposes) will also be immune from execution in the absence of waiver. This is the position taken in the Soviet treaties, which (with one, possibly inadvertent, exception) restrict execution either to property used and funds acquired by the relevant Trade Delegation in the course of its nonimmune trading functions,[223] or which, while allowing execution against Soviet property generally, except property that "in accordance with international practice" is "intended solely for the exercise . . . of the political and diplomatic rights" of the Soviet Union.[224] Similarly, section 13(4) of the UK State Immunity Act allows execution against "property which is for the time being in use or intended for use for commercial purposes." The U.S. Foreign Sovereign Immunities Act is, in one sense, at least, more restrictive: execution is available only against the state property actually "used for the commercial activity upon which the claim is based."[225] The Swiss and West German case law are in general agree-

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at 279–80, concluding that "property which a sending State uses to carry out its diplomatic functions has the protection of sovereign immunity even if it is not included in the property or located in the premises described as entitled to [diplomatic] immunity in Art. 22 of the Vienna Convention." And *see* Salmon, *Les Relations entre l'immunité de juridiction de l'Etat et les immunités diplomatiques et consulaires*, in L'IMMUNITÉ DE JURIDICTION ET D'EXÉCUTION DES ETATS, *supra* note 122, at 73 *passim*.

[220] *Supra*, text to notes 1–7.

[221] Of the bilateral treaties discussed above, only a few Soviet merchant shipping treaties limit arrest of state commercial ships; *supra* note 43. The matter is not expressly covered by the U.S.-USSR Agreement on Maritime Matters, Oct. 14, 1972, 23 UST 3573, TIAS No. 7513, though the effect of the parties' stated policies on immunity of ships would be that the restrictive rule would apply; *cf.* TIAS No. 7513 at 74–75, 97.

[222] Brussels Convention concerning the Immunity of State-owned Ships (1926), *supra* note 2, Art. 3; Geneva Convention on the Territorial Sea, *supra* note 1, Arts. 22–23. *Cf.* T. K. THOMMEN, *supra* note 4, at 3–8; Seidl-Hohenveldern, *supra* note 89, at 56–57.

[223] *Supra*, text to notes 34–43. The exception is the Protocol of 1961 with Togo, *supra* note 35.

[224] *Supra* notes 25, 35.

[225] *Supra* note 59. This requirement might cause difficulty if the property in question had been converted to public use. *Cf.* Flota Maritima Browning de Cuba S.A. v. Republic of Cuba, [1962] Can. S. Ct. 598. For the treatment of instrumentality property, see *infra*, text to notes 239–42.

ment on this point (though there is, it seems, a difference in presumption of use). If one interprets the French cases as allowing "private" state assets to be seized if they are sufficiently distinguished from assets or property used for public purposes, then they support the West German position.[226]

This restriction on execution is supported also by the underlying rationale of immunity, and by the arguments outlined already on the relation between jurisdiction and execution. It is strengthened by the established analogy of public ships. For these reasons, I suggest, it can be regarded as established.

Considerable problems of implementation remain. The clearest case of availability of assets for execution will be where specific state property has been used for the nonimmune activity that is the subject of suit (indeed, in the United States this is the *only* case of availability). The more removed the property from the activity, the more difficult it may be to show liability to execution. A brief account will be given of some of the problems that occur.

Mixed Government Accounts. The most frequent practical problem is that of mixed funds, or of property put to mixed use. In the West German decision of 1977, the bank accounts were said to contain funds used for trading purposes and others used for general diplomatic purposes. It has been suggested that in such a case the fund ought to be liable to attachment *to the extent* it can be shown to have been used for purposes that are not immune.[227] This presents obvious difficulties in the case of indivisible property, and it creates evidentiary problems that might well be insoluble without extensive discovery, including discovery of noncommercial documents.[228] The better view may be that only state property that can be shown to be substantially devoted to nonimmune use should be liable to execution. This was the view taken by the West German Federal Constitutional Court.[229] It is also consistent with the position of the Cour de Cassation in *Clerget* and subsequent cases. On the other hand, the Swiss cases, perhaps because of their requirement of a specific jurisdictional link, require some precise designation of the fund to public purposes. A general fund not so designated is thus available for attachment.[230] The same view has been taken by a United States district court, which allowed the attachment of a mixed embassy fund on the ground that to allow immunity would permit a foreign state to avoid

[226] *Supra*, text to notes 98–118. The English cases have not confronted the problem with any clarity, but the courts are unlikely to take a different position.

[227] Del Bianco, *supra* note 59, at 117.

[228] The problem of procedural immunities of foreign states is a neglected one. On the U.S. position, see Brower, Bistline, & Loomis, *supra* note 130, at 207–08. On the UK, cf. State Immunity Act, 1978, §13(1). For the problem of foreign state privilege from disclosure in litigation between other parties in England, see Buttes Gas & Oil Co. v. Hammer (No. 3), [1980] 3 W.L.R. 668 (C.A.).

[229] *Supra*, text to notes 95–97. For commentary, see Ress, *Entwicklungstendenzen der Immunitat ausländischer Staaten*, 40 ZaöRV 217, 271–75 (1980) (English summary), who regards the Court's decision as "cautious and aimed at avoiding an eventual erosion of the legal institution of immunity as a whole." Seidl-Hohenveldern, *supra* note 84, at 70–71, criticizes the Court's adoption of a "purpose" test, which should be restricted to the context of diplomatic property. It is suggested that the formula proposed here to a large extent overcomes that difficulty.

[230] *Supra*, text to notes 78–88.

all execution against funds by maintaining mixed accounts.[231] On what basis this justified attaching the *whole* fund is not clear.[232]

I would suggest that this view is satisfactory only to the extent that it relates to property or assets not in use for any particular purpose at all (for example, vacant land or fixed term deposits). Once assets are shown to be used in some part for immune purposes, then unless the nonimmune portion can be ascertained and severed, the whole item or fund is immune. Whether a liquid fund can be severed in this way will depend as much on availability of evidence and the problems of discovery as on any underlying principle. But as O'Connell pointed out, the effect is likely to be that, in proceedings against a foreign state (as distinct from a separate state instrumentality), execution will only be available in restricted cases.[233]

Central Banks. Section 14(4) of the UK State Immunity Act exempts from execution "property of a State's central bank or other monetary authority." Section 1611(b)(1) of the U.S. Foreign Sovereign Immunities Act similarly exempts property "of a foreign central bank or monetary authority held for its own account." The ordinary functions of a central bank or monetary authority are quite clearly governmental for the purposes of any distinction between "governmental" and other transactions of a state. Since central bank property and funds are likely to be of a mixed or undivided character, it follows that they would usually be immune, whatever rule of immunity might be adopted. To this extent, it seems that these provisions represent the general position rather than an arbitrary exception.[234]

As we have seen, in *Trendtex Trading Corp. v. Central Bank of Nigeria*, the Court of Appeal upheld an interim injunction restraining the removal from the jurisdiction of funds in a Central Bank account.[235] No very explicit consideration was given to the enforcement problem in that case, but in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, it was argued that the statutory provisions exempting central banks had in some way changed international law on the matter. Lord Denning M.R., in rejecting this argument, pointed out that the United States Act excluded only property held by a central bank or monetary authority "for its own account," and cited the congressional Explanatory Memorandum, which states that the term includes only

[231] Birch Shipping Corp. v. Embassy of Tanzania, Misc. No. 80–247 (D.D.C. Nov. 18, 1980).

[232] The attachment would not have been available under §1610(a)(2), since the fund was not "used for the commercial activity upon which the claim was based," but was justified under §1610(a)(1), pursuant to the finding that the defendant state had waived its immunity from execution (*supra* note 211). But this substantially answers the argument from effectiveness: there is no rule that a waiver should be "effective" beyond its terms.

[233] ILA, *supra* note 161, at 27–28, 30. And *cf.* Higgins, *supra* note 60, at 50.

[234] Thus, in *Blagojevic c. Banque du Japon* (1976), 66 REV. CRITIQUE DROIT INT'L PRIVÉ 359 (1977), the Cour de Cassation accorded immunity to the Bank of Japan in an action arising out of the bank's exercise of exchange control functions. *Cf.* the United Kingdom Attorney-General, Sir Michael Havers, 949 PARL. DEB., H.C. (5th ser.), col. 417 (1978): "It has always been accepted that for the purposes of enforcement of judgments the funds belonging to a State's central bank are regarded as the property of that State. . . ." On the U.S. Act, cf. del Bianco, *supra* note 59, at 116–18.

[235] *Supra*, text to notes 153–59.

> funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.[236]

On the other hand, the English Act was only prospective in effect. He concluded:

> I would say that the English Act is not applicable to the transactions in this case. So far as the American statute is concerned, it seems to me that it does not apply to this case at all because it can be argued that these funds are not being held by the Central Bank of Nigeria "for its own account". They are held not for its own central banking activities but for the activities of Government departments in Nigeria.
>
> Apart from these two grounds, it seems to me that the international law remains as I stated it in the *Trendtex* case. We had before us a decision of the Provincial Court of Frankfurt in which (in a precisely similar case to ours) an injunction had been granted: and in the *Trendtex* case (operating as we thought in accordance with international law as it then stood) we granted an injunction. It seems to me that the latest statutes of the U.S. and of our Parliament are not sufficient to alter the international law as we stated it.[237]

Despite appearances, it could not seriously be argued that the two municipal statutes had the effect of *changing* international law. But they do support the view that, at least in most cases, property or funds of central banks or monetary authorities must be immune from jurisdiction under general principles of immunity, since such property or funds are ordinarily in use for public or governmental purposes. In practice, foreign central bank funds are usually mixed funds (*i.e.*, bulk accounts not earmarked for any specific purpose), and it is likely to be difficult to distinguish central bank funds as set aside for commercial purposes.[238] On the other hand, no magic attaches to the label "central bank"; the question must always be whether a particular function or use of property is immune in accordance with the criteria suggested here. There is no reason why a special or earmarked fund held for nonimmune purposes by a central bank should not be liable to execution. This is, however, an unlikely possibility.

Other State Instrumentalities. Both reason and practice support the suggestion that property or funds of separate state instrumentalities, engaged in nonimmune transactions, should be more generally available for execution in respect of transactions of the instrumentality. When an instrumentality is substantially engaged in trade, its property is presumptively set aside

[236] [1979] 2 Lloyd's L.R. 277, 278–79 (quoting [1976] U.S. CODE CONG. & AD. NEWS 6604).

[237] *Id.* at 279. Waller L.J., rather more tentatively, agreed, as did Cumming-Bruce L.J.

[238] *Cf.* the Libyan State Bank's position in the *LIAMCO* case, *supra* note 118. And *see* the Note in 50 BRIT. Y.B. INT'L L. 221 (1979). *See also* Arts. 12 and 15 of the Swiss-Hungarian treaty of 1950, *supra* note 46. Article 15 precludes attachment of Central Bank assets in actions against separate state instrumentalities. Article 12 prohibits attachment of funds in specified Central Bank accounts.

for that purpose. No such presumption exists in the case of state property, hence the requirement that the dispute relate to the property, or that the property be set aside independently for nonimmune use. It is on this basis that the two leading decisions of the French Cour de Cassation can be reconciled.[239] The same distinction is evident in the U.S. and Soviet treaties, and in the Foreign Sovereign Immunities Act. Under the Act, *all* property of a foreign state instrumentality is liable to execution, in respect of a nonimmune transaction by the instrumentality.[240]

It should be emphasized that this distinction, which is fully supported in the case law, does not depend on the corporate personality of the state instrumentality but on the fact of its separate organization. It is not an exception to the "public use" rule but an application of it. Obviously, the "fact" of separate legal personality must be taken into account, but that "fact" is easily manipulated and cannot be decisive. Cases such as *Krajina v. Tass Agency*[241] demonstrate this clearly. If the Tass Agency had been separately incorporated, it would almost certainly not have been held to be immune in that case—but its incorporated status, or lack of it, was not relevant to any real issue there.

Whether the assets of a separate state corporation should be available for execution pursuant to claims against the state itself or other instrumentalities, is a different question. In the first instance, it must depend upon the status and organization of the instrumentalities, and upon the extent to which the ordinary law of the forum allows recourse to assets in this way. It might be thought that the objection of nonopposability, raised by the 11 Libyan instrumentalities in the *LIAMCO* case, was a cogent one.[242]

Cases Not Involving Execution Against State Property. Finally, and for the sake of completeness, it should be noted that certain cases of execution may not directly involve state property. For example, a set-off in an allowable counterclaim in proceedings with a state does not to that extent involve any execution: it simply defeats, *pro tanto*, the state's competing claim. Equally, payment out of a fund in the control of the court, even where the payment is adverse to a state's claim, does not involve execution against the state unless it is the owner of the fund.[243]

[239] *Supra*, text at note 110.

[240] *Supra* note 59. And *see* J. Thompson, *The Status of Legal Entities in Socialist Countries as Defendants under the Foreign Sovereign Immunities Act of 1976*, 12 VAND. J. TRANSNAT'L L. 165 (1979). On the question whether separate instrumentalities are exclusively covered by the 1976 Act or are subject to a cumulative jurisdiction under other provisions (*e.g.*, as a "subject of a foreign state"), see Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979); Rex. v. Cia. Peruana de Vapores, S.A., 493 F.Supp. 459 (E.D. Pa. 1980).

[241] [1949] 2 All E.R. 274 (C.A.).

[242] *Supra*, text to notes 116–18. *Cf.* Art. 15 of the Swiss-Hungarian treaty, *supra* note 46, to this effect. *See also* Huberlant & Delperée, *Les Personnes de droit public bénéficiaires de l'immunité d'exécution*, in L'IMMUNITÉ DE JURIDICTION ET D'EXÉCUTION DES ETATS, *supra* note 122, at 211–56; Bouchez, *supra* note 175, at 28; United Euram Corp. v. U.S.S.R., 461 F.Supp. 609 (S.D.N.Y. 1978).

[243] *Cf.* Larivière v. Morgan, (1872) L.R. 7 Ch. App. 550; United States v. Harris & Co. Advertising, Inc., 149 So.2d 384 (1963); Procureur-Générale c. Vestwig, 73–76 J. DROIT INT'L 4 (1952).

THE PROBLEM OF PREJUDGMENT ATTACHMENT

Prejudgment attachment of state property presents complex problems requiring further study: however, the availability of such attachment must be at least generally dependent on the conclusions already reached as to final execution.

Prejudgment attachment, for our purposes, takes at least three distinct forms; and the immunity rule may differ for each.

(1) Attachment of Property ad fundandam jurisdictionem

In some jurisdictions, property of a defendant may be seized and made the basis for jurisdiction against that defendant even where in personam jurisdiction would not be available. This is the case in the law of Scotland and South Africa (both influenced by the civil law); its U.S. equivalent is quasi in rem jurisdiction. However, it has no direct analogue at common law (apart from actions in rem against ships, to be discussed shortly). So far as the law of sovereign immunity is concerned, the permissibility of such seizure would seem to depend upon whether state property is immune from seizure for the purposes of execution.[244] Still, there is a further possible restriction, a matter of the international law of jurisdiction: it is by no means clear that a state could properly claim to exercise jurisdiction over a defendant in respect of acts unconnected with that state, simply on the basis that some property of the defendant happened to be within the state. At least, the action might have to relate to the property in question.[245]

To the extent, then, that attachment *ad fundandam jurisdictionem* has a merely notional or transient effect on the state's enjoyment of the property, it would appear to be subject only to the rules relating to the acquisition and exercise of jurisdiction over (as distinct from execution against) a foreign state. To the extent that it allows a more permanent arrest of property (with consequent deprivation of use), it is harder to justify on purely jurisdictional grounds, and the rules relating to execution may well become relevant.[246]

[244] Unless the attachment is purely notional, without effective seizure and detention of the property. Under the Scots procedure of arrestment, the property is released as soon as the defendant enters an appearance. At a time when the United States still adhered to the rule of immunity against execution, quasi in rem attachment of state property was nonetheless allowed in order to attract substantive jurisdiction; M. WHITEMAN, *supra* note 31, at 711–12. The Foreign Sovereign Immunities Act abolishes prejudgment attachment in all cases (§§1609–1611), providing instead more extensive methods of obtaining in personam jurisdiction by service of process (§1608).

[245] *Cf.* Ibrahim Shanker & Co. v. Distos Compania Naviera S.A. (*The Siskina*), [1978] 1 Lloyd's L.R. 1, 5–8, per Lord Diplock.

[246] *Cf* Brasseur v. Republic of Greece (1933), 59 J. DROIT INT'L 1088 (1932), 6 ANN. DIG. 164, 167 (1938) (Civil Tribunal of Brussels). However, the U.S. position after 1952 allowed quasi in rem proceedings against foreign states (with consequent interim attachment of property), even though final execution was precluded; *see* M. WHITEMAN, *supra* note 31, at 709–15. And *cf.* Braden Copper Co. v. Groupement d'Importation des Métaux (Trib. Gr. Inst. 1972), 12 ILM 187 (1973).

(2) Attachment of Government-owned Trading Ships

Attachment of ships serves the dual purpose of attracting jurisdiction over a foreign defendant who otherwise may not be amenable to suit, and of placing a fund (the ship or a bond given in substitution for it) in the custody of the court, out of which any eventual judgment may be obtained.[247] This form of attachment of state trading ships has been seen to be generally, though not universally, accepted.[248] It seems to be a concomitant of the very liberal rule of jurisdiction that the claim in question should relate to the use of the ship (or a sister ship).

(3) Attachment in Aid of Execution

The procedure of interim attachment of property in aid of execution is found in a number of legal systems. Perhaps the best known example is the French procedure of *saisie conservatoire.* Until recently, no common law equivalent existed, but since 1975 the remedy of an interim injunction—the so-called Mareva injunction—restraining removal of assets from the jurisdiction has been developed.[249] Although this operates formally in personam, its effect on property is very similar to a conditional attachment, and it should probably be assessed on this basis.

If particular state property is liable to final execution in a matter, then, unless some positive rule to the contrary can be established, it would seem to follow that the property should be liable to prejudgment attachment in aid of execution (subject to suitable guarantees such as the payment of costs if the plaintiff is unsuccessful, respect for other jurisdictional immunities, and the availability of judicial machinery to scrutinize claims for *bona fides*). There is at least some practice in favor of a positive rule precluding pre-

[247] For the related machinery of maritime liens, cf. the decision of the Privy Council in Bankers Trust Int'l Ltd. v. Todd Shipyards Corp., [1980] 3 W.L.R. 400.

[248] *Supra*, text to notes 1–7, 41–43.

[249] On the Mareva injunction, see generally Mareva Compania Naviera S.A. v. International Bulk Carriers Ltd., [1975] 2 Lloyd's L.R. 509; Rasu Maritima S.A. v. Perusahaan Pertambangan Minyakdangas Bumi Negara, [1977] 3 W.L.R. 518; Ibrahim Shanker & Co. v. Distos Compania Naviera S.A. (*The Siskina*), [1978] 1 Lloyd's L.R. 1; and Bin Turki v. Abu-Taha, [1980] 1 W.L.R. 1268. Despite a critical tendency in the speeches of Lords Diplock and Hailsham in *The Siskina*, the procedure seems to be well established. There are difficulties, however, in its application to state property. Since it operates in personam, it may not be available in respect of state property held by the state itself (as distinct from property held by a state instrumentality or third person), if only because of the difficulty of finding an appropriate person to enjoin. Secondly, even if, at common law, final execution is available against state property, a Mareva injunction cannot be obtained unless there is some evidence that the defendant will default. It could not simply be assumed, against a foreign state or instrumentality, that it intended to defeat the forum's jurisdiction by removing property or assets. As Lord Denning M.R. said in *Etablissement Esefka et Cie v. Central Bank of Nigeria*, in the absence of evidence to the contrary, "it would not be right to say that the government of Nigeria would not honour its obligations or that there is any risk of its dishonouring its obligations if it is found to be liable by this Court." [1979] 1 Lloyd's L.R. 445, 445. Lawton L.J. agreed.

Apparently, the point was not taken by counsel in the *Hispano Americana* case. But a similar position was taken by the District Court of Amsterdam in 1978; Kingdom of Morocco v. Stichting Revaliditie Centrum "de Trappenberg," 10 NETH. Y.B. INT'L L. 444 (1979).

judgment attachment: most of the Soviet Union's treaties expressly exclude it,[250] and it seems not to be available under the UK State Immunity Act.[251] The Foreign Sovereign Immunities Act excludes prejudgment attachment in aid of execution in the absence of a distinct, explicit waiver.[252] However, if international law does not preclude final execution against state property, it would seem strange that it should preclude a state from taking interim measures, in case of need, to make that final execution effective. The point is by no means settled, but the same structural argument applies here as in relation to final execution: it is doubtful whether a domestic court would be persuaded, on the limited material available, that it was required to refrain from preserving its (*ex hypothesi*, accepted) power of final execution. This view has certainly been taken in the European cases, very many of which have involved interim attachment or *saisie conservatoire.* In general, considerations of immunity from execution have been applied without distinction to interim attachment and final execution, and it is suggested that this is the preferable view.

[250] *Supra*, text to notes 21–22, 35–38.

[251] Section 13(2)(a) of the Act prevents relief from being given "against a state by way of injunction or order for specific performance or for the recovery of land or other property," and the exceptions to immunity from execution in section 13(4) do not apply to section 13(2)(a). Clearly enough, this prevents a Mareva injunction against a state as such; the question is whether it prevents such an injunction against a nonstate defendant (other than a central bank) in respect of state property. That depends on whether an (indirect) restraint on state property is relief "against a state," since it is clearly not "for the recovery of land or other property." During the parliamentary debates on the State Immunity Bill, Lord Wilberforce proposed the insertion of "(a) or" in what is now section 13(4) of the Act, to achieve this result; 389 PARL. DEB., H.L. (5th ser.), cols. 1935–38 (1978), on the ground that "the courts ought not to be deprived of the power to freeze assets in this country where there is a genuine and properly constituted dispute in which a State may be involved." His concern was mainly with cases in which the person enjoined was not the state (col. 1937). There was support for this view (*e.g.*, Havers, 949 PARL. DEB., H.C. (5th ser.), col. 417 (1978)), but the amendment was not passed.

[252] 28 U.S.C. §1610(d). *Cf.* del Bianco, *supra* note 59, at 143–44; Smit, *supra* note 130, at 67. It is still unclear whether the Iranian treaty (*supra* notes 29–30) entails waiver of prejudgment attachment. The reference to "immunity . . . from . . . execution of judgment, or other liability to which privately owned and controlled enterprises are subject" has been agreed not to constitute an "explicit waiver," but the statutory requirement of an explicit waiver does not apply to "existing international agreements" waiving immunity (§1609). In *Behring Int'l Inc. v. Imperial Iranian Air Force* (475 F.Supp. 383, 394–95 (1979)) the court held that on "ordinary principles of construction" Article XI(4) of the Iranian treaty did waive immunity from prejudgment attachment. But in three other cases it was held that the exceptional nature of prejudgment attachment against state property, in the context of the treaty, entailed its own standard of explicitness which Article XI(4) failed to meet; Reading & Bates Corp. v. National Iranian Oil Co., 478 F.Supp. 724, 727–29 (S.D.N.Y. 1979); E-Systems Inc. v. Islamic Republic of Iran, 491 F.Supp. 1294, 1300–01, 1303–04 (N.D. Tex. 1980); New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F.Supp. 120 (S.D.N.Y. 1980), 19 ILM 1298, 1307–11 (1979). Clear analysis has not been assisted by the failure to see the limited extent, *ratione personae*, of the treaty waiver; *supra* note 30.

ANNEX 116

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An activist revival in central banking? Lessons from the history of economic thought and central bank practice

Lilia Costabile and Gerald Epstein

1. Introduction

The financial crisis of 2008 has shaken up the world of central banking. Not only were central bankers in the United States, United Kingdom, and Europe widely criticised for failing to prevent the meltdown, but they have been also roundly denounced for spending billions of dollars to bail out financial institutions, while the mass of citizens and many businesses have been severely damaged by the crisis with little apparent help from their governments.[1]

In response to the criticism and crisis, as well as to the grim reality of a crashing economy, central banks, especially in the crisis epi-centres of the United States, United Kingdom, and Europe, have had to throw out their old rule books that governed monetary policy, and engage in some previously unthinkable policies. Starting with the widespread bail-outs of banks and other financial institutions and markets, central banks implemented experimental programmes including Quantitative Easing, new lending

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1 The term "bail-out" might seem misplaced, since the Bagehot Rule for lender of last resort activities prescribe lending only to illiquid but not insolvent institutions. But in the case of the US in 2007–2008, this prescription was not always followed. Charles Kindelberger suggests that blurring this distinction is not unusual and he is probably correct when he wrote that, when it comes to central bank lender of last resort activities, "the only rule is that there are no rules" (Kindleberger 1978, p. 23).

facilities for various financial institutions, and are now pursuing the highly controversial policy of negative nominal interest rates.

All of these experiments are a far cry from the conventional wisdom governing central bank policy just prior to the crisis. As Olivier Blanchard, former chief economist at the IMF, put it:

> Before the crisis, mainstream economists and policymakers had converged on a beautiful construction for monetary policy. … we had convinced ourselves that there was one target, inflation. There was one instrument, the policy rate. And that was basically enough to get things done. If there is one lesson to be drawn from this crisis, it is that this construction wasn't right, that beauty is unfortunately not always synonymous with truth.

Blanchard concludes: *The fact is that there are many targets and there are many instruments* (emphasis added).[2]

Thus, in response to the crisis, the issues, both of central bank objectives and central bank instruments, have been put squarely on the agenda – not out of choice, but out of necessity. This experimentation and search for new targets and instruments are not unprecedented in the world of central banking. In fact, we argue that there has been a long-standing movement in the world of central banking –both in theory and in practice – between two poles: *minimalism and activism*. Even within the twentieth and the very short twenty-first century, we can see the outlines of this spectrum and movements back and forth along it: from the commitment to the maintenance of the international gold standard at the turn of the twentieth century and following the "rules of the gold standard game" presumed during that period, to the neo-Keynesian interpretations of Paul Samuelson, James Tobin, Franco Modigliani, and Robert Solow, which called for monetary policy "fine-tuning", to the "monetarist" counter-revolution of Milton Friedman and followers. Parallel to this dance in the developed countries, was a trend towards "developmental", activist central banking in the developing world, exemplified by the work of Arthur Bloomfield at the New York Federal Reserve, Robert Triffin in the U.S. Treasury Department and Albert Hirschman of the Institute for Advanced Study in Princeton.[3]

In the second half of the twentieth century and early twenty-first century, we have had a second movement and reaction along this spectrum: the minimalist approach embodied in Inflation Targeting (*IT*) – which won the day in many developed and developing countries as the dominant approach to monetary policy. And now, this minimalist approach has been

2 Blanchard (2011).
3 See Epstein (2007), Helleiner (2003, 2014), Alacevich and Asso (2009).

strongly challenged by the radical responses to the great financial crisis. Where this movement will come to rest is completely unclear.

In this paper, we suggest that one particular subset of activist policies, namely those aimed at the promotion of economic growth, may be of particular interest for central banks today. We illustrate the scope of these policies both in theory and practice, through an investigation combining the history of economic thought perspective with historical analysis.

To do this, we first introduce the "minimalist – activist" spectrum as an analytical prism through which to view some key aspects of central banking theory and practice, and show how the concepts of minimalism and activism emerge from the history of monetary thought. Then we adopt this distinction as an organising principle for the analysis of some historical episodes in monetary policy and central banking practices that better illustrate the activist approach we propose in this paper.

To keep things manageable, we concentrate on three aspects of this larger set of issues.

First, we focus on the "activist" end of the spectrum, with the minimalist approach only serving as a term of comparison.

Second, we focus on one activist goal: *economic growth*. Although "activism" in central banking has multiple goals, in this paper, we select growth because we wish to call attention to this relatively unexplored objective of central bank policies. For instance, the Monetarist–Keynesian controversies mainly focused on other objectives such as full employment, the stabilisation of cycles, or balance of payments equilibrium. By contrast, one of our main objectives here is to show that at some important historical junctures, central banks have been prime actors of development and growth. They pursued growth strategies through combinations of macroeconomic policies and specific actions for promoting priority sectors and/or geographical areas, including through banking allocation techniques and their influence on banking policies. Thus, after illustrating the meaning of activism and minimalism in their wider sense, in this paper, we adopt a restrictive definition of "activism" as limited to growth and developmental objectives.

From this, our choice to concentrate on the work of one economist, Dennis Holme Robertson, follows naturally. Robertson's theory provides the best rationale for the central bank policies we focus on. He contemplated full employment and wanted to put people to work, but he always thought of this objective as part of the wider goal of promoting growth. Also, he was aware that this goal requires that central banks and the banking system combine macroeconomic policies with selective measures of credit allocation in order to privilege basic or dynamic sectors in the real sector of the economy. Thus, not merely for space reasons, but mainly because Robertson is the most congenial author to our objectives in this

paper, do we deal in some detail with his approach to "activism". We leave to another occasion the illustration of other architects of "activism" in the wider sense of our term.

This paper is organised as follows. In Section 2, we first define what we mean by the minimalist and activist spectrum. In Section 3, we take up the main focus of the paper: the "activist" approach, and discuss some key aspects of Dennis Robertson's theory as an example of theoretical foundations for an activist approach to central banking. By way of comparison, we also discuss briefly the work of von Mises as an example of the minimalist approach. We next turn from theory to practice. In Section 4, we show how activist approaches oriented towards growth and development motivated central banks in the early post-First World War period, and illustrate the specific techniques they adopted. Section 5 concludes.

2. Minimalism vs. activism in central banking

As is well known, "minimalism" has a long pedigree in the history of thinking about monetary policy, going back at least to the writings of David Hume, and represented, most recently, in the perspectives of advocates for inflation targeting. The key idea is that the capitalist economy maintains full employment and economic stability and achieves maximum economic growth through market mechanisms, with no room or need for policies by the central bank. In the absence of a commodity standard, however, there is one and only one role for the central bank: namely anchoring the price level. According to subscribers to "minimalism", attempts by the central bank to be active in achieving other goals – with the possible exception of acting as a lender of last resort (which we mention below) – is most likely to lead to inefficiency, instability, and even crisis.

"Activism" in central bank theory and policy, on the other hand, also has a significant historical trail. Its roots go back to the seventeenth and eighteenth centuries, when economists started to learn the new possibilities opened up by credit systems, paper money, and monetary management. Limiting ourselves to the English-speaking world, and to authors already acquainted with central banks, we may go back at least to John Law.[4] In the same line, we may also mention the "populist" theorists in the late nineteenth century in the United States, while a thicker history started in the turn of the twentieth century.[5]

From a theoretical perspective, advocates of a more activist central bank have a dimmer view of the efficiency, stability, development, equity, and

4 Murphy (1997), Schumpeter (1954, pp. 321–2).
5 See Goodwyn (1976).

growth characteristics of capitalist market processes, in general, and private finance in particular, than do most of the "minimalist" theorists. Active central banks, according to these theorists, can play an important role in promoting employment, economic growth, and development, with more stability and, in some case, more equality. These activist central banks' functions include their ability to create liabilities that are accepted as money "by manipulating their own balance sheets"; their ability to channel liquidity either to individual banks or, through open market operations, to the market as a whole; their traditional role in financing public expenditures and, at the same time, disciplining State finances; their function as selective credit allocators (Goodhart 2010). This wide spectrum of objectives and functions contrasts sharply with the one-objective one-instrument policy structure proposed by minimalists.

One area where there is some overlap between some minimalist and activist theorists is on the question of "lender of last resort" activities by central banks and their role in promoting financial stability. This is an important topic, but is one that requires a separate paper.

Here, for the reasons stated above, we focus on one version of activism: pro-growth activism. Our study of Dennis Robertson's thought in the next section proposes to clarify the theoretical foundations of this approach.

3. Robertson's activist approach to central banking

3.1 Monetary policy, growth, and cycles

Capitalist economies are dynamic economies: their very essence is a continuous push towards change and progress. And "the explosive forces of industrial progress" inevitably generate "industrial instability", that is, business cycles, as Robertson argued both in his *A Study of Industrial Fluctuation* written in 1915, and in *Banking Policy and the Price Level*, 1926.

Coherent with his approach to cycles as quintessential to growth, Robertson's prescriptions for central bank policy were innovative if not heretical, if judged with the lenses of monetary orthodoxy. He rejected monetary neutrality, and argued that the monetary authorities should not be fixed on the objective of stabilising prices (Robertson 1928b). Rather, they should expand the money supply to let prices rise as new productive capacity is built during expansions, via either capital widening (i.e. the absorption of a growing population into employment) or capital deepening (the production of new instrumental goods, usually embodying technical progress). And then they should keep the money supply constant when the increased output reaches the market, so as to let prices fall and induce some desirable distributional effects, to be described below.

Robertson also argued that in each historical episode, some specific sectors or firms work as the engine of growth. It follows that, if growth has to take place, resources have to be moved towards these expanding sectors and firms. Monetary policy should accommodate these re-allocations, for instance, encouraging banks to lend to firms in the dynamic sectors.

Let us analyse the theoretical foundations of these policy prescriptions in some detail.[6]

The following features of Robertson's model are relevant here.

First, growth involves a complex relationship between saving and investment. We must contemplate two cases, as growth may occur either in "equilibrium" or in "disequilibrium". [7]

Growth in equilibrium requires that the share of GDP that households decide to save is equal to and grows at exactly the same rate as the share that firms decide to devote to capital formation. This condition, if respected, also guarantees price stability. But, because firms and households are independent decision-makers, saving and investment decisions are not normally in equilibrium. Growth in equilibrium is the exception rather than the norm. Indeed, according to Robertson, "the preservation of even a stationary equilibrium would be something of a miracle" (Robertson 1954 [1956], p. 77).

If growth is normally a disequilibrium process, how are saving and investment brought into equality in growing economies? Robertson's answer was that individual saving decisions are not generally a binding constraint on growth, given that the production of capital goods is not normally financed by savings, but by bank credit. Saving adapts. Normally, if banks respond elastically to firms' demand for loans, the new injections of money raise the price level and reduce the real purchasing power of wages and other sticky incomes: income is redistributed in favour of profits. This process of inflation-cum-redistribution only stops when firms' savings out of inflation-induced profits equal their investment decisions. This clarifies why Robertson objected to a monetary policy aimed at the preservation of price stability. By imposing a restrictive stance on banks (for instance, through higher reserve coefficients), central banks would hamper the

6 Because our objective in this paper is to focus on Robertson's prescriptions for central bank policy in fully developed monetary economies, we leave out of our presentation some features of Robertson's approach, including his "type-of-economies" analysis, where he distinguished between co-operative and non-cooperative economies, barter and monetary economies. In terms of these distinctions, we concentrate on non-cooperative monetary economies.

7 Costabile (2005) presents a simple formal model encapsulating Robertson's ideas on growth. See also Costabile (1985, 1997) and the literature cited in these essays.

process of growth and hinder the increase in capacity and output that new capital goods bring about.[8]

Robertson was aware of the social costs of these policies of "forced levying" in the interests of capital accumulation. Consequently, he argued that they should not be pushed too far in "putting on the necks of economic subjects a heavier yoke than they have consciously consented to bear" (Robertson 1965, p. 361), because they have welfare costs and may cause political unrest. But Robertson's fundamental recommendation concerning these welfare issues was that, after facilitating growth in the ascending phase of the cycle with their expansionary monetary policies, central banks then keep the money supply constant and let prices fall after the increase in capacity and output has materialised, so as to promote a new redistribution of income, this time in favour of wage earners and other "fixed incomists". Thus, the sacrifices imposed on these classes and groups in order to make capital accumulation possible, would eventually be compensated by their participation in the fruits of economic growth. By contrast, firms' owners would reap all the benefits of economic progress if the money supply grew at the same rate as output.

In the light of his complex analysis, Robertson rejected price stabilisation as the overriding objective of monetary policy, both during the expansion and in the subsequent stage when the fruits of economic sacrifices appear in the form of a larger output. The "more scientific view", he argued, calls for a monetary policy aimed at stabilising "the price of productive capacity" rather than the price level (Robertson 1965, p. 356). Moreover, very interestingly, he even had doubts that price stabilisation was a feasible objective.[9]

The second feature of Robertson's model of interest here is his emphasis on structural change in the process of growth. In his view, the most

8 Notice that the interest rate as an equilibrating factor between saving and investment does not make its appearance in Robertson's work until the Thirties, particularly in his famous 1934 article (Robertson, 1934). From 1915 to the early Thirties, he worked with price variations as the equilibrating factors instead (see also Danes, 1979; Fellner, 1952; Robinson, 1946). Moreover, already in 1915, Robertson contemplated falls in the level of prices *and* the level of activity below full capacity in the course of downswings. Activity levels, he argued, adapt to changes in the demand for goods, not the other way around. He criticised the Law of Markets on this basis (Robertson 1915, pp. 5 and 200; see also Robertson [1926, pp. xii–xiii]). However, the capacity created in the upswing is never completely destroyed in the downswing. This is why economies grow and this is why Robertson's model is different from the Austrian model, as we will see below.

9 See his analysis of the reasons why the FED Governor, Strong, was unable to control the price level in the second half of the Twenties (Robertson, 1928b).

important key to growth is shifts in demand conditions for instrumental goods, giving rise to bursts of investment. These shifts may be due to various causes: a change in their *expected* yields, as a consequence of product innovation ("the railway, electric power, the diesel engine"), or "the wearing out of an unusually large number of the instruments of production in some important trade or groups of trades", or simply a revision in industrialists' "estimates" of future rewards (Robertson 1915, p. 157). Another cause of structural change is relative price effects. For example, when an increase in the "bounty of nature" lowers agricultural prices relative to industrial prices, industrialists may react to the rise in the relative price of their product by producing more in order to buy more "wheat" (Robertson 1915, p. 131). What all these cases show is that investment typically concentrates in some sectors or firms, while others lag behind. The implication is that pro-growth monetary policies should accommodate these movements, allowing the most dynamic firms and sectors to realise their desired investment projects.

Summing up, central banks have wide economic and social responsibilities, and for this reason they should *not* target price stabilisation under all circumstances. This is the foundation of Robertson's activist approach to central banking. By making investment independent from the general public's saving decisions, expansionary monetary policies finance growth out of equilibrium. It is a good thing if rising prices accompany the initial stages of economic expansions, because they provide finance for investment; and it is also a good thing if monetary policies let prices fall in the subsequent downturn, because falling prices in the presence of sticky wages raise the working classes' purchasing power. Moreover, selective policies may be needed to accommodate structural transformations.

This is Robertson's renderings of his own approach:

> I have tried not to take it for granted that the preservation of monetary equilibrium should be in all circumstances the overriding objective of policy in the wider strategic sense. Indeed, my little book on *Banking Policy and the Price Level* was written thirty years ago partly in order to suggest the contrary. Looking back on the history of capitalism, I should myself find it difficult to say dogmatically that such episodes as the English railway mania of the 1840s, or the American railway boom of 1869–71, or the German electrical boom of the 1890s, each of which drenched the country in question with valuable capital equipment at the expense of inflicting inflationary levies and adding to the instability of employment, were on balance a 'bad thing'. And in these more enlightened days if a community, even though making modest but steady progress, feels itself under an urgent need to equip itself rapidly with fixed capital instruments for purposes of defence, or for reaping the harvest of technical improvements in which it has for some reason lagged behind the rest of the world, the fact that a certain policy will involve monetary un-neutrality or disequilibrium cannot in my view be taken to be a decisive argument against it (…) we are far from being able

> to say that the amount of provision for the future which will be made by a free enterprise economy which preserves monetary equilibrium in any absolute sense is the 'right amount'. Thus the sort of analysis I have been conducting does not enable us to condemn off-hand Russian five-years plans, or Indian five-years plans, or any other nation's x- or y-year plans on the grounds that they are inflationary. (Robertson 1965, pp. 360–1)

3.2 Robertson and Mises

Robertson's innovative, farsighted stance of monetary policy becomes clearer if compared with the views of some of his contemporaries. Here, a comparison with Ludwig von Mises, one of the champions of minimalism, will help us better clarify the novelty of Robertson's approach.

Mises's main objective was price stability. Actually, his main preoccupation was "to erect safeguards against the inflationary misuse of the monetary system by the government and against the extension of the circulation of the fiduciary media by the banks" (Mises 1971, p. 410). In his view, expansionary monetary and banking policies were the main cause of economic cycles.

Thus, the first difference between the two authors is that, while Robertson viewed cycles as rooted in the technical and institutional structure of market economies, and indeed as a symptom of the system enduring propulsive force; by contrast Mises thought that growth in a market economy would be an equilibrium process if undisturbed by "arbitrary political influences" originating in governments, central banks, and banking systems (Mises 1971 [1924], p. 226).

Mises regarded a purely metallic monetary system as "the modern monetary ideal" (Mises 1971 [1924], p. 238), and praised the gold standard as exempt from destabilising political interferences. With a money supply exogenous to national policies, and depending only upon the world production of the precious metal, price stability would be higher than under alternative monetary regimes, he argued. Historical experience, he went on to say, demonstrated that "the biggest variations in the value of money that we have experienced during the last century have not originated in the circumstances of gold production, but in the policies of governments and banks of issue". And "the dependence of the value of money on the production of gold does at least mean its independence on the politics of the hour" (Mises 1971 [1924], p. 17).

In existing monetary systems, however, metallic money was complemented by many other categories of money, whose supply was directly or indirectly managed by the monetary authorities in accord with governments. Mises categorised money into money proper (fiat money

and credit money,[10] in addition to specie), money substitutes (banknotes, cash deposits, and token coins), and fiduciary money (i.e. money certificates that are accepted merely on account of the trustworthiness of their issuing bodies).[11] By managing the supply of these moneys in their own interests, he argued, governments, central banks, and banking systems impose instability on the private sector.

This is where we find other momentous differences with Robertson. Robertson did not assign any special status to metallic money. Money, in his view, was "everything that is universally acceptable within a given political area" (Robertson 1928a, p. 42). Coherently with this inclusive definition of money, he thought that monetary authorities and banks should, as part of their pro-growth strategies, use their ability to *create* money regardless of the gold supply. Expansionary monetary policies were not only legitimate, but indeed necessary to promote growth in output and welfare. Mises, by contrast, put metallic money at the top of his monetary hierarchy. He wanted monetary policies to be disciplined into mimicking the operation of a pure metallic money system, leaving no room for the money-creation function of banks and central banks. Borrowing the language that Hicks reserved for early nineteenth-century economists, we may say that Mises's was a late attempt at treating "the monetary system as if it was a metallic system, or could be forced into the mould of a metallic system" (Hicks 1979, p. 164).

But what were the consequences of undisciplined monetary policies according to Mises?

In his answer, he distinguished between alternative monetary systems. In a system with metallic money plus fiat money only, the deviation from the metallic "ideal" arises when the supply of fiat money increases beyond the limits set by the supply of gold. In this case, monetary policies impose (i) an inflation tax on the private economy, the tax being appropriated by the issuing authority (Hicks 1979, pp. 202, 210); (ii) a redistribution of income disfavouring all agents whose money incomes lag behind prices (Hicks 1979, p. 211); and (iii) a redistribution from creditors to debtors (Hicks 1979, pp. 195–201, 221).

But these "bad social consequences" of inflation are greatly exacerbated when, in addition to money proper, there is also fiduciary money. Being

10 What Mises meant by "credit money" is different from common usage. By credit money he meant the mere transference of already existing purchasing power from one person to another (as in debt/credit contracts), rather than the creation of new purchasing power by banks.

11 Consistent with his metallist credo, he refused to consider banknotes and deposits as money, and preferred to consider them as money substitutes. All went well if money substitutes did not exceed the reserves.

created out of nothing, fiduciary money would neither be "backed" by any reserve of money proper, let alone gold, nor have a fixed quantitative relationship with it. Under these circumstances, monetary instability would be magnified as banks, in their capacity as the issuers of fiduciary money, interfere with the process of capital accumulation.

More precisely, banking systems, according to Mises, *generate* instability when they artificially reduce interest rates below the level corresponding to the equality between saving and investment, and channel new loans into the hands of entrepreneurs, who demand these loans because they are fooled by the banks' interest policy into believing that the profitability of investment in capital goods has increased; or, in Mises's "Austrian" language, they believe that a "lengthening" of the production process is profitable. Therefore, they move resources from the consumption goods sector to the capital goods sector. But this allocation of resources is not maintainable because it does not respect consumers' intertemporal choices (i.e. their preferred allocation of income between consumption and saving). Sooner or later entrepreneurs will have to learn their mistake, and will have to abandon these longer production processes, with the consequent abandonment of the new plants in making. Economic resources run to waste because the bank-induced lengthening of production process is not "maintainable". His conclusion was that the monetary interference with capital accumulation is, at one and the same time, ineffective and disruptive of economic values, because banks do not respect the spontaneous equilibrium of capital markets where savings meet investments.

Mises' approach, which deploys many *ad hoc* assumptions, can be criticised under several respects.[12] For our present purposes, suffice it to say that, according to Robertson and many respectable growth models such as the post-Keynesian models by Kaldor, Harrod, and Domar, the maintainable rate of investment is not constrained by the existing amount of spontaneous savings when new profit opportunities are opened up by population growth and technical progress.[13] When these profits opportunities manifest themselves, monetary and credit policies may work powerfully in favour of growth, provided their welfare effects are duly remedied through egalitarian redistributions.

Summing up, price stability was conceived of by Mises as a sort of "central banks' discipline device" aimed at constraining their operations into a strict monetary rule in order to hinder their "etatist", exploitative power. By contrast, Robertson believed that monetary policy can positively

12 See Costabile (2005).

13 Robertson considered himself as a precursor of the Harrod-Domar model (Robertson, 1954 [1956].

affect the allocation of economic resources, particularly in the intertemporal dimension. This idea receives support from the experience of central banking in a number of historical periods.

In the remaining part of this paper, we analyse some of these historical experiences and show how the principles of activist monetary policy have been translated into practice and put to work when central banks have embraced developmental objectives.

4. Activist central banking in practice

4.1 Activist policy in the post-independence developing world[14]

Economic growth is a central goal of many societies, and it certainly became a dominant concern for many developed and developing countries in the aftermath of the Great Depression of the 1930s and the Second World War. The Great Depression itself had called into serious question the efficiency and stability of capitalist economies overall, and of liberalised financial markets more specifically. More to the point, developed and developing countries faced massive challenges of economic reconstruction and structural change. These challenges, in fact, are of the type that Dennis Robertson discussed. How could these economies generate "economic booms" and the kinds of structural transformations that were required to develop these economies? As Robertson suggested, a central bank policy directed primarily at controlling inflation was very unlikely to facilitate the development and growth that would be required.

And in fact, after the Second World War, there was a major transformation of central banking in the developing world. In developing countries, central banks were seen by key economists and policy-makers as *agents of economic development.*[15] As described by renowned monetary historian of the New York Federal Reserve, Arthur I. Bloomfield, in 1957:

> During the past decade there has been a marked proliferation and development of central banking facilities in the underdeveloped countries of the world, along with an increasing resort to the use of monetary policy as an instrument of economic control. Since 1945, central banks have been newly established and pre-existing ones thoroughly reorganized, in no less than some twenty-five underdeveloped countries. In other cases, the powers of pre-existing central banks have been broadened …in large part the recent growth of central banking in the economically backward areas has…reflected a desire on the part of the governments concerned to be able to

14 For more details, see Epstein (2007).

15 As we describe in more detail, most of the analysis of "development" during this period had in mind a model of rapid capital accumulation leading to high productivity growth and high economic growth.

> pursue a monetary policy designed to promote more rapid economic development and to mitigate undue swings in national money incomes. (Bloomfield 1957, p. 190)

Bloomfield goes on to describe the functions, powers, and goals of these central banks:

> Many of the central banks, especially those established since 1945 *with the help of Federal Reserve advisers* (emphasis added) are characterized by unusually wide and flexible powers. A large number of instruments of general and selective credit control, some of a novel character, are provided for. Powers are given to the central bank to engage in a wide range of credit operations with commercial banks and in some cases with other financial institutions… ..These and other powers were specifically provided in the hope of enabling the central banks…to pursue a more *purposive* (emphasis added) and effective monetary policy than had been possible for most… .that had been set up …during the twenties and thirties…(and that) for the most part (had) been equipped with exceeding orthodox statutes and limited powers which permitted little scope for a monetary policy *designed to promote economic development and internal stability* (emphasis added)…. (Bloomfield 1957, p. 191)

In line with Robertson's thinking, these policies were oriented to jump starting and sustaining economic growth.

We can illustrate with a specific example. The central bank plan that Robert Triffin helped to write for Paraguay in the early 1940s is instructive here (Helleiner 2014, pp. 142–5). Criticising the highly unstable and procyclical impacts of the gold standard for countries like Paraguay, Triffin argued for a central bank with more tools and policy space to promote stability *and growth*. Triffin proposed a new structure for the Paraguayan Central Bank that equipped the bank with the ability to conduct *activist* monetary management (Helleiner 2014, p. 142). Among other things, Triffin argued that the central bank had to become an *active* banker to the public. He proposed that the central bank have two departments that would engage in regular banking activities: a banking department and a savings and mortgage department. He argued that these activities would be useful in helping to address "the inadequacy of credit facilities for production and developmental loans" (quoted in Helleiner 2014, p. 143). These production and developmental loans were designed to spur productivity and economic growth.

Triffin and others sent out by the Federal Reserve developed plans for more activist central banks using a variety of tools to promote stability and development. And by development, these economists meant a broad conception of economic growth (Helleiner 2014).

Perhaps even more surprisingly, following the Second World War, similar activist policies also became widespread in the core countries of the developed world.

4.2 Activist policy in the aftermath of the Great Depression: developed countries

It is well known that following the disasters of the Great Depression and the Second World War, governments in the United Kingdom, Europe, Japan, and even the United States asserted much greater control over central banks and the banking industry (Capie 1999). Central banks became important institutions for financing and managing government debts accumulated during the war, and after the war, central banks also became important tools for rebuilding and restructuring national economies and providing for social needs, often under the government's direction. Central banks utilised a variety of credit allocation techniques to accomplish these goals, and in most cases, these techniques were supported by capital and sometimes exchange controls.

The types of controls central banks used, the goals they were directed to, and their degree of success varied from country to country and time to time. No matter how successful, however, virtually all of these central banks had ended or severely limited their use of these controls by the mid-1980s. Under the neo-liberal play book, these controls, despite their long histories and many successes, were seemingly thrown into the dust bin of history, at least, that is, until the Great Financial Crisis of 2007–2008.

4.3 Developed country central banks as agents of development during the "Golden Age of Capitalism"[16]

The Great Depression of the 1930s and then the Second World War were a watershed for central banks in the industrialised world. Virtually all were brought under more government control and were reoriented to facilitate government priorities. In the United States, the Federal Reserve was brought under tighter government control in the late 1930s, and then, at the start of the Second World War was required to help the Treasury finance the war effort at relatively low interest rates.[17] It remained under Treasury control until 1951, but even after that, was subject to significant government pressures to support the market for US government debt that had been accumulated during the war. In addition, the Humphrey–Hawkins full employment bill obligated the Federal Reserve to pursue polices to support high employment while controlling inflation. The era of Keynesian policies was at hand (Epstein and Schor 1990).

16 Most of this material, with the exception of the case study of Italy, has been drawn from U.S. Congress (1972); U.S. Congress, Joint Economic Committee (1981); Zysman (1983); Hodgman (1973). Also see Epstein (2007).

17 Epstein and Schor (1995).

In Europe and England, central banks that had been politically independent before the War found themselves subject to state control after 1945 (Capie *et al.* 1994, p. 72). During the War, monetary policy was often implemented through direct controls while interest rates were held low and constant. Direct controls continued in the aftermath of the war with various credit allocation techniques (Capie *et al.* 1994, p. 25.) These policies were designed to keep the cost of capital as low as possible to promote investment, growth, and recovery in these mostly war-ravaged countries. In some cases, the strategy was designed to promote leading and strategic sectors that would have higher productivity growth and more export potential, thereby allowing for a more sustainable high growth path.

These central banks used a variety of techniques to promote these goals. Often this tool box included credit allocation techniques. Credit allocation techniques or controls are commonly defined as measures by which the authorities seek to modify the pattern and incidence of cost and availability of credit from what markets would generate on their own.[18] To the extent that in recovering Europe some key resources were scarce, sometimes these controls were used to reduce resources availability in some sectors, while re-allocating them to priority sectors. These were sometimes designed to promote social goods such as housing, but in other ways to promote investment and the growth of priority sectors or regions. In Europe, credit controls served at various times and places (1) to finance government debt at lower interest rates; (2) to reduce the flow of credit to the private sector without raising domestic interest rates; (3) to influence the allocation of real resources to priority uses; (4) to block channels of financial intermediation and thus to assist restrictive general monetary policy; and (5) to strengthen popular acceptance of wage–price controls by holding down interest income.

In Japan, government savings institutions were used to capture personal savings flows and these were channelled by the finance ministry (of which the Bank of Japan is a part) to industries that were perceived to most preserve economic growth.

European experiences with credit controls varied from country to country. In Germany, controls were used only briefly after the Second World War. In the Netherlands and the United Kingdom, extensive use was made of them, but they were always seen as temporary and short-run expedients. In the Netherlands, credit controls were used to support macroeconomic policy, rather than credit allocation. In the United Kingdom, the principal aim of controls was to facilitate low-cost government debt. The government was concerned about the impacts of high interest rates on the bond

18 Hodgman (1973).

market, on income distribution and on the balance of payments. A more limited aim of the quantitative ceilings was to guarantee a flow of short-term credit at favourable interest rates to high-priority activities such as ship building and the finance of exports and productive investment in manufacturing. Credit ceilings were put into place, and exemptions were sometimes made for priority sectors such as industry or housing. Moreover, the Bank of England identified sectors for which credit should be limited, such as consumption and the financing of imports. In England, as elsewhere, these credit controls were accompanied by exchange and capital controls.

France, Italy, and Belgium were a different story. There, the principle of controlling credit flows and interest rates to serve national interests was widely accepted. France had, perhaps, among the most extensive and successful sets of controls, that were part of the government's overall approach to industrial policy. The Bank of France was nationalised in 1945, and placed under the National Credit Council, the institution in charge of implementing the financial aspects of the government plan. The broad aim of credit policy in France was to contribute to the modernisation of the French economy and its ability to compete in international markets. These aims were clearly designed to contribute to more rapid economic growth.

To influence the volume and allocation of credit, the Bank of France used various methods.[19] Variable "asset-based reserve requirements" were widely used. These require banks have to observe minimum reserve requirements based on the assets they hold, but the central banks vary these to promote lending to desired sectors. They do this by allowing lower required reserve rates on privileged assets. A second technique – ceilings on credit extension – has been used as well. The ceilings were used to reduce credit expansion without raising interest rates, and also to allocate credit: priority sectors were exempted from the ceilings. These included short-term export credits, medium-term loans for construction, and others. These ceilings applied to a large range of financial institutions, and were accompanied, as well, by capital and exchange controls as an important concomitant. A third tool was the scrutiny of individual credits made by banks. This allowed the Bank of France, for example, to approve loans for privileged purposes. Another approach to affecting the allocation of credit involved the use of rediscounting of bills at lower interest rates for priority purposes. While some of these purposes were to protect social goods such as housing, in many cases they were to support investment in leading industries.

19 See Hodgman (1973) and John Zysman (1983).

Zysman has emphasised the role of these credit allocation techniques in helping to revive the French economy and help it adjust to structural challenges in the post-war period. Italy and Belgium also used similar policies. In the case of Italy, a major goal was to help develop the southern part of the country.[20]

4.3.1 Italy. The case of Italy is particularly interesting and instructive.[21] Italy offers a paradigmatic case of central banks' policies in favour of growth, particularly under Donato Menichella, Governor of the Bank of Italy between 1947 and 1960.[22]

Menichella was particularly concerned with three basic problems with the Italian economy, namely the historically insufficient supply of private capital; the high propensity to import, due to lack of raw materials; the underdevelopment of Southern Italy (Mezzogiorno d'Italia). After the Second World War, he acted together with a group of far-sighted Italian Ministers, including prime ministers, state officials, central bank operators, and economists. Their macroeconomic strategy was centred on investment promotion, balance of payment equilibrium, and the development of Southern Italy. More specifically, the ingredients of their pro-growth strategy were, first, creating the conditions for industrial investment by supplementing the scarce supply of private capital with public capital to promote infrastructure, but later also agriculture and basic industries such as steel, chemicals etc. Second, a strictly related goal was curbing the balance of payments tensions originating in the imports of raw materials, which would inevitably accompany the planned investment programs. Last, but not least, their goal was developing the backward Mezzogiorno. Eminent development economists (including Rosenstein Rodan,Tinbergen, Chenery and Hirschman) were involved in the discussion.

Menichella himself negotiated with the World Bank (International Bank for Reconstruction and Development) a decennial loan of one hundred billion Italian Liras per year intended to promote the development of Southern Italy. Technically, the loan would be devoted to paying for

20 U.S. Congress, House of Representatives (1972).

21 See D'Antone (1995); Alacevich (2009); Costabile (2014); Costabile and Gambardella (2016).

22 Menichella had also been General Director of IRI, the Institute for Industrial Reconstruction, founded in 1933. In the Thirties, this institute saved the Italian industrial and banking systems after the great banking crisis of the late 20s. Menichella had also been one of the main contributors to the Bank Law of 1936, which separated commercial and investment banking in an attempt to sever the links between the banks' management of deposits and their involvement in highly risky investments.

imported raw materials. Also, Menichella wrote the articles of the law establishing the Cassa per il Mezzogiorno, the Italian regional development agency founded in 1950 on the blueprint of the Tennessee Valley Authority.[23] The Cassa received and administered the World Bank's funds (Menichella 1961; Barucci 1978, p. 338). In this context, Governor Menichella thought of price stability not as an end in itself, but as a means to preserve the real value of pro-growth expenditures (Menichella 1953, in Cotula *et al.* 1997, p. 475).

Also interesting in our present perspective is Menichella's action to influence the banking system's loans policy to favour the poorer Southern Italian regions, which were less able to generate savings. This redistribution was necessary to avoid a self-perpetuating, cumulative divergence in the rates of growth between the country's areas (Menichella 1955, in Cotula *et al.* 1997, p. 590). In the same direction went Menichella's proposal to redirect capital to the southern regions via lower interest rates on loans to southern peasants, compared to the terms of credit in other Italian regions (Menichella 1955, in Cotula *et al.* 1997, pp. 597–9). These ideas should also be seen against the background of Agrarian Reform in the Fifties.

Summing up, the policies of the Bank of Italy under Menichella consisted of three elements: promotion of regional development within the context of national growth; credit allocation techniques in favour of targeted regions and sectors; monetary policies aiming at price stability and external equilibrium as a general framework for development and growth policies.

4.3.2 The United States. In the United States, after the Great Depression of the 1930s, as with other central banks discussed in this section, the Federal Reserve was convinced by the government, in this case the Roosevelt administration, to develop new tools and engage in more activities to directly support other sectors of the economy besides finance. A little known example of this is the "Industrial Advances Act" passed by Congress and signed into law by FDR in 1934, which added section 13(b) to the Federal Reserve Act.[24] This act allowed Federal Reserve Banks to make loans for working capital to private non-financial companies, if they could not find credit from the financial markets. This bill was passed, NOT as an emergency measure, like the other section 13 measures, but as a

23 In his capacity as Roosvelt's economic adviser and assistant director of the World Bank's economic department, Rosenstein-Rodan was the "grey matter" behind the World Bank decision to finance the Cassa per il Mezzogiorno.

24 Fettig (2002, 2008).

permanent feature of the Federal Reserve policy. The Regional Federal Reserve Banks were encouraged to set up Regional Industrial Advisory Committees made up of local business people to give advice on how to allocate the credit to non-financial businesses in their districts. No limitation was placed on the quantity of each loan. $280 million or 0.43% of GDP was made available for these loans. That would equal about 68 Billion dollars in the US' 16 trillion-dollar economy. Not all of this lending capacity was utilised but millions of dollars for industrial and commercial products were lent out by the Regional Federal Reserve Banks to non-financial commercial entities. These activities continued as a part of the war effort in the early 1940s and helped to fund companies in the war effort.

During the Second World War, the Federal Reserve, under great pressure, agreed to hold short and long term interest rates at a relatively low level (3/8% on Treasury bills and 2 $^{1}/_{2}$% on longer term loans. The Fed also had numerous roles in marketing war bonds and helping to manage other wartime finances.

The President also issued a series of executive orders to insure working capital for war industries. These required the Federal Reserve and its branches to analyse "the integrity of loan applications" and to expedite loans.[25] As with the 13(b) facilities, the Federal Reserve got very much involved in the "business" of allocating credit to companies.

While the emergency war powers lapsed after the war ended, the 13(b) facilities were meant to be a permanent feature of the Federal Reserve. But in the end, they were closed down. After the Federal Reserve – Treasury Accord of 1951 which ended the Fed peg of interest rates, the Federal Reserve was very anxious to restore the Federal Reserve's independence from the government. The Federal Reserve was trying to "regularise" its operations, that is, go back to a situation in which it was relatively independent from the government. Federal Reserve officials, who wanted to restore a more minimalist conception of Federal Reserve Policy, fought for the elimination of the 13(b), "Industrial Advances" programme. They achieved their goal with the passage of the 1958 "Small Business Investment Act," which, among other things, repealed section 13(b) of the Federal Reserve Act.[26]

After the War, the US had a myriad of public or highly regulated financial institutions, moreover, that supported national goals, notably housing.[27] During this period, the Federal Reserve policy was quite sensitive to the needs of the housing market concerns and even tailored its monetary

25 Gary Richardson (2013).
26 Fettig (2008).
27 Dymski (1993, pp. 101–31).

policy to avoid significantly harming it. In the case of the United States, the focus of the policy was to protect important social sectors, especially housing, and to maintain high employment. These policies were thought to provide a good monetary framework for growth, but were not seen to directly promote growth in and of themselves. In Europe and Japan in the aftermath of the Second World War, the growth goal was more direct.

5. Conclusion

In this paper, we have introduced the distinction between "minimalism" and "activism" in central banking, with special focus on one specific subcategory of activism, namely activism devoted to the promotion of growth. Our main objective has been to illustrate the meaning and scope of this pro-growth approach both in theory and practice.

On the theoretical front, we have argued that Robertson's analysis of money, cycles, and capital formation provides a coherent theoretical framework within which factual historical examples of central bank activism can be interpreted and conceptualised. Robertson was not an advocate of price stabilisation because he regarded this objective as not useful, and even counterproductive, for the purposes of economic growth. We have illustrated his alternative recommendations for central bank policies in the light of his theory of growth. We have also investigated the allocational function of money and credit flows in light of the links that he established between growth and structural change. Our "robertsonian" analysis has been supplemented by a brief exposition of the contrasting approach of an architect of minimalism, Ludwig von Mises.

Having thus established our theoretical framework, in terms of central banking practice, we investigated some phases during the Second World War and in the post-Second World War period in which central banks in the developed and in the developing world pursued activist policies focused on direct and indirect methods of allocating credit to priority sectors. In a nutshell, our analysis shows that during this period, the principles of minimalism had been abandoned in favour of an activist philosophy when central banks have embraced developmental objectives in their economic strategies.

We also argued that minimalist and activist approaches to central banking derive from different conceptions of market economies. Robertson did not believe in either the automatic realisation of the objectives of full employment, growth, and other desirable objectives, or in a spontaneous harmony between social classes. Rather, he considered markets to be the place where the contrasting interests of social classes and groups confront

each other; and argued that activist monetary policies, if well-calibrated, can be instrumental in promoting growth and welfare, thus reconciling those contrasting interests to some extent.

Our analysis also provides some elements for distinguishing between the minimalist/activist spectrum that we have proposed here, and the better known distinction between "rules" and "discretion". The minimalist/activist spectrum has to do mainly with goals. As we saw above, activists consider a wide variety of goals for monetary policies, including employment, growth, sectoral and territorial balance, employment, and price-level management. In this context, means are instrumental, and vary according to, among other factors, the specific objectives pursued in a given historical period. Our post-Second World War historical examples illustrate this point. Minimalists, by contrast, consider price stability to be the only legitimate objective of monetary policy in all historical circumstances. By contrast, the "rules vs. discretion" debate had to do mainly with means, not goals. The contestants, in the 70s and after, for the most part took a common stance on central bank objectives, that is, the control of the business cycle and financial stability (we may think of Friedman vs. the Keynesians for illustration). The debate mainly concerned the most appropriate instruments, with one side recommending rules and the opposite side proposing a wider set of policy instruments and the possibility of "fine tuning" for achieving that common goal. Thus, we may argue that the rules vs. discretion debate provides a truncated version of the wider minimalist/activist spectrum, with major if not exclusive attention put on instruments rather than goals.

Summing up, we submit that our analysis in this paper provides a suggestive case for the usefulness of the "minimalist–activist" spectrum as an analytical prism to shed light on some key aspects of central banking theory and practice, admittedly with a focus here on the "activist" end of the spectrum and the objectives of growth and development. We plan to explore other aspects of this continuum in the near future.

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Abstract

We introduce the "minimalist–activist" spectrum as an analytical prism through which to view key aspects of central banking theory and practice. We focus on the activist end of this spectrum, concentrating on economic growth. We explore the theoretical roots of these ideas in the writings of Dennis Robertson. We illustrate central banking practice by detailing some approaches followed by central banks pursuing economic growth and development in the decades following the Second World War. History of monetary thought, monetary theory, and analysis of central bank practices blend together to illuminate key principles and practices of central banking.

Keywords

Central banking, monetary thought, Robertson, credit allocation techniques

ANNEX 117

No.

IN THE
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. While the case was pending, Congress enacted § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772. By its terms, that statute applies only to this one case: to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." *Id.* § 8772(b). "In order to ensure that Iran is held accountable for paying the judgments," it provides that, notwithstanding any other state or federal law, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* § 8772(a)(1), (2). The question presented is:

Whether § 8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix (App., *infra*, 130a-144a).

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank Markazi, the Central Bank of Iran, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 758 F.3d 185 (2d Cir. 2014). The opinions and orders of the district court (App., *infra*, 13a-127a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 9, 2014. It denied rehearing and rehearing en banc on September 29, 2014. App., *infra*, 128a. This Court has jurisdiction under 28 U.S.C. §1254(1). Although 28 U.S.C. §2403(a)

may apply, the court of appeals did not invoke that provision. The United States is being served with this petition.

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS INVOLVED

Relevant provisions of Article III of the U.S. Constitution, the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772; the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*; the Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610 note; the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; and Article 8 of the Uniform Commercial Code are set forth in the appendix. App., *infra*, 145a-186a.

PRELIMINARY STATEMENT

This case concerns nearly $2 billion of bonds in which Bank Markazi, the Central Bank of Iran, held an interest in Europe as part of its foreign currency reserves. Plaintiffs, who hold default judgments against Iran, tried to seize the assets. Under ordinary legal principles, the assets would not have been attachable.

Plaintiffs, however, persuaded Congress to enact a statute to dictate a contrary result in this one case. By its terms, the statute applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). "In order to ensure that Iran is held accountable for paying the judgments," the statute provides, the assets "shall be subject to execution" upon only two findings—essentially, that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* § 8772(a)(1), (2).

Relying on that statute, the district court ordered the assets turned over to plaintiffs. The Second Circuit affirmed. Conceding that there may be "little functional difference" between §8772 and a statute that simply directed the court to rule in plaintiffs' favor, the court upheld §8772 as a valid exercise of Congress's authority. App., *infra*, 10a. The question presented is whether such a statute—which effectively directs a particular result in a single pending case—violates the separation of powers.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive" theory of immunity that recognized limited exceptions. *Id.* at 486-487. Two decades later, Congress codified the exceptions in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§1602 *et seq.*).

The FSIA preserves the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. §1604. A "foreign state" includes any "agency or instrumentality of a foreign state." *Id.* §1603(a). Section 1605 then lists narrow exceptions to that immunity. *Id.* §1605.

The FSIA separately addresses the immunity of sovereign property from attachment or execution. Generally, "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. §1609. Section 1610 lists narrow exceptions,

but only for certain categories of "property in the United States." *Id.* §1610(a)-(b).

Section 1611(b) provides an additional, special immunity for central bank assets. Under that section, "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if * * * the property is that of a foreign central bank or monetary authority held for its own account." 28 U.S.C. §1611(b)(1).

B. The Terrorism Amendments to the FSIA

In 1996, Congress created an exception to immunity for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241. That exception allows suits for "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. §1605A(a)(1). It applies only if the Executive Branch has designated the sovereign a "state sponsor of terrorism" prior to, or as a result of, the act at issue. *Id.* §1605A(a)(2)(A)(i)(I).

In the years since, scores of suits have been filed. Typically, the sovereign does not appear, and plaintiffs are awarded default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67-74 (Aug. 8, 2008). Plaintiffs, however, have faced difficulty collecting. See *id.* at 5-68. Congress has responded by repeatedly amending the exceptions to immunity from execution. See *ibid.*

The 1996 amendments added two exceptions. Under the first, a foreign state's property "used for a commercial activity in the United States" is not immune from execution of a terrorism-related judgment. 28 U.S.C.

§1610(a)(7). A similar exception applies to certain property of agencies or instrumentalities. *Id.* §1610(b)(3).

In 2002, Congress enacted §201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, 2337, to permit execution against assets the President had "blocked" (*i.e.*, frozen) under certain economic-sanctions statutes. It provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A * * * , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution * * * .

28 U.S.C. §1610 note §201(a). By its terms, TRIA applies only to "blocked *assets of* that terrorist party"—*i.e.*, property owned by that party. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 937-941 (D.C. Cir. 2013).

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338. It expanded the remedies available under the terrorism exception. 28 U.S.C. §1605A. It also expanded the assets available for execution. *Id.* §1610(g).

C. Article 8 of the Uniform Commercial Code

The FSIA generally addresses only immunity, not substantive law. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983). The relevant substantive law here is Article 8 of the Uniform Commercial Code and its foreign equivalents.

In modern financial markets, securities owners rarely possess physical certificates. Instead, they own a "security entitlement" against an intermediary such as a bank or broker. See U.C.C. art. 8 prefatory note (1994); 7A W. Hawkland, *et al.*, *Uniform Commercial Code Series* §8-101 (2013). U.C.C. Article 8 defines the property rights in those entitlements.

The holder of a security entitlement has the right to receive interest, cast votes, and exercise other incidents of ownership. U.C.C. §§8-505 to 8-508. Rather than interacting with the issuer directly, however, the owner holds those rights against its securities intermediary. *Ibid.* The intermediary, in turn, must either own the underlying financial asset or own a security entitlement in that asset through yet another intermediary, so that it can provide the benefits of ownership to its customer. *Id.* §8-504(a). In that manner, Article 8 enables widespread holding and transfer of securities without physical transfers of the underlying securities.

Because Article 8 is built on potentially lengthy chains of ownership from intermediary to intermediary, it carefully defines attachable property rights. Section 8-112(c) provides that "[t]he interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary *with whom the debtor's securities account is maintained.*" U.C.C. §8-112(c) (emphasis added). In other words, if a debtor holds a security entitlement in a bond with Bank A, which in turn holds an entitlement with Bank B, the debtor's only property is the entitlement he holds with Bank A. Creditors may be able to seize the debtor's holdings at Bank A, but they cannot go beyond that and attach Bank A's holdings at Bank B to satisfy the debtor's debts. The official comment explains:

> Process is effective only if directed to the debtor's *own* security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, *Debtor's property interest is a security entitlement against Broker.* Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation.

U.C.C. §8-112 cmt. 3 (emphasis added); see also 7A Hawkland, *supra*, §8-112:01 ("Since [the debtor's] property interest is 'located' at [its intermediary], * * * the only proper subject of legal process by [the debtor's] creditors would be [that intermediary]. [The intermediary's intermediary] does not have possession of some item of property in which [the debtor] has a direct property interest * * * .").

II. PROCEEDINGS BELOW

A. Proceedings Before the District Court

1. *The Restraints and Blocking Order*

Petitioner Bank Markazi is the Central Bank of Iran. Like other central banks, it holds foreign currency reserves to carry out monetary policies such as maintaining price stability. C.A. App. 1330. Like other central banks, it often maintains the reserves in bonds issued by foreign sovereigns or "supranationals" like the European Investment Bank. *Id.* at 1331, 1146-1149.

As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. App., *infra*, 2a; C.A. App. 1329-1332, 1779. UBAE, in turn, held corresponding security entitlements in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. App., *infra*, 2a,

57a-59a. Clearstream then held corresponding security entitlements in an omnibus account at Citibank, N.A., in New York. *Id.* at 2a.[1]

Plaintiffs hold billions of dollars of default judgments against the Islamic Republic of Iran arising out of terrorist attacks by organizations that allegedly received support from Iran. App., *infra*, 2a, 52a-53a n.1, 116a. Bank Markazi is not a party to any of those judgments and is not alleged to have been involved in the attacks. See *id.* at 52a-53a n.1.

Upon learning of Bank Markazi's assets, plaintiffs did not try to attach them in Italy or Luxembourg. Instead, in June 2008, they served restraining notices on Clearstream and Citibank in New York. App., *infra*, 3a, 62a. Clearstream moved to vacate the restraints. On June 23, 2009, the district court "agree[d] with Clearstream that the assets * * * are governed by NY UCC 8-112(c)" and that, "[u]nder the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee" because "Clearstream does not currently carry on its books * * * an account in the name of the Islamic Republic of Iran." *Id.* at 126a. Nonetheless, the court left the restraints in place so plaintiffs could pursue their theory that the transfer to UBAE was a fraudulent conveyance. *Ibid.*; see n.1, *supra*.

In June 2010, plaintiffs commenced this action against Bank Markazi, UBAE, Clearstream, and Citibank for turnover of the restrained assets under TRIA. App., *in-*

[1] Until February 2008, Bank Markazi held the security entitlements directly with Clearstream in Luxembourg; the parties dispute whether the transfer to UBAE was a fraudulent conveyance. App., *infra*, 57a-59a & n.2; C.A. App. 1331-1332. During the proceedings below, moreover, the bonds matured so that Citibank then held the cash proceeds. App., *infra*, 61a. At the time of judgment, the assets were worth $1.895 billion. *Id.* at 23a.

fra, 3a, 62a-63a. Later, in February 2012, the President issued an order blocking all "property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States," citing purported "deceptive practices" and "deficiencies in Iran's anti-money laundering regime." Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). Citibank then reported the restrained assets as blocked by that order. App., *infra*, 64a.

Bank Markazi moved to dismiss, and plaintiffs moved for summary judgment. App., *infra*, 3a, 55a. Bank Markazi urged that the security entitlements Citibank held for Clearstream were not Bank Markazi's property under U.C.C. Article 8 and thus were not "assets of" Bank Markazi under TRIA. *Id.* at 96a-97a. Even if they were, it argued, the assets were entitled to central bank immunity under FSIA §1611(b). *Id.* at 102a. Bank Markazi also invoked the Treaty of Amity between the United States and Iran, which prohibits discrimination against Iranian companies. *Id.* at 101a (citing Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899).

2. *Congress's Enactment of §8772*

Plaintiffs' lawyers then lobbied Congress to change the law governing the case. Press coverage reported that "lawyers and lobbyists for victims of terrorist attacks were quietly jockeying" over the legislation, and that Senator Bob Menendez was "'working with all of the plaintiff groups to ensure that the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Kate Ackley, *Rival Groups of Terror Victims Square Off*, Roll Call, May 22, 2012. The House sponsor explained that the bill sought "to change a specific part of Federal law to allow assets seized from the

Iranian Government to be allocated to [plaintiffs] to recover the judgments owed to them." 158 Cong. Rec. H5569 (Aug. 1, 2012).

The result was § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772). Section 8772 specifically targets the assets in this case. It applies only to "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b). It adds: "Nothing in this section shall be construed * * * to affect the availability, or lack thereof, of a right to satisfy a judgment * * * in any proceedings other than [those] proceedings * * * ." *Id.* § 8772(c)(1).

As to those assets, § 8772 fundamentally changes the governing law. It provides:

> [N]otwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) * * * ; and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran * * * , that such foreign securities intermediary or a related intermediary holds abroad,

> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment * * * .

22 U.S.C. § 8772(a)(1).

The statute prescribes two "determination[s]" the court must make. 22 U.S.C. § 8772(a)(2). "In order to ensure that Iran is held accountable for paying the judgments," the court must determine (1) "whether Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "that no other person possesses a constitutionally protected interest in the assets." *Ibid.*

3. *The District Court's Decision*

On February 28, 2013, the district court denied Bank Markazi's motion to dismiss and granted summary judgment to plaintiffs. App., *infra*, 52a-124a.

The court held that § 8772 rendered U.C.C. Article 8 irrelevant: Section 8772 "specifically trumps 'any other provision of law' and specifically permits execution on the assets specifically at issue in this litigation." App., *infra*, 97a. Nonetheless, the court deemed the assets attachable regardless, relying partly on purported statements of ownership by Bank Markazi and partly on its view that Bank Markazi's U.C.C. argument was "sophistry." *Id.* at 97a-98a & n.10, 101a.

With respect to the Treaty of Amity, the court again ruled that § 8772 rendered the issue moot. App., *infra*, 102a. But it also found the Treaty inapplicable because, in its view, the Treaty could not be used to "circumvent congressional acts or authorized legal actions." *Ibid.*

As for central bank immunity, the court ruled that § 8772 "expressly preempt[s] any immunity." App., *infra*, 103a. But it also held that TRIA trumps central bank immunity and that the blocking order's reference to "de-

ceptive practices" "suggests that the activities of Bank Markazi are not central banking activities." *Ibid.*

The court next turned to § 8772's required findings. "On this record and as a matter of law," it held, "no other entity could have an equitable or beneficial interest" in the assets. App., *infra*, 111a. "Clearstream does not allege * * * that it has legal title or the right to acquire that title for the Blocked Assets." *Id.* at 112a. "UBAE disclaims any 'legally cognizable interest' in the Citibank proceeds." *Ibid.* And Citibank simply "maintain[s] [an] account on behalf of another." *Ibid.* In short, "[t]here simply is no other possible owner of the interests here other than Bank Markazi." *Id.* at 113a.

Bank Markazi argued that § 8772 violated the separation of powers by effectively dictating the outcome of a single case. App., *infra*, 114a. But the court disagreed. "The statute does not itself 'find' turnover required," the court asserted; "such determination is specifically left to the Court." *Id.* at 114a-115a. The statutory findings, it opined, were not "mere fig leaves" but left "plenty for this Court to adjudicate." *Id.* at 115a.

On May 20, 2013, the district court denied reconsideration. App., *infra*, 31a-51a. On July 9, 2013, it entered a Rule 54(b) judgment directing turnover of the assets (while retaining jurisdiction over a different dispute involving other assets). *Id.* at 13a-30a. The judgment released Citibank and Clearstream from liability to Bank Markazi and enjoined Bank Markazi from asserting claims against them. *Id.* at 24a-26a.

B. The Court of Appeals' Opinion

The court of appeals affirmed. App., *infra*, 1a-12a.

The court acknowledged Bank Markazi's arguments that the assets at issue were not "assets of" Bank

Markazi under TRIA and that, even if they were, they were protected by central bank immunity. App., *infra*, 5a. But the court declined to reach those issues. "Congress," it explained, "has changed the law governing this case by enacting 22 U.S.C. § 8772." *Ibid.*

The court then turned to Bank Markazi's separation-of-powers challenge. It recognized that *United States* v. *Klein*, 80 U.S. 128 (1872), had struck down a statute that directed courts to treat pardons of Confederate sympathizers as conclusive evidence of disloyalty. App., *infra*, 8a. Congress, *Klein* declared, may not "prescrib[e] a rule of decision to the courts." *Ibid.* But the court of appeals also noted that this Court had distinguished *Klein* in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). App., *infra*, 8a-9a. *Robertson* upheld a statute passed to resolve two environmental suits by deeming management of forests according to the statute's terms to satisfy applicable requirements. *Ibid.*

The court of appeals found § 8772 similar to the statute in *Robertson*. "[Section] 8772 does not compel judicial findings under old law," it held, but rather "changes the law applicable to this case." App., *infra*, 9a. And like the statute in *Robertson*, it "explicitly leaves the determination of certain facts to the courts." *Ibid.*

Bank Markazi argued that § 8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772." App., *infra*, 10a. The court did not deny that § 8772 had that effect. But it believed the argument foreclosed by *Robertson*, "as the statute there was specifically enacted to resolve two pending cases" as well. *Ibid.* "Indeed," the court added, "it would be unusual for there to be more than one likely outcome when Congress

changes the law for a pending case with a developed factual record." *Ibid.*

The court thus conceded that "there may be little functional difference between § 8772 and a hypothetical statute directing the courts to find that the assets at issue in this case are subject to attachment under existing law." App., *infra*, 10a. But it held that, under *Robertson*, "§ 8772 does not cross the constitutional line." *Ibid.*

The court also rejected Bank Markazi's reliance on the Treaty of Amity. "[E]ven if there were a conflict" between the Treaty and § 8772, it ruled, "the later-enacted § 8772 would still apply * * * ." App., *infra*, 5a. The court also denied the existence of any conflict. Although the Treaty requires treatment of Iranian companies to be "'fair and equitable' and no 'less favorable than that accorded nationals and companies of any third country,'" the court asserted that § 8772 "contains no country-based discrimination" and in fact is "expressly *non*-discriminatory" because it applies only to this case. *Id.* at 7a.

The court of appeals denied rehearing and rehearing en banc on September 29, 2014. App., *infra*, 128a. On October 29, 2014, the court granted Bank Markazi's motion to stay the mandate. *Id.* at 129a.

REASONS FOR GRANTING THE PETITION

By enacting § 8772, Congress legislated the outcome of a single case to ensure that nearly $2 billion of disputed assets would be turned over to plaintiffs. In doing so, it repudiated binding treaty obligations, ignored longstanding international law, and overturned substantive state property law. The Second Circuit upheld the statute as consistent with the separation of powers, even though it applies solely to this one case and effectively

dictated its outcome. No court has ever upheld such a blatant intrusion on judicial power.

If *United States* v. *Klein*, 80 U.S. 128 (1872), still has any force, Congress cannot enact such legislation. Congress passed a targeted statute to change the outcome of one case. Although it purported to require two findings, they were makeweights; the Second Circuit never suggested otherwise. And this case squarely presents the issue left open in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992): whether a statute is unconstitutional if it "swe[eps] no more broadly * * * than the range of applications at issue in [one] pending case[ ]." *Id.* at 441.

Section 8772 is merely the latest of several instances of Congress's disregard for separation-of-powers principles to favor sympathetic plaintiffs. The statute not only violates United States treaty obligations and imperils the United States' reputation as a safe custodian for central bank reserves. It also threatens the judiciary's ability to operate as an independent branch rather than a mere adjunct resolving property disputes as the legislature may direct. This Court should grant review.

I. THIS CASE PRESENTS IMPORTANT SEPARATION-OF-POWERS QUESTIONS LEFT OPEN IN *ROBERTSON*

Klein made clear that Article III prohibits Congress from exercising judicial power by legislating the outcome of a particular case. This Court, however, has not clearly defined the scope of that prohibition. This case tests *Klein*'s limits.

A. *Klein* Prohibits Congress from Dictating the Outcome of a Particular Case

1. In *Klein*, this Court addressed a post-Civil War statute designed to prevent pardoned Confederate sympathizers from prevailing in suits against the govern-

ment. An 1863 statute had authorized the Secretary of the Treasury to seize and sell abandoned or captured property during the war. Ch. 120, §1, 12 Stat. 820, 820 (1863). The owner could sue in the court of claims after the war to recover the proceeds, but had to prove his loyalty to the United States. *Id.* §3.

In *United States* v. *Padelford*, 76 U.S. 531 (1870), this Court held that acts of disloyalty would be disregarded if the claimant had been pardoned. *Id.* at 541-543. A few months later, Congress included a rider in an appropriations bill stating that a pardon was not "admissible in evidence on the part of any claimant"; to the contrary, if the pardon recited acts of disloyalty that the recipient had not denied upon being pardoned, the statute required that it be deemed "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." Ch. 251, 16 Stat. 230, 235 (1870).

This Court held the statute unconstitutional. Congress, it concluded, had "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 147. The statute purported to dictate the outcome of pending cases "founded solely on the application of a rule of decision * * * prescribed by Congress." *Id.* at 146. That was impermissible: Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Ibid.*

Klein distinguished the Court's earlier decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). In *Wheeling Bridge*, the Court had found a bridge to be an obstruction to navigation and ordered its removal. *Id.* at 429. Congress responded by passing a statute declaring the bridge to be a federal post-road. *Ibid.* That statute, *Klein* explained, left the Court "to apply its ordinary rules to the new circumstances created

by the act." 80 U.S. at 146-147. In *Klein*, by contrast, Congress had "prescribe[d] a rule in conformity with which the court must [decide the case]." *Id.* at 147.

2. This Court revisited *Klein*'s scope in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). *Robertson* arose out of two suits alleging that the government's plans to allow certain timber harvesting violated federal environmental statutes. *Id.* at 432. While the suits were pending, Congress enacted legislation that "established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain." *Id.* at 433-434 & n.1 (citing Pub. L. No. 101-121, §318(b)(3), (5), 103 Stat. 701, 746-747 (1989)). The statute provided that "management of areas according to [the new rules] * * * is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [the suits]." Pub. L. No. 101-121, §318(b)(6)(A), 103 Stat. at 747.

The Court rejected the claim that the statute violated *Klein*. The statute, it explained, "compelled changes in law, not findings or results under old law." 503 U.S. at 438. The Court "f[ound] nothing in [the statute] that purported to direct any particular findings of fact or applications of law." *Ibid.* Rather, the statute "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents authorizing [certain] sales" and "expressly provided for *judicial* determination of the lawfulness of [other] sales." *Id.* at 438-439.

An *amicus* argued that "even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441. But "[t]his alternative theory was neither raised below nor squarely considered by the

Court of Appeals, nor was it advanced by respondents in this Court," so the Court "decline[d] to address it." *Ibid.*

B. *Klein*'s Scope Remains Uncertain

Confusion over *Klein*'s scope is pervasive. The D.C. Circuit has described *Klein* as "a bit of a constitutional Sphinx." *Janko* v. *Gates*, 741 F.3d 136, 146 (D.C. Cir. 2014), petition for cert. filed, No. 14-650 (Nov. 26, 2014). The Tenth Circuit has observed that "*Klein* is a notoriously difficult decision to interpret." *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170 (10th Cir. 2004) (McConnell, J.), cert. denied, 543 U.S. 817 (2004). And the Second Circuit has agreed that "[w]hether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question." *Benjamin* v. *Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997), vacated, 172 F.3d 144 (2d Cir. 1999), cert. denied, 528 U.S. 824 (1999).

Courts of appeals have articulated *Klein*'s scope in varying ways. The Seventh Circuit has interpreted the case to mean that, while Congress "may make rules that affect *classes* of cases," it "cannot tell courts how to decide a *particular* case." *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc) (emphasis added), rev'd on other grounds, 521 U.S. 320 (1997). Thus, while Congress "may prescribe maximum damages for categories of cases," it "cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Ibid.*

The D.C. Circuit, by contrast, has reached the question reserved in *Robertson* and held that it is "unobjectionable" for Congress to target a particular case. *Nat'l Coal. To Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002). While conceding that "*Klein*'s exact meaning is far from clear," the court saw "no reason why the specificity should sud-

denly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1096-1097.

C. This Case Squarely Presents Important Issues Left Open in *Robertson*

This case presents the important questions about *Klein*'s scope that the Court left open in *Robertson*. And it does so in a context—where Congress sought to compel the transfer of nearly $2 billion from one litigant to another—that calls out for resolution.

Section 8772 applies to one case and one case alone. It governs only "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. §8772(b). For good measure, it adds that "[n]othing in this section shall be construed * * * to affect * * * any proceedings other than [those] proceedings." *Id.* §8772(c)(1). The statute thus not only identifies this case by caption and docket number, but expressly disclaims any broader effect.

The Second Circuit nonetheless upheld the statute because it purported to require two judicial "findings" before the assets were awarded to plaintiffs: (1) that "Iran holds equitable title to, or the beneficial interest in, the assets"; and (2) that "no other person possesses a constitutionally protected interest." 22 U.S.C. §8772(a)(2). Neither finding, however, left anything meaningful for the court to decide—indeed, both were forgone conclusions.

The Second Circuit never held otherwise. To the contrary, it conceded that "there may be little functional difference" between §8772 and a statute that simply decided the case. App., *infra*, 10a. Indeed, the court thought it "unusual for there to be more than one likely

outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.* The court thus held §8772 constitutional *even if*, as Bank Markazi contended, it left no meaningful role to the courts.

There was good reason for the court not to dispute that premise. The statute effectively directed that plaintiffs prevail—collecting almost $2 billion—so long as Bank Markazi had an interest in the assets and no one else did. That is like directing judgment for a plaintiff on the sole condition that the judgment runs *only* against the defendant. That is practically no condition at all.

Moreover, there was never any serious question that Bank Markazi had a "beneficial interest" in the assets. Plaintiffs first learned of the assets in June 2008 only because the Treasury Department's Office of Foreign Assets Control advised them that an Iranian government entity had an interest in the assets. See Julie Triedman, *Can U.S. Lawyers Make Iran Pay for 1983 Bombing?*, Am. Law., Oct. 28, 2013; C.A. App. 1386. And by the time Congress enacted §8772, the President had blocked the assets *precisely because* they were "interests in property" of Bank Markazi. 77 Fed. Reg. at 6659.

The finding that no other person had an interest in the assets likewise was not a meaningful reservation of judicial authority. The statute excluded a "custodial interest of a foreign securities intermediary * * * that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). It thus excluded interests of UBAE or Clearstream—the only other parties with plausible claims. By the time Congress enacted §8772, moreover, Citibank had filed its interpleader complaint disclaiming any interest. See App., *infra*, 54a; C.A. App. 1362. It was thus abundantly clear that no other party had a cognizable interest. And if someone did have a "*constitutionally* pro-

tected interest," of course, courts would have to consider the claim even without the statute.[2]

The Second Circuit thought that *Robertson* precluded any inquiry into whether the findings were meaningful. App., *infra*, 10a. But nothing in *Robertson* suggests that Congress can avoid *Klein* merely by requiring "findings" on collateral uncontested issues. *Robertson* upheld the statute there because it "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. There was no suggestion those findings were makeweights.

If Article III prevents Congress from "say[ing] that a court must award Jones $35,000 for being run over by a postal truck," *Lindh*, 96 F.3d at 872, it surely also prevents Congress from awarding the same amount conditioned on findings that the $35,000 is the defendant's and not someone else's. Yet that is effectively what Congress did here—to the tune of almost $2 billion. By upholding that law, the Second Circuit divested *Klein* of all force.

The correctness of that holding is a critical issue for the separation of powers. The federal courts are an independent branch of government, not mere handmaidens to legislative directives. As a result, Congress cannot enact a law that directs the entry of judgment for a plaintiff. Congress cannot avoid that prohibition by directing

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[2] The district court asserted that the statute left "plenty for [it] to adjudicate." App., *infra*, 115a. But that claim is hard to square with the court's actual analysis, which occupied only two paragraphs of its lengthy opinion and largely just recited various admissions about the assets' status. See *id.* at 111a-113a. In any event, the *court of appeals* did not rely on that assertion, much less agree with it. And it is the court of appeals' holding that this Court would review.

judgment conditioned only on a finding that the assets do not belong to someone other than the defendant.

Even if the findings §8772 required were meaningful, the statute would still offend the separation of powers by purporting to change the governing law for this one case alone. Section 8772 could not be more targeted. It not only identifies this case by caption and docket number, but expressly declares that it has no effect beyond this one case. 22 U.S.C. §8772(b), (c)(1). Congress's intent to interfere with the adjudication of one particular case is thus explicit. The decision below thus presents the question this Court reserved in *Robertson*—whether a change in law is unconstitutional if it "swe[eps] no more broadly * * * than the range of applications at issue in [a] pending case[ ]." 503 U.S. at 441.

Even where a statute does not conclusively resolve a case, it offends basic norms of legislative and adjudicative process for Congress to change the governing law solely for purposes of one case, and solely to benefit the preferred litigant. If *Klein* forbids Congress from directing judgment for a party, it likewise must prohibit Congress from achieving the same result by dramatically changing the law to favor that party, solely for purposes of that one case. Either way, Congress arrogates to itself the role of resolving specific cases and controversies that the Constitution reserves to the judiciary.

II. The Constitutional Issues Are Important And Recurring

A. The Question Presented Raises Fundamental Separation-of-Powers Issues

The importance of protecting the authority and independence of the judicial branch cannot be overstated. The Framers "lived among the ruins of a system of inter-

mingled legislative and judicial powers" in which impartial judicial administration was often marred by "abuses of legislative interference with the courts at the behest of private interests and factions." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219-221 (1995). The Framers felt the "sense of a sharp necessity to separate the legislative from the judicial power." *Id.* at 221. Article III is thus an "'inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011).

Article III "safeguards the role of the Judicial Branch in our tripartite system." *CFTC* v. *Schor*, 478 U.S. 833, 850 (1986). It is also essential to individual liberty. "'[T]here is no liberty,'" the Framers knew, "'if the power of judging be not separated from the legislative and executive powers.'" *The Federalist No. 78*, at 561 (Cooke ed., 1977) (Hamilton) (quoting Montesquieu). The separation of powers thus not only "protect[s] each branch of government from incursion by the others," but "protect[s] the individual as well." *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011).

Given that critical importance, this Court has not hesitated to review separation-of-powers cases, even absent a clear circuit conflict. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367 (2004); *Freytag* v. *Comm'r*, 501 U.S. 868 (1991). The issues are no less important here.

B. Congress Has Repeatedly Disregarded Separation-of-Powers Principles in This Context

The question presented is not merely important, but recurring as well. In recent years, Congress has repeatedly intervened in lawsuits to help one particular set

of plaintiffs—terrorism victims—prevail against foreign governments.

In 2000, for example, individuals detained during the 1979 Iran hostage crisis tried to sue Iran, notwithstanding the United States' settlement with Iran in the Algiers Accords. See *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004). While the suit was pending, Congress enacted a new exception to sovereign immunity that applied solely to that case, identified by docket number in the statute. See Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001) (adding the words "or the act is related to Case Number 1:00CV03110(ESG) in the United States District Court for the District of Columbia" to existing immunity exception), amended by Pub. L. No. 107-117, § 208, 115 Stat. 2230, 2299 (2002) (correcting typo in docket number) (currently codified at 28 U.S.C. § 1605A(a)(2)(B)).

On appeal, the D.C. Circuit recognized that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and reserved judgment as to "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." 333 F.3d at 237 & n.5 (citing *Plaut* and *Robertson*); see also *id.* at 231 (quoting district court's observation that "Congress' intent to interfere with this litigation was clear"). Ultimately, the court did not reach the issue, because it held the claims barred by the Algiers Accords. *Id.* at 237-238.

Congress disregarded the separation of powers again when it expanded the FSIA's terrorism exception in 2008. 28 U.S.C. § 1605A. Congress included a provision allowing plaintiffs who had already litigated their case to judgment to refile their claims under the new statute. Pub. L.

No. 110-181, §1083(c)(2), 122 Stat. 3, 342 (2008). The Congressional Research Service observed that the statute "may be vulnerable to invalidation as an improper exercise of judicial powers by Congress." Elsea, *supra*, at 61. And courts have disagreed over its constitutionality. Compare *Kumar* v. *Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *11 (E.D. Va. Sept. 19, 2011) (finding constitutional violation), rev'd on other grounds *sub nom. Clodfelter* v. *Republic of Sudan*, 720 F.3d 199 (4th Cir. 2013), with *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 68-70 (D.D.C. 2009) (upholding statute despite "legitimate question of whether this enactment offends deeply entrenched constitutional principles relating to the separation of powers and the ability of the judiciary to function independently without interference from the political process" (citing *Klein*)).

Now, Congress has done it again. This case is just the latest—and most extreme—example of Congress's willingness to test the constitutional boundary between itself and the judicial branch.

III. This Case Has Important International Ramifications

A. The Decision Below Puts the United States in Violation of Its Treaty Obligations

The Second Circuit's decision is also important because it puts the United States in breach of its solemn treaty obligations. Article IV.1 of the Treaty of Amity requires the United States to "accord fair and equitable treatment to nationals and companies of [Iran]," and to "refrain from applying *unreasonable or discriminatory measures* that would impair their legally acquired rights and interests." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.1, Aug. 15, 1955, 8 U.S.T. 899, 903 (emphasis added). Section 8772 plainly

violates that provision. It is hard to imagine a more "unreasonable or discriminatory" measure than one that allows seizure of an Iranian entity's assets, because the entity is Iranian, and orders them paid over to private plaintiffs notwithstanding any state, federal, or international legal principle that would otherwise bar the seizure.

The Second Circuit saw "no country-based discrimination." App., *infra*, 7a. But it ignored the statute's plain terms. Section 8772 applies *only* to assets "equal in value to a financial asset *of Iran*"; it requires the court to find that "*Iran* holds equitable title to, or the beneficial interest in, the assets"; and its purpose is "to ensure that *Iran* is held accountable for paying the judgments." 22 U.S.C. §8772(a)(1)(C), (2) (emphasis added). While the court emphasized that the statute applies only to this case, App., *infra*, 7a, that makes no difference. Whether a statute singles out *one* Iranian instrumentality for arbitrary treatment or *all* of them, it is still a "discriminatory measure[]" that singles out an Iranian instrumentality because it is Iranian. Art. IV.1, 8 U.S.T. at 903.[3]

The Second Circuit also held that §8772 would abrogate any inconsistent Treaty provision. App., *infra*, 5a-6a. But an abrogation is still a breach. "That a * * * provision of an international agreement is superseded as domestic law does not relieve the United States of its in-

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[3] Bank Markazi, moreover, is not even a party to the underlying judgments. See App., *infra*, 52a-53a n.1. Article III.1 of the Treaty requires the United States to respect the "juridical status" of Iranian entities. 8 U.S.T. at 902; see App., *infra*, 6a-7a. And this Court has made clear that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983). By allowing seizure of Bank Markazi's purported assets to satisfy Iran's debts, Congress violated those principles as well.

ternational obligation or of the consequences of a violation of that obligation." *Restatement (Third) of the Foreign Relations Law of the United States* §115(1)(b) (1987).

That breach could expose the United States to claims in the International Court of Justice, which has authority to resolve Treaty disputes. Art. XXI.2, 8 U.S.T. at 913; see, *e.g.*, *Oil Platforms (Iran* v. *U.S.)*, 2003 I.C.J. 161 (Nov. 6). The State Department has warned that, when Iranian property is distributed to private plaintiffs, the United States may confront claims in international tribunals, "where we will have to account for it." *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, S. Hr'g No. 108-214, at 8 (July 17, 2003).

The decision below also calls into question the United States' commitment to its treaty obligations generally. The Treaty of Amity is but one of more than a dozen similar treaties the United States has signed. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185-186 & n.13 (1982); Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 373 n.1 (1956). The Nation's repudiation of its obligations here gives other treaty partners reason to doubt its commitment. In *Sumitomo*, this Court cited the fact that "treaty provisions similar to that invoked by [petitioner] are in effect with many other countries" as a reason the question there was "clearly of widespread importance." 457 U.S. at 182 n.7. The same reasoning applies here.

B. The Decision Below Undermines the President's Authority over Foreign Affairs

Section 8772 also interferes with the President's ability to conduct foreign affairs. As this Court has explained, "the congressional purpose in authorizing block-

ing orders is 'to put control of foreign assets in the hands of the President.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981). "The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country." *Ibid.* The Court has thus been reluctant to "allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments." *Ibid.*

For the same reason, the Executive Branch has repeatedly opposed using blocked assets to pay judgments. The President twice invoked statutory authority to waive provisions permitting such payments, finding that they would "impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). Using blocked assets to pay plaintiffs, he warned, would "effectively eliminate" an "important source of leverage," "seriously affect our ability to enter into global claims settlements," and threaten liability in international tribunals. 1998 Pub. Papers 1843, 1847 (Oct. 23, 1998); see also 2002 Pub. Papers 1697, 1699 (Sept. 30, 2002) (invoking "prerogatives * * * in the area of foreign affairs").

The need to preserve that authority is especially acute today. The President has questioned the wisdom of "[m]any years of refusing to engage Iran." *National Security Strategy* 26 (May 2010). The United States is thus currently involved in ongoing multilateral negotiations with the country. 79 Fed. Reg. 4522 (Jan. 28, 2014); 79 Fed. Reg. 45,228 (Aug. 4, 2014); 79 Fed. Reg. 73,141 (Dec. 9, 2014). As part of that process, Iran will "gain access, in installments, to $4.2 billion of its restricted revenues now held in overseas accounts." 79 Fed. Reg. at 4522. "Imposing additional sanctions now," the President has warned, "will only risk derailing our efforts * * * ." 2014

Daily Comp. Pres. Doc. 14, at 1 (Jan. 12, 2014). The decision below threatens those negotiations. Other statutes such as TRIA may already impair the President's authority to some degree. But §8772—which directs turnover of nearly $2 billion without regard to customary standards—raises that interference to a whole new level.

C. The Decision Undermines Confidence in U.S. Financial Markets

The Second Circuit's decision also undermines the United States' reputation as a safe custodian for central bank reserves. Congress enacted central bank immunity in §1611(b) to avoid "significant foreign relations problems" and to encourage the "deposit of foreign funds in the United States." H.R. Rep. No. 94-1487, at 31 (1976). "[F]oreign central banks are not treated as generic 'agencies and instrumentalities' of a foreign state under the FSIA; they are given 'special protections' befitting the particular sovereign interest in preventing the attachment and execution of central bank property." *NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 188 (2d Cir. 2011), cert. denied, 133 S. Ct. 23 (2012). That special treatment tracks international norms. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 21(1)(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (immunity for "property of the central bank or other monetary authority").

Section 8772 defies those goals. Foreign central banks can hardly be expected to deposit reserves at U.S. institutions if the funds are at risk of being seized whenever Congress wants to favor plaintiffs with well-connected lawyers. The impact is not limited to politically unpopular nations. The assets seized here were not *Bank Markazi's* foreign reserves, but rather assets deposited at

Citibank by *Clearstream*, a European securities intermediary, that were merely "equal in value to a financial asset of Iran * * * that [a] foreign securities intermediary * * * holds abroad." 22 U.S.C. § 8772(a)(1)(C). The district court effectively allowed plaintiffs to circumvent territorial limitations by treating the New York assets as a proxy for Bank Markazi's unattachable holdings in Europe. The decision thus discourages not just countries like Iran from holding reserves here, but also intermediaries in friendly nations like Luxembourg.

D. The Decision Invites Retaliation by Foreign Governments

A key justification for the FSIA's enactment was to promote U.S. interests by encouraging reciprocal treatment under foreign law. See H.R. Rep. No. 94-1487, at 31 (exemption for military property encourages "reciprocal application" under foreign law); cf. *id.* at 29-30 ("If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations * * * ."). The Executive Branch has thus opposed efforts to restrict immunity, citing the potential for retaliatory measures that would imperil U.S. property abroad. See, *e.g.*, 2007 Pub. Papers 1592, 1593-1594 (Dec. 28, 2007) (vetoing provision that "would be viewed with alarm by the international community and would invite reciprocal action against United States assets abroad").

Section 8772 raises precisely such concerns. By dictating the outcome of a case against a foreign sovereign, the statute invites other countries to intervene in litigation against the United States in their own courts. If this sort of legislation passes muster in a country with a supposedly well-developed legal system and commitment to the

rule of law, it is hard to see why countries with more developing systems should feel any compunction about changing the rules for their own preferred litigants.

The United States will ultimately be worse off. "U.S. citizens, corporations, the United States government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections * * * [are] eroded." *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 54 (Apr. 13, 2000) (joint statement of the State, Treasury, and Defense Departments) (emphasis omitted). For that reason too, the case warrants review.

* * * * *

This Court often grants certiorari due to a case's impact on foreign relations. See, *e.g.*, *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002) (citing "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002). At a minimum, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008).

IV. THIS CASE IS AN EXCELLENT VEHICLE

This case is also an excellent vehicle for review. It presents the *Klein* issue in its starkest form: a private suit for money. Sometimes, *Klein* arguments are raised in administrative challenges to government action. See,

e.g., *Robertson*, 503 U.S. at 432. But *Klein* might not apply to such suits involving "public rights." See *Biodiversity Assocs.*, 357 F.3d at 1170-1171. This case, however, involves paradigmatic private rights: a demand for money as compensation for losses. "[V]ery different considerations" arise when Congress tries to prescribe the outcome of an "action * * * at common law for damages." *The Clinton Bridge*, 77 U.S. 454, 463 (1870). This is the proverbial case where Congress has "sa[id] that a court must award Jones $35,000 for being run over by a postal truck." *Lindh*, 96 F.3d at 872.

Congress, moreover, could not have been more explicit about its intent to direct the outcome of a single case. It identified this case by caption and docket number in the statutory text. 22 U.S.C. §8772(b). The statute's express purpose is "to ensure that Iran is held accountable for paying the judgments." *Id.* §8772(a)(2). And the only findings the statute requires—that Bank Markazi rather than someone else has a beneficial interest in the assets—are so anemic that the Second Circuit all but conceded they are makeweights. See App., *infra*, 10a.

The statute's author, Senator Menendez, issued a press release explaining that the bill "makes it so that the [plaintiffs] will be able to attach two billion in Iranian Central Bank assets being held at a New York Bank." *Menendez Hails Banking Committee Passage of Iran Sanctions Legislation* (Feb. 2, 2012). News reports confirmed that he was "'working with all of the plaintiff groups to ensure that the approximately $2.5 billion in Iranian blocked assets located in New York are available.'" Ackley, *supra*. And he reiterated on the Senate floor that he "wanted to be sure that there was understanding on the record that Iran * * * should not be able to avoid having its assets attached." 158 Cong. Rec.

S3321 (May 21, 2012). The House sponsor agreed that the statute sought to "allow assets seized from the Iranian Government to be allocated to [plaintiffs] to recover the judgments owed to them." 158 Cong. Rec. H5569 (Aug. 1, 2012). "It is time that Iran is held accountable," he opined, and the statute would "offer [plaintiffs] the justice that they have long been denied." *Ibid.* Congress's intent to make plaintiffs prevail was thus unmistakable.

Finally, the issue's importance is underscored by the massive amount of money at stake. Congress effectively directed that nearly $2 billion held by Citibank, for another bank, ultimately for Bank Markazi's benefit be paid over to plaintiffs. Such a huge wealth transfer in violation of ordinary legal principles sets a very high-profile—and very bad—precedent for the predictability of the Nation's financial markets and the integrity of its judicial system. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2014

ANNEX 118

No.

IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Traditionally, a foreign sovereign's assets were absolutely immune from execution, wherever located. Congress modified that rule in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891, by providing that a foreign sovereign's "property in the United States" is immune from execution unless it falls within certain narrowly defined exceptions. 28 U.S.C. §§ 1609-1610. In the decision below, the Second Circuit held that the FSIA places no limits at all on the seizure of a foreign sovereign's property *outside* the United States, and in fact displaces any common-law immunity that would otherwise apply. Applying that rule, the Second Circuit held that the district court could order a foreign bank to transfer $1.68 billion of sovereign assets from Luxembourg to New York to satisfy default judgments. The question presented is:

Whether a foreign sovereign's property outside the United States is entitled to sovereign immunity.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix (App., *infra*, 83a-95a).

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IN THE

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v.

DEBORAH D. PETERSON, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank Markazi, the Central Bank of Iran, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 876 F.3d 63 (2d Cir. 2017). The opinion of the district court (App., *infra*, 56a-79a) is unreported but available at 2015 WL 731221 (S.D.N.Y. Feb. 20, 2015).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 21, 2017. It denied rehearing and rehearing en banc on February 7, 2018. App., *infra*, 80a-82a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602 *et seq.*, are set forth in the appendix. App., *infra*, 96a-125a.

PRELIMINARY STATEMENT

The Foreign Sovereign Immunities Act prohibits plaintiffs from executing against a foreign sovereign's property in the United States, subject only to narrow exceptions. In the decision below, however, the Second Circuit held that the Act places *no limits at all* on the seizure of property *outside* the United States—and in fact displaces any common-law immunity that would otherwise apply. Applying that rule, the Second Circuit held that the district court could order a foreign bank to transfer $1.68 billion of sovereign assets from Luxembourg to New York to satisfy default judgments.

The disastrous foreign policy implications of that rule are obvious. The seizure of another sovereign's property raises concerns under any circumstances. But a rule that permits the seizure of sovereign property outside the United States, without regard to any customary immunity standards, is destined to embroil the Nation in international disputes. It also threatens the U.S. assets of U.S. companies by exposing them to reciprocal treatment by foreign courts.

The Second Circuit acknowledged that the rule it adopted "abrogated decades of pre-existing sovereign immunity common law." App., *infra*, 2a. It nonetheless deemed its holding compelled by this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). But *NML*'s brief discussion of the topic was not necessary to the decision and rested on a mistaken premise. The question is important and warrants full consideration. As the Second Circuit observed, the "prob-

lem is one for the Supreme Court * * * to resolve." App., *infra*, 52a. The Court should grant review.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity for a state's "strictly commercial acts." *Id.* at 486-487. Two decades later, Congress codified the restrictive theory in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*).

The FSIA addresses both (1) the immunity of *foreign sovereigns from suit*; and (2) the immunity of *sovereign property from attachment and execution*. With respect to immunity from suit—commonly known as "jurisdictional" immunity—the FSIA confirms the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The Act then lists carefully circumscribed exceptions. *Id.* § 1605. For example, under the "commercial activity" exception, a foreign sovereign is not immune from actions "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Even after the State Department adopted the restrictive theory of immunity in 1952, U.S. courts continued to accord absolute immunity to sovereign property. As Congress observed: "Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment." H.R. Rep. No. 94-1487, at 8 (1976). Plaintiffs who obtained judgments thus had to rely on sovereign grace for their satisfaction.

In enacting the FSIA, Congress chose to "modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity." H.R. Rep. No. 94-1487, at 27. Section 1609 thus codifies the general rule that "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Section 1610 then lists narrow exceptions for certain types of "property in the United States." Section 1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution," if one of certain additional conditions is met. *Id.* § 1610(a). Under § 1610(a)(2), for example, property in the United States of a foreign state used for commercial activity in the United States is not immune if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2). Section 1610(b) lists additional exceptions for "property in the United States of an agency or instrumentality of a foreign state en-

gaged in commercial activity in the United States." *Id.* §1610(b).

Section 1611 sets forth additional immunities that are not subject to the exceptions in §1610. Under §1611(b)(1), for example, property of a "foreign central bank or monetary authority held for its own account" is immune unless the central bank or its parent government specifically waives the immunity. 28 U.S.C. §1611(b)(1).

In 1996, Congress added an exception to jurisdictional immunity for certain claims based on acts of terrorism. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241 (currently codified at 28 U.S.C. §1605A). Congress also added exceptions for execution of the resulting judgments. Section 1610(a)(7) provides that, with respect to such terrorism judgments, a foreign sovereign's "property in the United States * * * used for a commercial activity in the United States" is not immune, "regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. §1610(a)(7). Section 1610(b)(3) provides a similar exception for "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." *Id.* §1610(b)(3). Both exceptions thus apply only to "property in the United States."

B. This Court's Decision in *NML*

For 35 years, no appellate court held that the FSIA permits execution against property *outside* the United States. Courts uniformly understood the Act to leave intact the traditional absolute immunity accorded to property abroad. See, *e.g.*, *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against

a foreign sovereign's property * * * wherever that property is located around the world."); pp. 13-15, *infra*.

This Court then decided *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). *NML* did not present any question of execution immunity. It concerned only whether the Republic of Argentina was immune from *discovery* into its foreign assets. *Id.* at 2254. The Court held that it was not. Argentina had waived its *jurisdictional* immunity in certain bond indentures. *Id.* at 2256. And while execution immunity might ultimately restrict the plaintiffs' ability to seize assets, it was no bar to discovery. *Id.* at 2256-2257.

NML addressed execution immunity in passing. Argentina claimed that discovery into foreign assets was inappropriate because Congress could not have intended to allow discovery into assets the plaintiff had no power to execute against. 134 S. Ct. at 2257. The Court rejected that argument on multiple grounds.

First, the Court identified no pre-FSIA precedent recognizing any common-law immunity for assets outside the United States. 134 S. Ct. at 2257. "Our courts generally lack authority in the first place to execute against property in other countries," the Court noted, "so how could the question ever have arisen?" *Ibid.* The FSIA did not itself grant such immunity, the Court added, because §1609 by its terms "immunizes only foreign-state property '*in the United States*.'" *Ibid.*

Second, the Court held that any consideration of execution immunity was premature. "[T]he reason for these subpoenas," it noted, "is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law." 134 S. Ct. at 2257. That the subpoenas might sweep in information about property that *was* arguably

immune was not a basis to foreclose discovery. *Id.* at 2258. Accordingly, the Court refused to quash the subpoenas. *Ibid.*

II. Proceedings Below

A. Proceedings Before the District Court

1. Petitioner Bank Markazi is the Central Bank of Iran. App., *infra*, 2a. Like other central banks, it holds foreign currency reserves to carry out monetary policies, such as maintaining price stability. C.A. Confid. App. 425-426. Like other central banks, it often maintains those reserves in bonds issued by other sovereigns. App., *infra*, 5a; C.A. Confid. App. 426.

To carry out those central banking activities, in 1994 Bank Markazi opened an account in Luxembourg with Clearstream Banking, S.A., a Luxembourg-based bank that specializes in bonds and equities. App., *infra*, 5a; C.A. Confid. App. 426. Clearstream maintained its own accounts at banks in New York, including JPMorgan Chase Bank, N.A. and Citibank, N.A., which it used to process bond proceeds for customers. App., *infra*, 5a. In 2008, Bank Markazi stopped holding bonds at Clearstream directly and started doing so through an intermediary bank, Banca UBAE, S.p.A. *Id.* at 5a-6a.

2. This case arises out of efforts to seize those holdings to pay off default judgments against the Iranian government. Plaintiffs obtained those judgments in suits concerning terrorist attacks by organizations that allegedly received support from Iran. App., *infra*, 56a-57a; see, *e.g.*, *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003). Bank Markazi, an entity separate from the Iranian government, is not a party to any of those judgments and is not alleged to have been involved in the attacks.

In June 2008, plaintiffs sought to satisfy a portion of the judgments by restraining nearly $2 billion in bonds that Clearstream held at Citibank in New York for the ultimate benefit of Bank Markazi. App., *infra*, 6a. Bank Markazi resisted those efforts on multiple grounds, including that Clearstream's holdings in New York could not be seized to satisfy debts of Iran and that the assets were immune under the FSIA. See *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at *19-26 (S.D.N.Y. Mar. 13, 2013). While those proceedings were unfolding, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, which abrogated Bank Markazi's defenses solely for that one case. See *id.* § 502, 126 Stat. at 1258 (codified at 22 U.S.C. § 8772). The district court ordered the assets distributed to plaintiffs, and the Second Circuit affirmed. App., *infra*, 6a-7a & n.3. This Court granted review but ultimately affirmed, holding that the statute did not violate the separation of powers. See *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016).

3. This case concerns an additional $1.68 billion in bond proceeds not at issue in the prior proceedings. App., *infra*, 9a-10a. In December 2013, plaintiffs filed a complaint against Bank Markazi, Clearstream, UBAE, and JPMorgan alleging that Clearstream was holding bond proceeds in a JPMorgan account in New York for the benefit of Bank Markazi. *Id.* at 9a, 56a-57a. Plaintiffs sought, among other relief, a "turnover" order directing Clearstream and JPMorgan to turn over the proceeds to satisfy the judgments. *Id.* at 10a. They relied on New York's turnover statute, which provides:

> Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in

> which the judgment debtor has an interest * * * , the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor * * * .

N.Y. C.P.L.R. §5225(b). The district court initially issued an *ex parte* order restraining the funds, but it later vacated the order. App., *infra*, 10a.

Plaintiffs moved to reinstate the order, while defendants moved to dismiss. App., *infra*, 10a-11a. Defendants urged, among other things, that the assets were located in Luxembourg rather than New York and were therefore immune from execution. *Id.* at 11a. The district court agreed and dismissed the complaint. *Id.* at 56a-79a.

Reviewing the evidence, the court found that the assets were located in Luxembourg, not New York. "[T]he records before the Court are clear: JPM received proceeds relating to the Remaining Bonds, which it credited to a Clearstream account at JPM. * * * Clearstream in turn credited amounts attributable to the Remaining Bonds to the UBAE/Bank Markazi account in Luxembourg." App., *infra*, 69a-70a. "The JPM records are clear that whatever happened to the proceeds, they are gone. There are numerous days in which the Clearstream account at JPM showed a zero or a negative balance. As a matter of law, there is no asset in this jurisdiction to 'turn over.'" *Id.* at 70a (citation omitted).

Because the proceeds were in Luxembourg, the court held, they were immune from execution. "The evidence in the record is clear that any assets in which Bank Markazi has an interest, and which are at issue in this action, are in Luxembourg." App., *infra*, 77a. "The FSIA does not allow for attachment of property outside of the United States." *Ibid.* Accordingly, "the Court cannot entertain the instant claims against Bank Markazi." *Id.* at 78a.

B. The Court of Appeals' Opinion

The Second Circuit vacated in relevant part. App., *infra*, 1a-55a.

The court of appeals agreed with the district court that the assets were located in Luxembourg, not New York. App., *infra*, 32a. The JPMorgan account in New York was "a general 'operating account' used to service transactions on behalf of many customers," and it was "not segregated by customer." *Id.* at 33a (citation omitted). The account "frequently had a near-zero or negative end-of-day balance." *Ibid.* When "Clearstream received cash payments into [that] general pool," it "caused a corresponding credit to be reflected in the Markazi, and later UBAE, account in Luxembourg as a right to payment equivalent to the bond proceeds that Clearstream received and processed in New York." *Id.* at 35a. Because "the situs of an intangible property interest * * * is 'the location of the party of whom performance is required,'" the court held, "the asset the plaintiffs seek—a right to payment—is located in Luxembourg." *Id.* at 35a-36a.

Nonetheless, the court of appeals rejected the district court's conclusion that assets located outside the United States are immune. The court conceded that "the district court's assumption was reasonable in light of many judicial decisions suggesting as much." App., *infra*, 38a. But it deemed the assumption "incorrect" after *NML*, which it characterized as "abrogat[ing] decades of pre-existing sovereign immunity common law." *Id.* at 2a, 38a.

Under Federal Rule of Civil Procedure 69(a), the Second Circuit explained, "'a district court has the authority to enforce a judgment by attaching property in accordance with the law of the state in which the district court sits'"—in this case, New York. App., *infra*, 42a. In *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), the

New York Court of Appeals construed New York's turnover statute to authorize turnover orders even for property outside the country. App., *infra*, 45a. So long as the court has personal jurisdiction over the property's custodian, *Koehler* held, the court can order the custodian to bring the property into New York: "'[T]he key to the reach of the turnover order is personal jurisdiction over a particular defendant,'" and thus "a court sitting in New York with personal jurisdiction over a party may order that party 'to bring property into the state.'" *Ibid.* (quoting 12 N.Y.3d at 540).

The Second Circuit saw nothing in the FSIA that precluded applying the same statute to sovereign assets abroad. "Following *NML Capital*," it held, "the FSIA appears to be no impediment to an order issued pursuant to *Koehler* directing Clearstream * * * to bring the Markazi-owned asset held in Luxembourg to New York State." App., *infra*, 45a. The Second Circuit acknowledged the "many cases cited by the defendants for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution." *Id.* at 46a. But the court deemed them "no longer binding" because they were "decided before the Supreme Court's decision in *NML Capital*." *Ibid.* "Following *NML Capital*, this body of former case law is of no help to the defendants." *Ibid.* "*NML Capital* and *Koehler*, when combined, * * * authorize a court sitting in New York * * * to recall to New York extraterritorial assets owned by a foreign sovereign." *Id.* at 47a.

The court of appeals directed the district court on remand to "determine in the first instance whether it has personal jurisdiction over Clearstream." App., *infra*, 50a. The district court would also consider other potential barriers to recalling the assets, whether under "state

law, federal law, international comity, or for any other reason." *Id.* at 50a-51a (footnotes omitted). Once the assets were recalled, the district court would determine whether they "qualif[ied] as an asset '*in the United States* of a foreign state' * * * afforded execution immunity as such." *Id.* at 51a. But "[w]hether [an] extraterritorial asset is owned by a foreign sovereign is of no moment," because "the FSIA's grant of execution immunity does not extend to assets located abroad." *Id.* at 52a.

The court of appeals confessed that it was "cognizant of the conundrum apparently posed by *NML Capital* and *Koehler* when read in tandem." App., *infra*, 51a. "The FSIA 'aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.'" *Ibid.* The court was "not at all sure that *NML Capital* when read in light of the law established by *Koehler* furthers that goal." *Id.* at 52a. "But if we are correct in our analysis," the court concluded, "any such problem is one for the Supreme Court or the political branches—not this Court—to resolve." *Ibid.*[1]

On February 7, 2018, the court of appeals denied rehearing and rehearing en banc. App., *infra*, 80a-82a. On March 1, 2018, the court stayed its mandate pending this Court's review. C.A. Dkt. 352.

[1] The Second Circuit also vacated the district court's ruling that certain settlement agreements from earlier proceedings precluded other claims. App., *infra*, 17a-31a. That ruling is not at issue here.

REASONS FOR GRANTING THE PETITION

The Second Circuit held that sovereign immunity places no limits on execution against a foreign sovereign's property outside the United States. That holding upends decades of practice, creates an incoherent regime that Congress could not have intended, puts the United States in violation of international law, and threatens disastrous consequences for the Nation's foreign relations. While the Second Circuit's ruling rests on language from *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), the stark result in this case confirms the need for this Court to confront directly an issue it considered only obliquely in *NML*.

I. This Case Presents An Important Question With Drastic Foreign Relations Consequences

Categorically denying immunity to all sovereign property outside the United States defies longstanding precedent and threatens grave foreign relations consequences. The issue warrants review.

A. For Decades, Courts Unanimously Agreed That Sovereign Assets Abroad Were Not Subject to Execution

The law was once well settled: Sovereign assets were subject to execution under the FSIA *only* if they were located in the United States *and* one of §1610's narrow exceptions applied. Assets outside the United States were—for that reason alone—immune.

Courts applied that rule to the plaintiffs in this very case. A decade ago, plaintiffs sought to execute their judgment against a French shipping company's debt to Iran. See *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1122 (9th Cir. 2010). The Ninth Circuit rebuffed the claim: "[T]he debt obligation [the respondent] owes

to Iran is located in France. Iran's rights to payment from [the respondent] are not 'property in the United States' and are immune from execution." *Id.* at 1131-1132 (quoting 28 U.S.C. § 1610(a)(7)).

Every court of appeals to confront the issue agreed. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property * * * wherever that property is located around the world."); *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) ("courts in the U.S. may execute only against property that meets the[ ] two statutory criteria," including that it be "'in the United States'"); *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) ("[S]ection 1610 does not empower United States courts to levy on assets located outside the United States."); cf. *Aurelius Capital Partners, LP* v. *Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("[P]roperty that is subject to attachment and execution must be 'property in the United States of a foreign state' * * * ."). District courts and state courts followed the same rule.[2]

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[2] See, *e.g.*, *Fid. Partners, Inc.* v. *Philippine Exp. & Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996) ("Under the FSIA, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts."); *Raccoon Recovery, LLC* v. *Navoi Mining & Metallurgical Kombinat*, 244 F. Supp. 2d 1130, 1142-1143 (D. Colo. 2002); *Quaestor Invs., Inc.* v. *State of Chiapas*, No. CV-95-6723, 1997 WL 34618203, at *6 (C.D. Cal. Sept. 2, 1997); *Philippine Exp. & Foreign Loan Guar. Corp.* v. *Chuidian*, 267 Cal. Rptr. 457, 476 (Ct. App. 1990); *Int'l Legal Consulting Ltd.* v. *Malabu Oil & Gas Ltd.*, No. 651773/11, 2012 WL 1032907, at *10-11 (N.Y. Sup. Ct. Mar. 15, 2012).

As those courts explained, the immunity of overseas assets flows directly from the history and structure of the statute. Before the FSIA, sovereign property was absolutely immune from execution, wherever located. See H.R. Rep. No. 94-1487, at 8 (1976) ("Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation * * * ."). Congress decided to "modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity." *Id.* at 27. It did so by creating new immunity rules *for property in the United States*. Specifically, Congress confirmed a presumption of immunity for "property in the United States" in §1609, while creating exceptions for certain "property in the United States" in §1610. Congress did not purport to address or alter the traditional treatment of sovereign property abroad—much less *eliminate* immunity for such property entirely. Rather, the provisions addressing sovereign property—both the one granting immunity and the one creating exceptions—speak only to property in the United States.

The Second Circuit conceded that state of the law below. It acknowledged the "many cases cited * * * for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution." App., *infra*, 46a; see also *id.* at 38a ("many judicial decisions suggesting as much"); *id.* at 2a ("decades of pre-existing sovereign immunity common law"). The court could not cite a single case to the contrary from the first 35 years of the FSIA's history. Its decision was a dramatic break from decades of precedent.

B. The Decision Below Will Have Far-Reaching Consequences for Sovereign Property

The Second Circuit held that, under *NML*, foreign sovereign property abroad has *no* immunity from execution under U.S. law—not even the immunity applicable to property in the United States. App., *infra*, 38a-42a. As a result, a custodian of sovereign assets abroad could be ordered to bring them here for execution. *Id.* at 42a-47a. The Second Circuit relied on New York's turnover statute and the construction of that statute in *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009). But there is nothing unique about New York law. The decision below thus invites other courts across the country to seize foreign sovereign assets outside the United States.

Dozens of States have turnover statutes like New York's.[3] Some have been around for more than a century. See, *e.g.*, Ill. Rev. Stat. ch. 21, §§36-37 (1845); 1856 Wis. Gen. Acts ch. 120, §208; 1872-1873 W. Va. Acts ch. 218, §§10-11; 1881 Ind. Laws ch. 38, §226. Those statutes typically contain no express territorial limitation on the property's location.

Some courts have construed those statutes to apply only to property within the State. See, *e.g.*, *Sargeant* v. *Al-Saleh*, 137 So. 3d 432, 435 (Fla. Dist. Ct. App. 2014)

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[3] See, *e.g.*, Ariz. Rev. Stat. §12-1634; Cal. Civ. Proc. Code §708.205; Conn. Gen. Stat. §52-356b; Idaho Code §11-506; 735 Ill. Comp. Stat. 5/2-1402(c); Ind. Code §34-25-3-12; Iowa Code §630.6; Kan. Stat. §61-3604; 14 Me. Stat. §3131; Mich. Comp. Laws §600.6104; Minn. Stat. §575.05; Mont. Code §25-14-107; Neb. Rev. Stat. §25-1572; Nev. Rev. Stat. §21.320; N.C. Gen. Stat. §1-360.1; Ohio Rev. Code §2333.21; 12 Okla. Stat. §850; Or. Rev. Stat. §18.268; R.I. Gen. Laws §9-28-3; S.C. Code §15-39-410; S.D. Codified Laws §15-20-12; Tex. Civ. Prac. & Rem. Code §31.002; Va. Code §8.01-507; Wash. Rev. Code §6.32.080; W. Va. Code §38-5-15; Wis. Stat. §816.08; Wyo. Stat. §1-17-411.

(declining to follow *Koehler*). But others have rejected that limitation, holding that a court with *in personam* jurisdiction may compel a party to turn over property outside the State—even outside the country. See, *e.g.*, *Inter-Reg'l Fin. Grp.* v. *Hashemi*, 562 F.2d 152, 154-155 (2d Cir. 1977) (requiring party to "bring [stock] certificates into the State of Connecticut from their locations in other states, and indeed, even in other countries"); *Lozano* v. *Lozano*, 975 S.W.2d 63, 68 (Tex. App. 1998) (ordering "turnover of appellants' property located in Mexico"); *Schaheen* v. *Schaheen*, 169 N.W.2d 117, 118 (Mich. Ct. App. 1969) (enforcing order to transfer property in Lebanon because "a court may compel execution of a deed to land located outside a court's jurisdiction by acting *in personam*").[4]

More than a century ago, this Court observed that "[a] court of equity acting upon the person of a defendant may control the disposition of real property belonging to him situated in another jurisdiction, and *even in a foreign country*." *Corbett* v. *Nutt*, 77 U.S. 464, 475 (1871) (emphasis added); see also *Fall* v. *Eastin*, 215 U.S. 1, 8 (1909) ("A court of equity having authority to act upon the

[4] See also *Aurelio* v. *Camacho*, No. 2011-SCC-0023-CIV, 2012 WL 6738437, at *3 (N. Mar. I. Dec. 31, 2012) (ordering transfer of real property in the Philippines); *Reeves* v. *Fed. Sav. & Loan Ins. Corp.*, 732 S.W.2d 380, 381 (Tex. App. 1987) (real estate in Portugal); *Estates of Ungar ex rel. Strachman* v. *Palestinian Auth.*, 715 F. Supp. 2d 253, 257-264, 269 (D.R.I. 2010) (funds in Israel); *Clark* v. *Allen*, No. 95-2487, 1998 WL 110160, at *7 (4th Cir. Mar. 13, 1998) ("Under West Virginia law, appellants could be required to turn over property in their possession * * * in Florida."); *Dalton* v. *Meister*, 239 N.W.2d 9, 14 (Wis. 1976) ("Wisconsin courts may issue *in personam* orders which may operate on out-of-state property."); *Lyons Hollis Assocs.* v. *New Tech. Partners, Inc.*, 278 F. Supp. 2d 236, 246 (D. Conn. 2002); *In re Martin*, 145 B.R. 933, 948 (Bankr. N.D. Ill. 1992).

person may indirectly act upon real estate in another State."). Courts issued such orders long before the FSIA's enactment. See, *e.g.*, *Hodes* v. *Hodes*, 155 P.2d 564, 566, 570 (Or. 1945) (ordering turnover of stock certificates in Washington); *Wilson* v. *Columbia Cas. Co.*, 160 N.E. 906, 908 (Ohio 1928) (funds in Pennsylvania); *Tomlinson & Webster Mfg. Co.* v. *Shatto*, 34 F. 380, 381 (C.C.D. Minn. 1888) (real estate in Dakota territory); *Mitchell* v. *Bunch*, 2 Paige Ch. 606, 607, 615 (N.Y. Ch. 1831) (ordering defendant to turn over property located in Colombia because, "[a]lthough the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction").

Because New York is the Nation's financial capital, the Second Circuit's ruling would be important even if confined to that jurisdiction. But State turnover statutes are ubiquitous, and the decision below invites plaintiffs across the country to invoke those statutes to seize sovereign property abroad. The question presented is thus a matter of nationwide importance.

C. The Decision Below Threatens Serious Foreign Relations Consequences

This Court has long recognized that "[t]he judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity" as to "affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945); see also *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (noting "affront that could result * * * if property * * * is seized by the decree of a foreign court"). "[A]t the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sov-

ereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce*, 309 F.3d at 255-256; see also *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016), aff'd, 138 S. Ct. 816 (2018). For that reason, the FSIA's exceptions to execution immunity are "narrower" than its exceptions to jurisdictional immunity. *NML*, 134 S. Ct. at 2256.

Whatever friction may result from restraining a foreign state's property *within* the United States, ordering foreign state property *outside* the United States to be seized and brought here for execution is profoundly more provocative. Foreign sovereigns will inevitably perceive such orders to be a serious overreach. Cf. *Kiobel* v. *Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013) (noting potential for "diplomatic strife" and "serious foreign policy consequences" from extraterritorial application of U.S. law); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 269 (2010) (same). The court below candidly admitted that it was "not at all sure" its decision could be reconciled with the FSIA's goal of "'minimiz[ing] irritations in foreign relations.'" App., *infra*, 51a-52a. That was an understatement. The decision increases the risk of international discord exponentially.

The decision below, moreover, permits such orders in total disregard of the property's nature or use. Congress strictly limited execution against sovereign property *in the United States* by imposing a "commercial activity" requirement as well as other conditions. 28 U.S.C. §1610(a), (b). That limitation reflects the settled view that a sovereign's commercial property is entitled to lesser protection than property used for traditional sovereign functions. See *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821-822, 825 (2018). Under the decision below, however, property *outside* the United States

would be fair game even if used for core sovereign functions. The threat to foreign relations is self-evident. Cf. *Colella* v. *Republic of Argentina*, No. C 07-80084, 2007 WL 1545204, at *1, *6 (N.D. Cal. May 29, 2007) (rejecting attempt to seize Argentina's equivalent of Air Force One because "transport[ing] the president of Argentina" is not a "commercial activity").

Novel departures from traditional immunity principles threaten United States interests by encouraging reciprocal or retaliatory action by other nations. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) (rejecting rule that would "produc[e] friction in our relations with [other] nations and lead[ ] some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation'"). Those concerns apply with special force to execution immunity. "[J]udicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad." *Rubin*, 830 F.3d at 480; see also U.S. Br. in *Rubin*, No. 16-534, at 31 (Oct. 2017) (urging that "execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States' own property abroad"); 2007 Pub. Papers 1592, 1593-1594 (Dec. 28, 2007) (vetoing amendment that would "invite reciprocal action against United States assets abroad").[5]

Under the approach adopted below, *foreign* courts could order the custodians of *U.S. government* property to transfer the property to a foreign country for execution, whether the property was located in the United

[5] Indeed, "some foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). Denying immunity may thus impair United States interests even absent specific retaliatory measures.

States or in any third country. The disruption that would result is obvious. "U.S. citizens, corporations, the United States Government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose" if traditional protections are eroded. *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 54 (Apr. 13, 2000) (joint statement of the State, Treasury, and Defense Departments). The threat to United States interests is thus particularly acute.

D. The Second Circuit's Decision Violates International Law

The decision below also puts the United States in violation of international law. The U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004), imposes an express territorial limitation on execution against sovereign property: Absent consent, execution is allowed only if "the property is specifically in use or intended for use by the State for other than government non-commercial purposes *and is in the territory of the State of the forum*." *Id.* art. 19(c) (emphasis added). This Court has looked to that Convention for "basic principles of international law." *Helmerich*, 137 S. Ct. at 1320. The Convention's territorial limitation reflects settled law.[6]

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[6] See, *e.g.*, *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 12, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (execution must be "instituted before a court of the State where the property is located"); Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* art. 4(3)(b) (1991) (limiting execution to "property of the State within the

Violations of those principles could have serious consequences. The Treaty of Amity between the United States and Iran, for example, requires that property of Iranian entities receive protection "in no case less than that required by international law." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.2, Aug. 15, 1955, 8 U.S.T. 899, 903; see also *id.* art. IV.1, 8 U.S.T. at 903 (requiring "fair and equitable treatment" and proscribing "unreasonable * * * measures"). Similar provisions appear in the United States' commercial treaties with many countries. See Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 386 (1956).

Denying immunity where required by international law violates those protections and exposes the United States to claims for reparations in international tribunals. In the treaty with Iran, for example, the United States agreed to resolve disputes in the International Court of Justice. Treaty of Amity art. XXI.2, 8 U.S.T. at 913. The United States is already a party to ongoing ICJ proceedings seeking reparations for, among other things, the statute this Court upheld in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016). See *Certain Iranian Assets (Iran* v. *United States)* (I.C.J. filed June 14, 2016).

The State Department has cited such proceedings in urging restraint. "Virtually all of the Iranian blocked property that has been the subject of attachments," it notes, "is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it." *Bene-*

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territory of the forum State"); cf. Geneva Convention on the High Seas art. 23(2), Apr. 29, 1958, 13 U.S.T. 2312 (prohibiting maritime seizures where ship "enters the territorial seas of its own country or a third State").

fits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations, S. Hr'g No. 108-214, at 8 (July 17, 2003). "And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, it will no doubt be confronted with offsetting claims to cover judgments against the United States rendered in other national courts." *Ibid.*

E. The Decision Below Conflicts with the Position of the Executive Branch

Finally, the Second Circuit's decision contradicts the considered views of the Executive Branch. The United States has made its position clear: Assets outside the United States are immune. "The FSIA provides that only foreign-state property that is * * * situated 'in the United States' * * * is subject to execution * * * ." U.S. Br. in *NML*, No. 12-842, at 24 (Mar. 2014). "The FSIA therefore does not authorize U.S. courts to order execution against sovereign property located outside the United States." *Id.* at 24-25.

The decision below thus conflicts with the views of the Executive Branch—the branch with primary responsibility for the Nation's foreign relations. This Court regularly grants review where a decision threatens the Executive's ability to conduct foreign affairs, even absent a clear circuit conflict. See, *e.g.*, *Republic of Iraq* v. *Beaty*, 555 U.S. 1092 (2009) (granting review of sovereign immunity ruling despite concession that "[t]here is no circuit conflict," U.S. Br. in No. 07-1090, at 17 n.1 (Dec. 2008)).[7]

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[7] Other examples abound. See, *e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2081 (2015) ("difficult and complex [question] in international affairs"); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) ("sensitive and weighty interests of national se-

At a minimum, given the weighty foreign relations repercussions and the United States' prior submissions, the Court should invite the Solicitor General to file a brief expressing the views of the United States, as it has done in many similar cases. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 137 S. Ct. 708 (2017); *Bank Markazi* v. *Peterson*, 135 S. Ct. 1753 (2015); *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008).

II. The Decision Below Is Incorrect

The Second Circuit's ruling produces an incoherent statutory regime that Congress could not plausibly have intended. Those issues, not fully explored in *NML*, warrant thorough consideration here.

A. The Decision Below Produces an Incoherent Immunity Regime That Flouts the FSIA's Structure and History

1. The Second Circuit's decision creates an irrational immunity regime. The FSIA sharply limits execution against sovereign property *in the United States* by requiring both commercial activity and one of several other conditions. 28 U.S.C. §1610(a), (b). Under the decision below, however, the statute leaves *no immunity at all* from execution against property *outside* the United States. That makes no sense. Execution against assets abroad raises far more serious foreign relations concerns

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curity and foreign affairs" that raised "acute foreign policy concerns"); *Kiyemba* v. *Obama*, 559 U.S. 131 (2010) (Guantánamo detainees); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (Alien Tort Statute); *Société Nationale Industrielle Aerospatiale* v. *U.S. Dist. Court*, 482 U.S. 522, 528 (1987) (international comity).

and presents a much weaker case for the involvement of U.S. courts. There is no rational reason why Congress would impose sharp limits on seizure of domestic assets while declaring open season on assets elsewhere throughout the world. The decision below thus produces an "'absurd * * * result which Congress could not have intended'"—something this Court strives to avoid. *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998).

The decision also completely unmoors execution immunity from the principles Congress sought to adopt. Congress passed the FSIA to codify the restrictive theory of immunity. The statute declares: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. §1602. Congress codified jurisdictional immunity rules consistent with that theory. *Id.* §§1604-1605. And it "partially lower[ed]" the absolute immunity from execution that previously prevailed in U.S. courts "to make this immunity conform more closely with the provisions on jurisdictional immunity." H.R. Rep. No. 94-1487, at 27; see 28 U.S.C. §§1610-1611.

Under the Second Circuit's holding, however, property outside the United States can be seized whether it is commercial or not. Far from "conform[ing]" execution rules "more closely with the provisions on jurisdictional immunity," that approach abrogates them entirely. In *Rubin*, this Court refused to construe another provision to authorize execution against non-commercial property, citing Congress's "historical practice of rescinding attachment and execution immunity primarily in the con-

text of a foreign state's commercial acts." 138 S. Ct. at 825. The decision below does the opposite.

By permitting execution against property with no connection to the United States, moreover, the decision inverts the ordinary relationship between jurisdiction and execution. Traditionally, the execution exceptions to sovereign immunity are "narrower" than the jurisdictional exceptions. *NML*, 134 S. Ct. at 2256. The Act's commercial activity exception to jurisdictional immunity carefully specifies the required nexus to the United States. See 28 U.S.C. §1605(a)(2) (allowing actions "based upon a commercial activity carried on in the United States," "an act performed in the United States in connection with a commercial activity" elsewhere, or an act in connection with a commercial activity that causes a "direct effect in the United States"). By contrast, the decision below permits execution against property with *no* nexus to the United States whatsoever, sweeping far beyond the jurisdictional exception. That ruling stands the statutory structure on its head.

2. Nothing in the FSIA supports those results. It is true, as this Court observed in *NML*, that §1609 refers to the immunity of "property 'in the United States.'" 134 S. Ct. at 2257 (quoting 28 U.S.C. §1609) (emphasis omitted). But it is equally true that §1610's *exceptions* to immunity apply only to "property in the United States." 28 U.S.C. §1610(a), (b). The most reasonable inference from that domestic focus is not that Congress meant to declare open season on sovereign assets abroad. Rather, Congress was legislating only for domestic assets, leaving the pre-existing rules for foreign assets in place.

"'Congress generally legislates with domestic concerns in mind.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). It did precisely that here.

Congress created a statutory immunity regime for property in the United States. It reaffirmed the presumption of immunity for sovereign "property in the United States." 28 U.S.C. §1609. And it created exceptions for certain "property in the United States." *Id.* §1610(a), (b). The point of those territorial references was not to imply that property *outside* the United States is completely up for grabs. It was to mark out the scope of the issue Congress was addressing.

This Court construed the FSIA in precisely that fashion when addressing the immunity of foreign *officials* in *Samantar* v. *Yousuf*, 560 U.S. 305 (2010). The FSIA provides immunity to "'agenc[ies] or instrumentalit[ies] of a foreign state'" but does not mention officials. *Id.* at 313-319 (quoting 28 U.S.C. §1603(a)). Finding "nothing in the [FSIA's] origin or aims to indicate that Congress * * * wanted to codify the law of foreign official immunity," the Court held that claims against foreign officials remained "governed by the common law" that predated the FSIA. *Id.* at 325. So too here. Extraterritorial property is beyond the scope of the issues the FSIA addresses. It thus retains the absolute immunity it enjoyed before the statute.[8]

3. If the FSIA were meant to expose extraterritorial assets to execution, with no limitation on the type of

[8] Reading §1609's reference to "property in the United States" to create an immunity-free zone outside the United States would also render other language in the FSIA superfluous. If property outside the United States categorically lacked immunity, Congress would have had no reason to limit §1610's *exceptions* to "property in the United States." 28 U.S.C. §1610(a), (b). The Act would have the same effect without that language. "'[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Rubin*, 138 S. Ct. at 824.

property that may be seized, there would be some evidence Congress intended that result. There is none. The FSIA's history belies any such design.

The House Report's description of § 1609 does not even mention the "in the United States" language. It simply explains that "section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611." H.R. Rep. No. 94-1487, at 26; see also S. Rep. No. 94-1310, at 26 (1976) (identical language in Senate Report). If Congress had intended the phrase "in the United States" to work a fundamental transformation by lifting the immunity of assets abroad, the legislative history would have mentioned it.[9]

Finally, as explained above, denying immunity to sovereign property abroad violates international law. See pp. 21-23, *supra*. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming*

[9] Hearing testimony described the Act as subjecting to execution "some property of foreign states *located here*." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 98 (June 2, 1976) ("*1976 House Hearings*") (Michael M. Cohen, Maritime Law Ass'n) (emphasis added). Other passages discuss concerns about sovereigns frustrating execution by removing assets from the jurisdiction—concerns that make little sense if assets lack *any* immunity once outside the United States. See H.R. Rep. No. 94-1487, at 30 (stating that courts may consider whether a "foreign state is about to remove assets from the jurisdiction" in deciding how much notice to give under § 1610(c)); *1976 House Hearings* 76 (N.Y.C. Bar Ass'n); *id.* at 81 (Cecil Olmstead, Rule of Law Comm.).

Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). That, too, is a powerful reason to reject the interpretation.

B. This Court's Decision in *NML* Confirms the Need for Review

The Second Circuit's holding rested almost entirely on language from this Court's decision in *NML*. App., *infra*, 1a, 38a-55a. But the question here was not directly presented or properly briefed in *NML*; the discussion was not necessary to the Court's decision; and the matter did not receive careful attention.

NML concerned immunity from discovery, not execution. The question presented was whether the plaintiff could obtain discovery into Argentina's foreign assets—not whether it could ultimately execute against them in a U.S. court. 134 S. Ct. at 2254. Although the Court's opinion contains one paragraph discussing execution immunity, *id.* at 2257, that question simply was not presented in the case. The parties' briefs barely touched it.

The Court's discussion of execution immunity was not even necessary to its decision. Discovery into foreign assets may be appropriate even if a plaintiff must commence a proceeding in the country where the assets are located to execute against them. Thus, while the Court invoked the scope of execution immunity, the decision also rests on a separate rationale: "[T]he reason for these subpoenas," the Court noted, "is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law." 134 S. Ct. at 2257. The plaintiff was entitled to "ask for information about Argentina's worldwide assets generally, so that [it] can identify where Argentina may be holding property that *is* subject to execution." *Id.* at 2258.

NML's discussion of execution immunity, moreover, misapprehends a key fact. This Court assumed there were no pre-FSIA cases recognizing execution immunity for extraterritorial assets because the issue was wholly theoretical: "Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen?" 134 S. Ct. at 2257. That was the basis for the Court's suggestion that there was no common-law immunity for such assets. See *ibid.* But plaintiffs have often sought extraterritorial assets by means of *in personam* turnover orders directed to the custodians of the assets, and courts had issued such orders decades before Congress enacted the FSIA. See pp. 16-18, *supra*. Had that history been brought to the Court's attention in *NML*, the Court may well have concluded that the more persuasive explanation for the dearth of pre-FSIA precedent concerning the seizure of extraterritorial sovereign assets was that everyone understood that such assets were immune—just like assets in the United States.

This Court is not bound by prior statements concerning a matter that was not at issue in the case, not fully briefed, and not necessary to the decision. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (declining to follow language from prior case where "[t]he language * * * was not at issue in [the case]" and "the point before us now was not then fully argued"); *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (same where "the point now at issue was not fully debated" and "[c]areful study and reflection have convinced us * * * that th[e] assumption was erroneous"). The question warrants careful consideration in a case that actually presents the issue.

III. This Is An Appropriate Case For Review

This case squarely presents the issue. Both courts below issued thorough opinions finding that the assets at issue were located in Luxembourg. App., *infra*, 32a-38a, 69a-70a. And New York's highest court has authoritatively construed that State's turnover statute to reach assets abroad. See *Koehler*, 12 N.Y.3d at 540. This case is thus unlike others where there are doubts over the location of the assets or the content of state law. See, *e.g.*, *Peterson*, 627 F.3d at 1131-1132 (dispute over situs of intangible property).

There is no reason to wait for further decisions from the courts of appeals. Whatever the merits of *NML*'s statements regarding extraterritorial execution immunity, those statements are clear enough. 134 S. Ct. at 2257. While they do not bind this Court, it is highly unlikely that lower courts would feel free to disagree. See, *e.g.*, *Utah Republican Party* v. *Cox*, 885 F.3d 1219, 1231 (10th Cir. 2018) (lower courts are "'bound by Supreme Court dicta almost as firmly as by the Court's outright holdings'"). As the Second Circuit observed, the problem is thus "one for the Supreme Court * * * to resolve." App., *infra*, 52a.

The nature of the issue favors immediate review. A denial of sovereign immunity, like other immunities, is "effectively unreviewable on appeal from a final judgment" because the immunity includes "an entitlement not to be forced to litigate." *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985); see also *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011) (denial of execution immunity immediately appealable because "[t]he FSIA protects foreign sovereigns from court intrusions on their immunity in its various aspects"). Further delay simply exacerbates the intrusion on immunity.

Whether or not the district court ultimately distributes the assets to plaintiffs, an order directing that $1.68 billion of Bank Markazi's property be transferred from Luxembourg to the United States and then kept here for years while the parties litigate further is a serious infringement on immunity. See *Stephens* v. *Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-1230 (2d Cir. 1995) (prohibiting order requiring sovereign to post security because it would "force [the] foreign sovereign * * * to place some of [its] assets in the hands of the United States courts for an indefinite period"). Bringing the assets to the United States also threatens to alter the immunity analysis substantially.[10] For those reasons too, this case warrants review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] The Terrorism Risk Insurance Act ("TRIA") provides that "blocked assets" are subject to execution. 28 U.S.C. § 1610 note § 201(a). Under Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012), "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, *[or] that hereafter come within the United States*, * * * are blocked." *Id.* § 1(a), 77 Fed. Reg. at 6659 (emphasis added). Thus, plaintiffs may argue that bringing the assets to the United States defeats immunity under TRIA.

Respectfully submitted.

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MAY 2018

ANNEX 119

Peterson v. Islamic Republic of Iran

United States District Court for the Southern District of New York

February 19, 2015, Decided; February 20, 2015, Filed

13-cv-9195 (KBF)

Reporter
2015 U.S. Dist. LEXIS 20640 *; 2015 WL 731221

DEBORAH D. PETERSON et al., Plaintiffs, -v- ISLAMIC REPUBLIC OF IRAN; BANK MARKAZI a/k/a CENTRAL BANK OF IRAN; BANCA UBAE SpA; CLEARSTREAM BANKING, S.A.; and JP MORGAN CHASE BANK, N.A., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Judgment entered by, Costs and fees proceeding at Peterson v. Islamic Republic of Iran, 2015 U.S. Dist. LEXIS 73917 (S.D.N.Y., June 3, 2015)

Decision reached on appeal by, Remanded by Peterson v. Islamic Republic of Iran, 876 F.3d 63, 2017 U.S. App. LEXIS 23456 (2d Cir., Nov. 21, 2017)

Decision reached on appeal by, Remanded by Olson v. UBAE, S.p.A., 703 Fed. Appx. 46, 2017 U.S. App. LEXIS 23445 (2d Cir. N.Y., Nov. 21, 2017)

Prior History: Peterson v. Islamic Republic of Iran, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y., Mar. 13, 2013)

Counsel: [*1] For Deborah D. Peterson, personal representative of the Estate of James C. Knipple, Plaintiff: James Patrick Bonner, Patrick Louis Rocco, Susan M. Davies, Stone Bonner & Rocco LLP, New York, NY; Liviu Vogel, Mark Nathan Antar, Salon Marrow Dyckman Newman BroudyLLP, New York, NY.

For Bank Markazi, also known as Central Bank of Iran, Defendant: Bension Daniel De Funis, Donald F. Luke, Eli Joshua Kirschner, Jaffe & Asher LLP, New York, NY.

For Banca UBAE SpA, Defendant: John J. Zefutie, JR., Thompson Hine LLP (NYC), New York, NY; Ugo Alfredo Colella, PRO HAC VICE, Thompson Hine LLP(DC), Washington, DC.

For Clearstream Banking, S.A., Defendant: Gerald Michael Moody, Jennifer Gillian Newstead, Jonathan David Martin, Karen E Wagner, LEAD ATTORNEYS, Benjamin S. Kaminetzky, Davis Polk & Wardwell L.L.P., New York, NY.

For JP Morgan Chase, NA, Garnishee: Gregory Phillip Feit, Steven B. Feigenbaum, Levi Lubarsky & Feigenbaum LLP, New York, NY.

Judges: KATHERINE B. FORREST, United States District Judge.

Opinion by: KATHERINE B. FORREST

Opinion

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

On December 30, 2013, plaintiffs—judgment-creditors of the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and [*2] Security ("MOIS")—commenced the instant action against Iran, Bank Markazi a/k/a Central Bank of Iran ("Bank Markazi" or "Markazi"), Banca UBAE S.p.A. ("UBAE"), Clearstream Banking, S.A. ("Clearstream"), and JP Morgan Chase Bank, N.A. ("JPM"). (ECF No. 1.)[1] Deborah Peterson, the first listed plaintiff, is just one of the numerous plaintiffs who were victims, or are family members of victims, of the 1983 bombing of the U.S. Marine Barracks in Beirut, Lebanon.[2] Each plaintiff group has obtained a judgment against Iran and MOIS as sponsors of the Beirut bombing, in amounts ranging from more than $800 million to over $2 billion. Each of the judgments has been duly registered in this district. (See Am. Compl. ¶¶ 39-43.)

[1] Plaintiffs filed an amended complaint, dated April 25, 2014, on July 24, 2014. (ECF No. 104 ("Am. Compl.").)

[2] The full list of plaintiffs is set forth at Exhibit A to the Amended Complaint.

Plaintiffs assert the following claims in the Amended Complaint:

- Count One: against Bank Markazi for a declaratory judgment;
- Counts Two and Three: against all defendants except for JPM for rescission of fraudulent conveyances;
- Counts Four, Five, and Six: against all defendants for turnover; [*3]
- Count Seven: against Clearstream and Bank Markazi for rescission of fraudulent conveyance; and
- Count Eight: against all defendants for equitable relief.

Plaintiffs allege that Clearstream is in possession of assets valued at over $1.6 billion, representing proceeds of bonds beneficially owned by Bank Markazi. (See Am. Compl. ¶ 3; Declaration of Liviu Vogel dated July 11, 2014 ("Vogel Decl.") ¶ 3.) According to plaintiffs, JPM in New York received the bond proceeds into one of its accounts, and these proceeds legally remain on deposit with JPM and are therefore subject to turnover. Defendant JPM alleges that it never knew that any proceeds with which it credited Clearstream were connected to Bank Markazi, and that in any event the money is long gone and JPM has no role in this dispute. Clearstream argues that plaintiffs previously settled with Clearstream whatever claims they may have had as to these funds and the account against which they were credited, and that in all events, it does not maintain any of the funds with which JPM once credited it in New York—all funds have been transferred and all client transactions relating to the proceeds are on Clearstream's books in Luxembourg. [*4] Bank Markazi asserts that its account is with UBAE outside of the United States and that this Court therefore lacks jurisdiction over Bank Markazi under the Foreign Sovereign Immunities Act ("FSIA"). Finally, UBAE argues that it also previously entered into a settlement releasing the instant claims, and that while it holds an account for Bank Markazi's benefit with Clearstream, such account is maintained in Luxembourg, and this Court lacks any basis for personal jurisdiction over UBAE in this district.

Before the Court are motions by each defendant for dismissal. While the parties raise numerous arguments, there is really little complexity to this matter: plaintiffs released the instant claims against Clearstream and UBAE, there is nothing left in the Clearstream account at JPM for JPM to "turn over," and this Court lacks subject-matter jurisdiction over Bank Markazi as to assets located abroad. Accordingly, as set forth below, defendants' motions are GRANTED.

I. FACTUAL BACKGROUND

Plaintiffs have substantial outstanding judgments against Iran and MOIS. They have been pursuing collection on those judgments in this and other courts in various jurisdictions since those judgments were obtained. [*5] This action arises from these ongoing collection efforts.

In June 2008, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") responded to a subpoena served in connection with plaintiffs' efforts to collect on their judgments against Iran. (Am. Compl. ¶ 46.) OFAC's response indicated that "an Iranian government client" maintained an interest in bonds with a face amount of $2,003,000,000. (Id.) Referred to as the "Original Assets" in this litigation, the subject bonds were held on Clearstream's books and records and maintained in a sub-custodial account with Citibank.[3] (See id.) Subsequent information provided by OFAC in April 2010 indicated that the subject bonds were "apparently owned by the Central Bank of Iran." (Id. ¶ 47.) Plaintiffs sought and obtained turnover of the Original Assets (amounting to approximately $1.75 billion) in a judgment entered by this Court on July 9, 2013, and affirmed by the Second Circuit on July 9, 2014.

The instant lawsuit relates specifically to additional assets plaintiffs allege are also present in New York, referred to here as the "Remaining Assets." Plaintiffs assert that the Remaining Assets amount to over $1.6 billion in proceeds attributable to bonds (the "Remaining Bonds") which Bank Markazi maintained with Clearstream and which Clearstream had in turn sub-custodized with JPM in New York. (See Am. Compl. ¶ 3.)

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[3] The Peterson Judgment Creditors immediately sought and obtained issuance of an Execution upon these bonds (the "First Execution"); a Second Execution was served on Clearstream on October 27, 2008. (See Am. Compl. ¶¶ 48, 50.) Plaintiffs [*6] served Clearstream with a restraining notice in June 2008; that restraining notice was extended in July 2009 and remains in effect. (See id. ¶¶ 51, 52.) The effect of the First and Second Executions and restraining notices was to restrain the Original Assets. (See id. ¶ 53.) Plaintiffs obtained a turnover order as to the Original Assets in 2013, affirmed by the Second Circuit on July 9, 2014. See Peterson v. Islamic Republic of Iran, No. 10 CIV. 4518 KBF, 2013 U.S. Dist. LEXIS 40470, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013) ("Peterson I"), recons. denied, 2013 U.S. Dist. LEXIS 73852, 2013 WL 2246790 (S.D.N.Y. May 20, 2013); Peterson v. Islamic Republic of Iran, 758 F.3d 185 (2d Cir. 2014).

The parties do not contest that the Remaining Assets exist in approximately the amount alleged, that Bank Markazi is the Central Bank of Iran, that it was also the beneficial owner of the Remaining Bonds and is now the beneficial owner of the Remaining Assets. Finally, the parties do not dispute [*7] that UBAE has an account with Clearstream in Luxembourg which it maintains for Bank Markazi.[4] The parties vigorously dispute whether the Remaining Assets are in a Clearstream account maintained by JPM in New York; whether the Remaining Assets are anything more than book entries maintained by Clearstream in Luxembourg; and finally, whether if, once JPM credited Clearstream with the Remaining Assets (which occurred at various times) Clearstream did in fact manage to transfer them from New York to Luxembourg via book entry, it should now be required to reverse those entries. The mechanics of the actions relating to the Remaining Assets are as follows:

Prior to February 2012, approximately $1.4 billion in proceeds relating to the Remaining Bonds was paid to JPM and JPM in turn credited that amount to Clearstream. Approximately $104 million was later also transferred [*8] in the same manner. (See Vogel Decl. ¶ 12.) The banking transactions occurred in various steps. As an initial matter, the Remaining Bonds were issued by sovereigns such as the European Investment Bank. (Am. Compl. ¶ 137.) Owners of beneficial interests in the types of bonds that constituted the Remaining Assets generally do not receive physical certificates evidencing their interest. (Id. ¶ 139.) Rather, the owner's interest is reflected in book-entry form. (Id.)

The prospectuses for the Remaining Bonds required Clearstream, as custodian for its customers who held the beneficial interests in those bonds, to accept payment of interest and redemption proceeds into an account at a bank located in New York. (Vogel Decl. ¶ 3(a).) The prospectus for one of the Remaining Bonds states:

> Beneficial interests in the Global Notes will be shown on, and transfers thereof will be effected only through, records maintained in book-entry form by . . . Clearstream, Luxembourg . . . .
>
> Payments shall be made in U.S. dollars by cheque drawn on a bank in New York City and mailed to the holder . . . .
>
> Each of the persons in the records of . . . Clearstream, Luxembourg . . . as the holder of a Note represented [*9] by a Global Note must look solely to . . . Clearstream, Luxembourg . . . for his share of each payment made by H.M. Treasury to the holder of such Global Note and in relation to all other rights arising under the Global Note . . . .

(Id. ¶ 38.)

Clearstream maintains an account at JPM into which it receives funds on behalf of numerous clients; over the course of a four-year period spanning from 2008 into 2012, proceeds relating to the Remaining Bonds went into this account. (See Declaration of Gauthier Jonckheere dated August 5, 2014 ("Jonckheere Decl.") ¶ 4.)

On January 17, 2008, Markazi opened an account with UBAE to act as its custodial bank in connection with its securities positions at Clearstream. (See Vogel Decl. ¶ 19.) The next day, UBAE sent an "URGENT" electronic message to Clearstream instructing it to open a new account in UBAE's name.[5] (Id.) Clearstream opened account no. 13061 for UBAE that same day. (Id.) Thereafter, Markazi instructed Clearstream to transfer $4.6 billion in securities from its account at Clearstream to UBAE's 13061 account.[6] (Id.) Among the assets transferred in this manner were those which are the subject of the instant lawsuit. (Id.)

On June 16, 2008, plaintiffs served a restraining notice on Clearstream, which should have had the effect of preventing Clearstream from transferring any property in which Bank Markazi had an interest out of the United States. (See Am. Compl. ¶¶ 51, 53.)

On June 5, 2009, Clearstream informed UBAE that, due to laws passed in the United States, it could no longer process transactions for bonds held on behalf of Iran

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[4] Plaintiffs allege that Clearstream, Bank Markazi, and UBAE agreed to transfer the Remaining Assets from Bank Markazi to UBAE prior to changes in U.S. law which restricted the movement and transfer of Iranian assets. According to plaintiffs, Clearstream opened an account for UBAE in Luxembourg for this purpose. (See Am. Compl. ¶¶ 10-11.)

[5] Prior to this instruction, [*10] UBAE had maintained a single account with Clearstream which it had opened in 1973. (Vogel Decl. ¶ 19.)

[6] Plaintiffs assert that such transfer was made free of any payment by UBAE. (See Am. Compl. ¶ 11; Vogel Decl. ¶ 19.) As UBAE does not contest that the securities in the UBAE account are held for Markazi's benefit (see UBAE's Objections and Responses to Plaintiffs' Interrogatories ¶ 8, Vogel Decl. Ex. 25), the existence of payment or other form of consideration is irrelevant to the instant motions.

using the services of a U.S. person—that is, JPM. (Vogel Decl. ¶ 29.) Clearstream stated that, as a result, it had opened up a "sundry blocked account 13675" and that this account would hold cash payments received by Clearstream in connection with the Markazi securities it held. ([*11] See id.)

Thereafter, Clearstream credited the 13675 account with proceeds relating to the Remaining Bonds—totaling $1,683,184,679.47 as of May 2013. (See id. ¶ 32.) It is evident from records produced by Clearstream that these proceeds are denominated in U.S. dollars. (See id.) No party disputes that in the absence of the block that Clearstream had imposed, Clearstream would have credited UBAE's 13061 account with the same proceeds. But nor can any party dispute that this is counterfactual; proceeds from the Remaining Bonds were never credited to the 13061 account and were instead credited and blocked in the 13675 account. No party disputes that neither UBAE nor Markazi has received any of these funds and that Clearstream's obligation with respect to the underlying financial assets associated with the Remaining Bonds remains outstanding. (See id. ¶ 42.)

UBAE is organized under the laws of Italy and operates principally as a trade bank. (Declaration of Mario Sabato dated July 18, 2014 ("Sabato Decl.") ¶ 2.) As of December 2013, when this lawsuit was first filed,[7] UBAE did not transact business, have customers, advertise, solicit business, or market services in New York or anywhere else [*12] in the United States. (Id. ¶ 3.) As of that date, it did not have any employees, officers, or directors in the United States. (Id.) UBAE was not listed on any U.S. stock exchange. (Id.) Until 2009, UBAE had maintained an account with HSBC in New York and used that account to facilitate international transactions or money transfers for itself and its customers. (Id. ¶ 5.) This HSBC account was one of the bases for this Court's determination in Peterson I that UBAE was amenable to jurisdiction. See Peterson, 2013 U.S. Dist. LEXIS 40470, 2013 WL 1155576, at *16-18; Peterson, 2013 U.S. Dist. LEXIS 73852, 2013 WL 2246790, at *6. The HSBC account was closed on September 25, 2009. (Sabato Decl. ¶ 6.) None of the transactions at issue in the Amended Complaint occurred via the HSBC account. (Id. ¶ 5.) All of UBAE's acts in relation to the Remaining Bonds and Remaining Assets have occurred with Clearstream in Luxembourg. (Id.)

On January 23, 2012, UBAE opened a correspondent [*13] account with JPM in New York. (Id. ¶ 6.) None of the transactions at issue in the instant lawsuit went through that account. (Id.)

II. DISCUSSION

Clearstream and UBAE seek dismissal on the basis that plaintiffs' claims were released as part of separate settlements in connection the Peterson I litigation. They are correct. While the settlement agreements entered into between plaintiffs and these two parties differ in certain respects, the ultimate result is the same: plaintiffs' claims here are foreclosed. As to UBAE, plaintiffs released it from any action save a turnover action. Since the Remaining Assets are no longer in this district, turnover is not an available remedy. As to Clearstream, plaintiffs entered into a covenant not to sue with regard to any assets in the 13675 account; they may only sue for turnover and a ministerial action in connection therewith—which is far from the claims pursued here.

A. Clearstream

On October 23, 2013,[8] Clearstream and the plaintiffs settled all claims, with a limited exception discussed below. The Clearstream Settlement Agreement contains the following WHEREAS clauses:

> WHEREAS, on June 16, 2008, Citibank moved for an order to show cause why the Restraints [*14] should not be vacated, and on June 27, 2008, the Court vacated the Restraints with respect to certain Assets nominally valued at approximately $250,000,000 that were no longer in the possession of Citibank (the "Transferred Assets"), but left the Restraints in place with respect to assets valued at approximately $1,750,000,000 (the "Restrained Assets"); and
>
> ...

[7] Personal jurisdiction is determined as of the date the original complaint was served. See Indymac Mortgage Holdings, Inc. v. Reyad, 167 F. Supp. 2d 222, 232 (D. Conn. 2001) ("It is well established that jurisdiction is to be determined by examining the conduct of the defendants as of the time of service of the complaint." (quoting Greene v. Sha-Na-Na, 637 F. Supp. 591, 595 (D. Conn. 1986)) (internal quotation marks omitted)); see also Ginsberg v. Gov't Properties Trust, Inc., No. 07 CIV. 365 CSHECF, 2007 U.S. Dist. LEXIS 75771, 2007 WL 2981683, at *6 (S.D.N.Y. Oct. 11, 2007).

[8] The Clearstream Settlement Agreement was signed earlier, but it became effective on October 23, 2013, after being ratified by a specified number of plaintiffs. (Memorandum of [*15] Law in Support of Clearstream's Motion to Dismiss the Amended Complaint at 2 n.1, ECF No. 98.)

> WHEREAS, on June 8, 2010, the Peterson Plaintiffs filed a complaint . . . seeking, inter alia, turnover of the Restrained Assets . . .
> ...
>
> WHEREAS, certain Plaintiffs have asserted claims in Peterson for avoidance or damages against Clearstream with regard to the Transferred Assets, including, but not limited to, claims for fraudulent conveyance, tortious interference with the collection of a money judgment, and prima facie tort (the "Peterson Direct Claims"); and
> ...
>
> WHEREAS, on February 28, 2013, the Court issued an Opinion and Order that, inter alia, granted the Turnover Motion . . .

(See Settlement Agreement ("Clearstream Agr.") at 1-2, Vogel Decl. Ex. 6.)

The Clearstream Settlement Agreement also recited the then-pending appeal to the Second Circuit of the Court's February 28 Opinion & Order (as well the Court's denial of a motion for reconsideration). (Id. at 2-3.) The final WHEREAS clause states:

> WHEREAS, Plaintiffs and Clearstream wish to resolve all of the disputes and claims between them for good and valuable consideration
> . . .

(Id. at 3.)

Paragraph 1 of the Agreement contains provisions relating to the termination of the litigation to which the Agreement referred in the WHEREAS clauses. (See id. ¶ 1.) Paragraph 2 of the Agreement is entitled "Ratification By Plaintiffs and Covenant Not To Sue." (See id. ¶ 2.) This section consists of a series of provisions reciting that each plaintiff is to execute a "Ratification Agreement." By executing a Ratification Agreement, each plaintiff "ratifies and agrees to be legally bound by the terms" of the Clearstream Settlement Agreement. (Id. ¶ 2(i).) (The UBAE Settlement Agreement contains no equivalent procedure.[9] In addition, each plaintiff agrees not to sue Clearstream in law or in equity for any claims other than certain [*16] defined "Direct Claims." (See id. ¶ 2(ii).) The covenant not to sue concerns enumerated "Covered Subjects." The Covered Subjects include claims in the Peterson I litigation, and:

> (b) any account maintained at Clearstream . . . by or in the name of or under the control of any Iranian Entity . . . or any account maintained at Clearstream or at any Clearstream Affiliate by or in the name of or under the control of UBAE, including but not limited to, accounts numbered . . . 13061 . . . 13675 . . . (each an "Account") or any asset or interest held in an Account in the name of an Iranian Entity (an "Iranian Asset"); [as well as]
> (c) any transfer or other action taken by or at the direction of any Clearstream Party, Citibank, or any Iranian Entity, including any transfer or other action in any account, including a securities account or cash account or omnibus account or correspondent account maintained in Clearstream's name or under its control, that in any way relates to any Account or any Iranian Asset.

(Id. ¶ 2(ii)(b), (c).) Paragraph 2 further provides that each plaintiff, independently or through counsel, performed "an independent inquiry as to the facts and law upon which the Actions are [*17] based" and "nevertheless wishes to resolve any dispute or claim with the Clearstream Parties," and such resolution will be unaffected by later discovery of any new facts. (Id. ¶ 2(iii).) The key issue here is whether this broad covenant encompasses the claims in the instant action. This is resolved by reference to the carve-out provision contained in paragraph 4 of the Agreement. That paragraph provides:

> **Garnishee Actions**. Notwithstanding the provisions of paragraph 2 of this Agreement, the Covenant shall not bar any action or proceeding regarding (a) the rights and obligations arising under this Agreement, or (b) efforts to recover any asset or property of any kind, including proceeds thereof, that is held by or in the name, or under the control, or for the benefit of, Bank Markazi or Iran . . . in an action against a Clearstream Party **solely** in its capacity as a garnishee (a "Garnishee Action.") Such a Garnishee Action may include, without limitation, an action in which a Clearstream Party is named solely for the purpose of seeking an order directing that a Clearstream Party perform an act that will have the effect of reversing a transfer between other parties that is found to have [*18] been a fraudulent transfer under any legal or equitable theory, **provided however** that such a Garnishee Action shall not seek an award of damages against a Clearstream

[9] The UBAE Settlement Agreement states that it "is entered into by and among the judgment creditors in the actions listed on Annex A (the 'Plaintiffs'), by their attorneys." (Confidential Settlement Agreement ("UBAE Agr.") at 1, Declaration of John J. Zefutie, Jr. dated July 22, 2014 ("Zefutie Decl.") Ex. 2.)

Party.

(Id. ¶ 4 (emphasis in original).)

Plaintiffs argue that the Clearstream Settlement Agreement specifically carves the claims against Clearstream in the instant action out of the settlement. Paragraph 4 carves out one type of claim—a "Garnishee Action." As defined in that Agreement, such an action could include a request for an order that Clearstream take an action to reverse a transfer between other parties that is found to have been a fraudulent conveyance. This provision does not allow plaintiffs to bring a fraudulent conveyance or equitable action.[10] Indeed, the wording with respect to the fraudulent conveyance action is in the past tense—indicating that a Garnishee Action, with the requested order, would follow [*19] a prior determination of fraudulent conveyance. Accordingly, the claims plaintiffs assert against Clearstream in Counts Two, Three, Seven, and Eight must be dismissed for this reason alone.[11]

The turnover claims against Clearstream—asserted in Counts Four, Five, and Six—also fail. As a matter of law, a turnover action must be brought against a party who is "in possession or custody" of money or other personal property in which a creditor has an interest. See N.Y. C.P.L.R. § 5225; Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55, 990 N.E.2d 114, 116-17, 967 N.Y.S.2d 876 (N.Y. 2013). It is a classic in rem action. See RCA Corp. v. Tucker, 696 F. Supp. 845, 851 n.4 (E.D.N.Y. 1988) ("[T]urnover proceedings . . . are in fact actions in rem."). The Court may not direct an entity to "turn over" assets that are not in its actual possession or custody, even if the assets may be said to be within its "control." See Commonwealth of N. Mariana Islands, 990 N.E.2d at 116-17. An action which seeks an order granting relief with regard to potential assets, including to reverse transfers which would result in the presence [*20] of assets, is not a turnover action.

In the instant case, the records before the Court are clear: JPM received proceeds relating to the Remaining Bonds, which it credited to a Clearstream account at JPM. Whether it should have or should not have, Clearstream in turn credited amounts attributable to the Remaining Bonds to the UBAE/Bank Markazi account in Luxembourg. The JPM records are clear that whatever happened to the proceeds, they are gone. There are numerous days in which the Clearstream account at JPM showed a zero or a negative balance. (See Jonckheere Decl. ¶ 5.) As a matter of law, there is no asset in this jurisdiction to "turn over." Could this Court require Clearstream to reverse its own transfer? Not under the Settlement Agreement; such an action is not the type of action as to "others" anticipated by paragraph 4 of the Clearstream Settlement Agreement.

Plaintiffs have a slightly more nuanced argument with regard to proceeds which JPM received on Clearstream's behalf subsequent to issuance of Executive Order ("E.O.") 13599 on February 5, 2012.[12] Section 1 of that E.O. states, in relevant part:

(a) All property and interests in property of the Government of Iran, including the Central [*21] Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, includingany foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order. No. 13599, 77 Fed. Reg. 6659, 6659 (2012).

There is no dispute that $104 million of the Remaining Proceeds was credited by JPM to Clearstream subsequent to the issuance of this Executive Order. It may be, therefore, that when Clearstream received that $104 million, which related to interests of Iran (via its central bank, Bank Markazi), it should not have credited account 13675 outside of the United States, and that in so doing it violated this Executive Order. However, plaintiffs have [*22] no private right of action for a violation of this Executive Order. Section 12 of the E.O. explicitly states that it does not "create any right or

[10] Count Eight asserts a claim for equitable relief.

[11] Notably, the language regarding plaintiffs' ability to seek an order directing Clearstream to reverse a transfer refers to a fraudulent conveyance found between "other parties." In the instant lawsuit, plaintiffs seek to assert fraudulent conveyance claims against Clearstream itself.

[12] The E.O went into effect on February 6, 2012.

benefit, substantive or procedural, enforceable at law or in equity" against any person. Exec. Order. No. 13599, 77 Fed. Reg. at 6661. The Second Circuit has also held that "Executive Orders cannot be enforced privately unless they were intended by the executive to create a private right of action." Zhang v. Slattery, 55 F.3d 732, 748 (2d Cir. 1995) (citations omitted). In any event, an action to enforce E.O. 13599 is not a type of action anticipated by paragraph 4 of the Clearstream Settlement Agreement. The Agreement is unambiguous that plaintiffs released all claims to accounts 13061 and 13675 except for a Garnishee Action. A claim as to a violation of the E.O. is not that.

Plaintiffs also assert that because of the existence of E.O. 13599, the book entries Clearstream made on its Luxembourg books for the benefit of UBAE and Bank Markazi are void; and—the argument goes—since they are "void," that $104 million is, as a matter of law, deemed to be within Clearstream's JPM account in New York. Plaintiffs refer to 31 C.F.R. § 560.212(a), which provides that transfers of blocked property shall be deemed null and void.[13] However, if a transferor meets certain requirements [*23] set forth in subpart (d) of that section, they are not null and void. See id. § 560.212(d).[14]

Whether plaintiffs may sue for a declaration that such transfers are void, or sue based on the assumption that such transfers are void, is irrelevant to the outcome of this motion because the covenant not to sue encompasses such claims. In effect, [*24] plaintiffs want to assert an action against Clearstream in two steps: (1) seek a declaration that any transfer made to UBAE's account in Luxembourg is void, and (2) once the transfer is deemed void, the assets would revert to the United States and be subject to turnover. The first of these two steps is necessary—and it is foreclosed by the covenant not to sue. The first step directly implicates the transfer into account 13675—the very account as to which plaintiffs agreed not to sue. (See Clearstream Agr. ¶ 2(ii)(b).) The Direct Claims which are released are those concerning account 13675. Moreover, paragraph 2(ii)(c) of the Clearstream Settlement Agreement explicitly grants a release concerning "any transfer or other action taken by or at the direction of any Clearstream Party . . . including any transfer or other action in any account . . . maintained in Clearstream's name or under its control, that in any way relates to any Account or any Iranian Asset." (Id. ¶ 2(ii)(c).)

To the extent plaintiffs seek to simply assert, without any legal declaration, that a Clearstream transfer violated § 560.212 and the Court may assume that is correct, that is wishful thinking. To establish how the transfer [*25] occurred, to what it related and where it occurred as a matter of law, are all aspects of what would need to be reviewed in connection with such a legal/judicial determination. Plaintiffs released their right to seek such a declaration. Only after a legal determination has been made that Clearstream in fact violated E.O. 13599 could such a Garnishee Action be ripe. As it stands, the number of steps to arrive at the point at which Clearstream would have to unwind—or be deemed to unwind—any transfer are many and are outside of the scope of the carve-out provision.

In addition, insofar as plaintiffs' claim would then be one for damages against Clearstream—for violating the E.O. and removing the $104 million from this jurisdiction—plaintiffs specifically settled that claim as well. In this regard, paragraph 4 of the Clearstream Settlement Agreement states, "provided however that such a Garnishee Action shall not seek an award of damages against a Clearstream Party." (Clearstream Agr. ¶ 4.)

Following full briefing and oral argument on this motion, plaintiffs raised a new argument with regard to the Clearstream Settlement Agreement: that certain plaintiffs herein have not signed the required [*26] Ratification Agreements. This argument is clearly an afterthought and is without merit. Counsel for all plaintiffs signed the Clearstream Settlement Agreement. As of the date of this Opinion & Order, plaintiffs have informed Clearstream that they have received Ratification Agreements from 93% of all plaintiffs. (See Letter from Liviu Vogel dated October 2, 2014, ECF No. 150.) Counsel for plaintiffs and

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[13] 31 C.F.R. § 560.212(a) states:

> Any transfer after the effective date that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 560.211, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests.

[14] In accordance with § 560.212(d), JPM sent a letter to OFAC "reporting its limited knowledge of the circumstances underlying the transfer of the Blocked Proceeds out of Clearstream's operating account on October 15, 2012, and explaining why [JPM] could not have known that that transfer may have been subject to Iranian sanctions regulations." (Jonckheere Decl. ¶ 14.) As of December 12, 2014, OFAC has not responded to JPM's letter.

Clearstream have both represented to the Court that while all plaintiffs have not yet executed the Ratification Agreements, none of them has declined to do so. (See Letter from Karen E. Wagner dated September 29, 2014, ECF No. 140; Stipulation and Order at 3 ("[C]ounsel for plaintiffs has represented and warranted to Clearstream that no Plaintiff . . . has indicated that he or she does not intend to execute a Ratification Agreement."), ECF No. 552 in 10-cv-4518.) Several months have passed since the last letter on this subject, and the Court has not received any different information. Receipt of fully executed Ratification Agreements appears to be a matter of logistics. It is clear is that the parties to the Clearstream Settlement Agreement are proceeding on the assumption that the Agreement [*27] is binding—though the instant dispute indicates a difference of view as to scope. Plaintiffs have not so much as suggested that a single plaintiff has refused to sign the Ratification Agreement, and it is undisputed that the percentage of Ratification Agreements which needed to have been received in order for the settlement to become effective has been received.

B. UBAE

Plaintiffs settled with UBAE on November 28, 2013. The UBAE Settlement Agreement does not contain a provision for separate ratification; it was entered into by counsel on behalf of their respective clients. The Agreement was effective upon execution.

The UBAE Settlement Agreement also contains a series of WHEREAS clauses. Importantly, it specifically acknowledges that "the Parties agree that certain assets remain in an account at Clearstream in a UBAE customer account, that are beneficially owned by Bank Markazi (the 'Remaining Assets')." (UBAE Agr. at 2.) In this Agreement, plaintiffs agreed to release:

> UBAE and all of its past, present, and future affiliates, owners, directors, members, officers, employees, law firms, attorneys, predecessors, successors, beneficiaries, assigns, agents, and representatives from any and all liability, [*28] claims, causes of action, suits, judgments, costs, expenses, attorneys' fees, or other incidental or consequential damages of any kind, whether known or unknown, arising out of or related to the Plaintiffs' Direct Claims against UBAE, except for the obligations stated in this Settlement Agreement.

(Id. ¶ 1.) There is no dispute that Bank Markazi constitutes a "beneficiary" of UBAE. Plaintiffs have made that assertion repeatedly. (See, e.g., Am. Compl. ¶ 12 ("UBAE's sole value was its willingness to serve as a front for Markazi."); id. ¶ 33 ("UBAE opened [the UBAE/Markazi Account] exclusively for Markazi's benefit and at the direction of Markazi and Iran.").) Thus, the release encompasses Bank Markazi to the same extent that it does UBAE. Moreover, in the UBAE Settlement Agreement, plaintiffs further agreed that "any future claim against UBAE for the Remaining Assets shall be limited to turnover only, and Plaintiffs waive all other claims against UBAE for any damages regarding the Remaining Assets whether arising in contract, tort, equity, or otherwise." (UBAE Agr. ¶ 5.)

The instant lawsuit contains numerous claims not purporting to be turnover: Count One seeks a declaratory judgment; [*29] Counts Two, Three, and Seven seek rescission of fraudulent conveyances;[15] Count Eight seeks equitable relief. These counts are explicitly barred by the UBAE Settlement Agreement. Only Counts Four through Six are denominated as turnover claims.

As a matter of law, a turnover action is one in which an asset is both within the jurisdiction [*30] of the Court[16]

[15] Plaintiffs have entitled these counts as claims for "rescission" for fraudulent conveyance, presumably to try and fit within paragraph 4 of the Clearstream Settlement Agreement (which allows for a claim that Clearstream take an action to reverse a transfer). Rescission is a remedy, not an independent cause of action. See Zola v. Gordon, 685 F. Supp. 354, 374 (S.D.N.Y. 1988). Read liberally, these counts instead assert claims for fraudulent conveyance. Such an action is not a "Garnishee Action" as defined in paragraph 4. As explained above, the "action" that plaintiffs may seek to require Clearstream to take under paragraph 4 must follow a separate judicial determination of fraudulent conveyance. (See Clearstream Agr. ¶ 4 (permitting an action to direct a Clearstream Party to "perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer").)

[16] The fact that "turnover actions" are carved out of the UBAE Settlement Agreement cannot eliminate the requirement that sufficient facts support this Court's subject-matter jurisdiction. As discussed in Section II.C infra with regard to the FSIA, the fact that the Remaining Assets are credited to an account located in Luxembourg places those assets outside of the reach of the FSIA. See 28 U.S.C. § 1609; EM Ltd. v. Republic of Argentina, 695 F.3d 201, 208 (2d Cir. 2012), aff'd sub nom., Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014); Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 130 (2d Cir. 2009). The same fact—a lack of assets in this jurisdiction—is a basis for dismissal of the turnover claims against UBAE.

and in the possession or custody of the party against whom turnover is sought. There is no assertion that UBAE maintains any bank account within this Court's jurisdiction into which any of the Remaining Assets were deposited or against which they were credited. The facts in this regard are quite clear: whatever account UBAE maintains for Bank Markazi is in Luxembourg. Thus, any Remaining Assets which it may possess or as to which it has rights or an interest, are in Luxembourg. Plaintiffs' assertions to the contrary are without merit and without basis in fact. Thus, on this basis alone, UBAE is dismissed from this lawsuit.

C. Bank Markazi

Plaintiffs seek a [*31] variety of relief against Bank Markazi. As discussed above, the release that plaintiffs provided to UBAE covers Bank Markazi (as UBAE's beneficiary). Thus, plaintiffs' claims must be dismissed as to Bank Markazi for this reason alone.

But perhaps more importantly, this Court lacks subject-matter jurisdiction over Bank Markazi. It is undisputed that Bank Markazi is the Central Bank of Iran. Thus, the Court's subject-matter jurisdiction must be found within the FSIA. One fact alone disposes of claims against Bank Markazi: it does not maintain the assets that plaintiffs seek in the United States. The evidence in the record is clear that any assets in which Bank Markazi has an interest, and which are at issue in this action, are in Luxembourg. The FSIA does not allow for attachment of property outside of the United States. See 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." (emphasis added)); Republic of Argentina, 695 F.3d at 208 ("We recognize that a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries."); Aurelius, 584 F.3d at 130 ("[T]he property that is subject to attachment and execution [*32] must be property in the United States of a foreign state." (internal quotation marks omitted)). Accordingly, the Court cannot entertain the instant claims against Bank Markazi.

D. JPM

Plaintiffs assert claims against JPM in Counts Four through Six for turnover and in Count Eight for equitable relief. JPM has proffered records which make it clear that it has no assets in which Bank Markazi has an interest. (See Jonckheere Decl. ¶¶ 5-11, 13 & Exs. A, B, C.) Indeed, in their complaint, plaintiffs acknowledge this fact in all practical respects by referring to the fact that Clearstream credited the 13675 account with the Remaining Assets. (See Am. Compl. ¶ 61, 66.) Plaintiffs assert that if one accepts the legal proposition that Clearstream's transfer of such proceeds out of its account with JPM was in violation of E.O. 13599, then any such transfer is void, and therefore JPM still has the assets. This is fiction. If the transaction is ever, in some other action, found to be void, that will be at some future point in time. As matters stand now, there is simply nothing for JPM to turn over.

Plaintiffs spend a significant amount of briefing on whether, as a matter of law, Clearstream's account [*33] at JPM must be deemed to have within it the Remaining Assets. The rather intricate way in which plaintiffs assert this could be so is creative—but mind numbing. The reality is far simpler: JPM simply lacks that as to which plaintiffs seek turnover. JPM must therefore be dismissed—and this Court need not reach the series of banking law and U.C.C.-related questions which plaintiffs raise.[17]

III. CONCLUSION

For the reasons set forth above, defendants' motions are GRANTED. Plaintiffs' motion for writs of execution is DENIED as moot, and this action is dismissed. The Clerk of Court is directed to terminate the motions at ECF Nos. 97, 109, and 116, and to terminate this action.

SO ORDERED.

[17] Further, it is undisputed that JPM does not have an account for UBAE or Bank Markazi. The account at issue is in Clearstream's name and the evidence is unrebutted that Clearstream uses the account into which the Remaining Assets were credited in its own name as a general-purpose account. So far as JPM is concerned, as a matter of law, any assets it may have in an account for Clearstream are Clearstream's and no one else's. See NML Capital, Ltd. v. Banco Cent. de la Republica Argentina, 652 F.3d 172, 192 (2d Cir. 2011) ("'[U]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor' and no one else." (citation omitted)). Further, for funds to be considered those of a foreign central bank, they must be in the name of the foreign central bank. Cf. id. Finally, the law is clear that a judgment creditor may not reach assets in which a judgment [*34] debtor has no legal interest. See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 83 (2d Cir. 2002). If a judgment debtor cannot assign or transfer an asset, then a creditor of the judgment debtor may not enforce a judgment against such asset. See Bass v. Bass, 140 A.D.2d 251, 253, 528 N.Y.S.2d 558 (N.Y. App. Div. 1988).

Dated: New York, New York

February 19, 2015

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

End of Document

ANNEX 120

Avis juridique sur l'immunité d'exécution de la Banque Centrale de la République islamique d'Iran (Banque Markazi) en vertu du droit international dans le cadre de la procédure en validation de saisie-arrêt pendante devant le Tribunal d'arrondissement de Luxembourg dans le rôle n° 177.393

16 mars 2018

Frédéric Dopagne

Table des matières

I. INTRODUCTION

1. Je soussigné, Dr. Frédéric Dopagne, déclare être depuis 2008 professeur, avec le rang de chargé de cours, au Centre Charles De Visscher pour le droit international et européen au sein de la Faculté de droit et de criminologie de l'Université catholique de Louvain (UCL).

2. J'ai étudié le droit à l'Université de Namur et à l'UCL. J'ai ensuite obtenu un Diplôme d'Etudes Spécialisées en droit international de l'Université libre de Bruxelles. Puis un doctorat en sciences juridiques de l'UCL.

3. Après avoir été durant sept ans (2001-2008) assistant en droit international public et droit de l'Union européenne à l'UCL, j'y enseigne depuis dix ans dans les matières du droit international public, en particulier le droit des immunités (de l'État, de l'organisation internationale et de leurs organes et agents respectifs), le droit diplomatique, le droit des organisations internationales et le droit de la responsabilité internationale. J'y suis par ailleurs actuellement le Directeur du *Advanced Master (LL.M.) in International Law* – Master de spécialisation en droit international.

4. Je suis également, depuis 2012, professeur invité en droit des organisations internationales à l'Université de Liège, et, depuis 2016, professeur invité en droit international public à l'École Royale Militaire (Bruxelles). J'ai en outre enseigné à l'Université catholique de Lille (France) (2013-2015), à l'Université de Leiden (Pays-Bas) (2008), à l'Université du Burundi (2006), et à l'Institut Royal Supérieur de Défense (Bruxelles) (2001-2005).

5. À côté de mon activité académique, j'ai été, durant deux ans (2009-2011), conseiller du Président de la Commission du Sénat de Belgique chargée du suivi des missions militaires à l'étranger.

6. Je suis par ailleurs avocat au barreau de Bruxelles depuis huit ans. Ma pratique se concentre sur le conseil et la représentation d'États et d'organisations internationales devant les tribunaux internes – avec un accent particulier sur les questions d'immunités – et sur les litiges de droit de la fonction publique internationale devant les tribunaux administratifs internationaux.

7. En 2017, j'ai été élu Secrétaire général de la Société belge de droit international. Je fais partie du Comité de rédaction de la *Revue belge de droit international* et de celui de *Oxford International Organizations*.

8. Une liste de publications figure en annexe au présent avis.

II. CONTEXTE ET PORTÉE DU PRÉSENT AVIS

9. À la suite des attentats terroristes du 11 septembre 2001, les proches de certaines victimes ont obtenu, des tribunaux américains, plusieurs jugements condamnant par défaut la République islamique d'Iran, certains de ses ministères ainsi que sa Banque centrale (Banque Markazi) à leur payer des dommages et intérêts à concurrence de montants importants.

10. Dans le cadre de l'exécution forcée de ces jugements, ils ont fait pratiquer, au Grand-Duché de Luxembourg, une saisie-arrêt à charge de la Banque Markazi, entre les mains de Clearstream Banking SA, et ont assigné la Banque Markazi en validation de ladite saisie.

11. Une procédure d'*exequatur* des jugements américains a par ailleurs été diligentée devant les tribunaux luxembourgeois. Elle est toujours pendante.

12. Une action en mainlevée de la saisie a été portée par la Banque Markazi devant le Juge des référés. Elle a, jusqu'à ce jour, été rejetée en première instance puis en degré d'appel.

13. Le 19 janvier 2018, j'ai reçu une demande de Me Fabio Trevisan, du cabinet *Bonn Steichen & Partners*, représentant la Banque Markazi dans les procédures susvisées, en vue de la rédaction d'un avis juridique portant sur l'immunité d'exécution dont bénéficie la Banque Markazi en vertu du droit international dans le cadre de la procédure précitée en validation de la saisie-arrêt[1]. Dans ce cadre, j'ai reçu copie d'un avis juridique rédigé par le professeur August Reinisch à la demande des conseils des demandeurs dans cette même procédure[2] (ci-après « l'avis du professeur Reinisch »).

14. Le présent avis, compte tenu de son objet limité conformément à la demande de Me Trevisan (voy. ci-avant), n'évoque pas les questions relatives à l'immunité de juridiction de la Banque Markazi dans le cadre de la procédure en validation, ni les questions d'immunité – de juridiction ou d'exécution – de la Banque Markazi dans le cadre de la procédure d'*exequatur* ou de l'action en référé. Le présent avis n'aborde pas davantage les aspects de droit luxembourgeois.

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1 Trib. arr. Lux., n° 177.393, *Tara Bane et csrts, Succession de Donald J. Havlish, Jr. et csrts c. Banque Centrale de la République islamique d'Iran et csrts.*

2 « Legal Opinion on The Scope of Enforcement Immunity under Customary International Law Relevant to the Proceedings before Courts in Luxembourg in *Havlish, et al. v. Banque Centrale de la République Islamique d'Iran (Bank Markazi)* », 11 décembre 2017.

III. ANALYSE

15. Le présent avis traite des questions suivantes : l'étendue de l'immunité d'exécution de la Banque Markazi (A), la renonciation à son immunité d'exécution (B) et l'incidence, sur cette immunité, du droit d'accès au juge garanti aux particuliers par certains instruments internationaux (C). Ces aspects sont abordés dans cet ordre car, d'une part, il n'y a de sens à s'interroger sur la renonciation à une immunité que si cette immunité est dûment applicable[3], d'autre part, il n'y a de sens à s'interroger sur l'impact du droit d'accès au juge sur une immunité que si cette immunité est dûment applicable et qu'il n'y a pas été renoncé (valablement).

16. Sur ces trois questions, il convient d'identifier le droit international coutumier en faisant application des deux critères bien établis que sont, dans les termes de la Cour internationale de Justice (CIJ), la pratique effective et l'*opinio juris* des États[4]. À cet égard, il faut relever que, dans l'affaire des *Immunités juridictionnelles de l'État (Allemagne c. Italie ; Grèce (intervenant))*[5], à l'occasion de laquelle la CIJ était appelée spécifiquement à déterminer l'existence et la portée des règles de droit international coutumier régissant les immunités de juridiction et d'exécution de l'État, la Cour a, dans son examen de la pratique étatique, accordé une importance significative aux lois promulguées par les États ayant légiféré en la matière, ainsi qu'aux décisions des tribunaux nationaux s'étant prononcés sur l'immunité d'un État étranger[6] ; il y a là en

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3 En ce sens, voy. par ex. Tribunal fédéral suisse, *Moscow Center for Automated Air Traffic Control c. Commission de surveillance des offices des poursuites et des faillites du canton de Genève*, n° 7B.2/2007, 15 août 2007, § 5.3.3, BGE 134 III 122 S. 132, aussi disponible sur http://www.servat.unibe.ch/dfr/bge/c3134122.html.

4 *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark ; République fédérale d'Allemagne/Pays-Bas)*, arrêt du 20 février 1969, *C.I.J. Recueil 1969*, p. 44, § 77.

5 Arrêt du 3 février 2012, *C.I.J. Recueil 2012*, p. 99, aussi disponible sur http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-FR.pdf. Ci-après « l'arrêt *Allemagne c. Italie* ».

6 *Ibid.*, not. p. 123, § 55. Le juge national peut également utilement s'inspirer, dans la détermination du droit international coutumier, des « Draft conclusions on identification of customary international law » adoptés en première lecture par la Commission du droit international des Nations Unies lors de sa 68e session en 2016, disponibles sur http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp5.pdf&lang=EFSRAC (pp. 76 et s., § 62) : en particulier, la *Draft conclusion 8* prévoit ce qui suit :

> « 1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
> 2. Provided that the practice is general, no particular duration is required ».

Et la *Draft conclusion 9, § 1*, se lit comme suit :

> « The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation ».

effet une pratique d'États qui sont à considérer comme des « États particulièrement intéressés », dont la pratique est tout spécialement pertinente dans la détermination du droit international coutumier[7].

17. Par ailleurs, la Convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens, ouverte à la signature le 17 janvier 2005[8] (la Convention des Nations Unies), revêt une importance particulière dans la détermination du droit international coutumier. Bien qu'elle ne soit pas à ce jour entrée en vigueur sur le plan international faute d'un nombre suffisant de ratifications[9], les juges nationaux, y compris ceux d'États n'ayant pas ratifié la Convention, s'y réfèrent de manière croissante, et de nombreuses décisions de tribunaux internes, y compris de juridictions suprêmes, ont déjà considéré que plusieurs dispositions de la Convention reflétaient en réalité des règles de droit international coutumier ou en constituaient une preuve récente particulièrement fiable[10] [11]. Il en va de même de la Cour européenne des droits de l'homme[12] (voy. *infra*, §§ 100-101). Et de la doctrine autorisée[13]. À ce titre, il faut donc

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7 Voy. CIJ, *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark ; République fédérale d'Allemagne/Pays-Bas)*, arrêt du 20 février 1969, *C.I.J. Recueil 1969*, p. 42, § 73.

8 Annexe à A/RES/59/38 du 2 décembre 2004, disponible sur http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/59/38.

9 L'article 30, § 1er, de la Convention exige 30 ratifications. Voy. l'état des ratifications au 14 mars 2018 sur https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en#EndDec : 21 États sont parties à la Convention (et 28 l'ont signée).

10 Outre la jurisprudence spécifique à l'immunité d'exécution citée par ailleurs dans le présent avis, voy. entre autres :

- UK House of Lords, *Jones v Saudi Arabia* [2006] UKHL 26, 14 juin 2006 : « Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases » (§ 26, *per* Lord Bingham) ; « It is the result of many years work by the International Law Commission and codifies the law of state immunity » (§ 47, *per* Lord Hoffmann). Disponible sur https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf.
- New Zealand High Court, *Fang and Ors v Jiang and Ors*, [2007] NZAR 420, 21 décembre 2006, § 65 : « This Convention is a very recent expression of the consensus of nations on this topic ». Disponible sur http://opil.ouplaw.com/view/10.1093/law:ildc/1226nz06.case.1/law-ildc-1226nz06.

Sur ce phénomène de manière générale, voy. not. H. FOX et Ph. WEBB, *The Law of State Immunity*, 3e éd. révisée et augmentée, Oxford University Press, 2015, pp. 294-295.

11 C'est dès lors, à notre estime, quelque peu restrictivement que l'avis du professeur Reinisch indique pour sa part que « some domestic courts have considered [the] provisions [of the UN Convention] when analyzing customary international law » (§ 23) : l'attitude des tribunaux internes vis-à-vis de la Convention des Nations Unies paraît nettement plus engagée.

12 *Manoilescu et Dobrescu c. Roumanie et Russie*, 3 mars 2005, n° 60861/00, §§ 75, 80-81 ; *Cudak c. Lituanie*, 23 mars 2010, n° 15869/02, §§ 66-67 ; *Sabeh El Leil c. France*, 29 juin 2011, n° 34869/05, §§ 57-58 ; *Wallishauser c. Autriche*, 17 juillet 2012, n° 156/04, § 69 ; *Oleynikov c. Russie*, 14 mars 2013, n° 36703/04, §§ 66 et 68 ; *Radunovic et autres c. Monténégro*, 25 octobre 2016, nos 45197/13, 53000/13 et 73404/13, § 73 ; *Naku c. Lituanie et Suède*, 8 novembre 2016, n° 26126/07, § 89. Tous disponibles sur https://hudoc.echr.coe.int.

13 En introduction à leur ouvrage de référence, R. O'KEEFE et Chr. TAMS écrivent que la Convention des Nations Unies est « largely declaratory » du « modern customary international law of State

voir, dans la Convention des Nations Unies, une source indirecte potentielle, étant entendu qu'il faut sans doute se garder à ce jour d'affirmer que l'ensemble du texte de la Convention serait le reflet du droit international coutumier en bloc, et qu'il s'indique plutôt d'appréhender de ce point de vue chaque disposition individuelle de la Convention.

18. La CIJ elle-même, dans l'arrêt *Allemagne c. Italie*, a substantiellement analysé les dispositions de la Convention des Nations Unies relatives aux divers points litigieux, et, s'agissant de l'immunité d'exécution spécifiquement, a même jugé qu'à tout le moins les éléments essentiels de l'article 19 de la Convention étaient effectivement l'expression du droit international coutumier en vigueur[14]. À noter que dans cette affaire *Allemagne c. Italie*, aucun des deux États n'avait ratifié, ni même signé, la Convention[15] ; en comparaison, il y a, dans le cas d'espèce, d'autant plus de raisons d'accorder une autorité toute particulière à la Convention puisque l'État étranger en cause, la République islamique d'Iran, a pour sa part bel et bien ratifié la Convention en date du 29 septembre 2008.

19. Quant au Grand-Duché de Luxembourg, s'il n'a jusqu'à présent ni signé ni ratifié la Convention des Nations Unies, il ne semble pas, à tout le moins, avoir d'objection de principe sur le texte dans son ensemble. En effet, le Grand-Duché a, le 30 octobre 2015, signé la Déclaration sur les immunités juridictionnelles des biens culturels appartenant à un État, élaborée dans le cadre du Comité des conseillers juridiques sur le droit international public du Conseil de l'Europe (CAHDI), ouvertement présentée comme un instrument juridiquement non contraignant en tant que tel mais qui, de manière remarquable, indique que le régime d'immunité d'exécution qu'elle prévoit au profit des biens culturels appartenant à un État est « [e]n conformité avec le droit international coutumier *tel que codifié par la Convention* [des Nations Unies] »[16] : en signant cette Déclaration, le Grand-Duché exprime donc son *opinio juris* quant à la valeur coutumière, à tout le moins, des dispositions de la Convention portant sur l'immunité d'exécution des

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immunity » (*in* R. O'KEEFE et Chr.J. TAMS (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, Oxford University Press, 2013, p. xlii). G. HAFNER écrit pour sa part que « [o]ne may conclude that the new convention reflects the generally accepted state of affairs regarding state immunity » (« Accountability and Immunity : The United Nations Convention on Jurisdictional Immunity of States and Their Property and the Accountability of States », *Proceedings of the American Society of International Law*, 2005, p. 242.

14 P. 148, §§ 117-118.

15 Arrêt, p. 122, § 54.

16 Ital. aj. Texte français de la Déclaration disponible sur https://rm.coe.int/1680305d82, et texte anglais signé par le ministre luxembourgeois des Affaires étrangères et européennes disponible sur https://rm.coe.int/16804915a1. Au 14 mars 2018, 20 États, y compris le Grand-Duché, avaient signé la Déclaration.

biens culturels[17] (et nous ne sommes pas au courant de motifs qui permettraient de penser que le Grand-Duché tient à adopter une approche distincte vis-à-vis des dispositions de la Convention portant sur l'immunité d'exécution des banques centrales). Par ailleurs, bien que nous ne possédons pas d'informations quant à une éventuelle ratification prochaine de la Convention par les autorités luxembourgeoises compétentes, il peut être relevé que, lors de la deuxième réunion informelle des Parties à la Convention européenne sur l'immunité des États du 16 mai 1972, qui s'est tenue le 13 septembre 2006, « la plupart des États parties » à ladite Convention européenne – États parties parmi lesquels figure le Grand-Duché – ont en tout cas « confirmé qu'ils s'acheminaient vers une ratification de la Convention des Nations Unies »[18].

A. L'étendue de l'immunité d'exécution

20. Il peut sans guère d'hésitation être affirmé qu'en droit international coutumier, l'immunité d'exécution de l'État étranger, considérée de manière générale, n'est plus aujourd'hui conçue comme absolue. À la suite de l'évolution qu'a connu l'immunité de juridiction, et bien que plus tardivement que cette dernière, l'immunité d'exécution générale de l'État est passée d'un régime d'immunité absolue – protégeant l'ensemble des biens de l'État – à un régime d'immunité restreinte ou relative – couvrant alors les biens de l'État utilisés ou destinés à être utilisés à des fins souveraines, à l'exclusion de ceux qui sont affectés à des fins commerciales. La CIJ, éminemment, a consacré cette évolution dans son arrêt *Allemagne c. Italie*[19].

21. Il serait cependant excessif de soutenir que la limitation de l'immunité d'exécution générale de l'État a été poussée aussi loin que celle de l'immunité de juridiction. Le droit international coutumier demeure, aujourd'hui, plus exigeant lorsqu'il s'agit d'adopter des mesures de contrainte sur les biens d'un État étranger que lorsqu'il s'agit de soumettre celui-ci au pouvoir de juridiction des tribunaux du for. La raison en est simple : « En effet, les mesures de contrainte contre un État sont perçues comme des atteintes plus importantes à la souveraineté de l'État étranger que la simple soumission

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17 La Déclaration a d'ailleurs été décrite par les États l'ayant initialement promue comme « témoign[ant] d'une vision commune (*opinio juris*) de ses signataires » : Annexe à la lettre du 27 janvier 2017 des Représentants permanents de l'Autriche et de la République tchèque auprès des Nations Unies, adressée au Secrétaire général, doc. A/71/772, 31 janvier 2017, disponible sur https://digitallibrary.un.org/record/858703/files/A_71_772-FR.pdf.

18 « Rapport de la deuxième réunion informelle des États Parties à la Convention européenne sur l'immunité des États », Annexe V au Rapport de la 32e réunion du CAHDI, doc. CAHDI (2006) 32, 22 mars 2007, disponible sur https://rm.coe.int/16800528fe.

19 P. 148, § 118.

à la juridiction. C'est pour cette raison que les restrictions à l'immunité admises en matière de juridiction ne se retrouvent pas à propos de l'exécution, qui apparaît comme 'le dernier bastion des immunités' »[20].

22. En outre, le passage à une règle d'immunité d'exécution restreinte concerne l'immunité d'exécution *générale* de l'État, mais est sans préjudice de règles *spécifiques* applicables à certaines catégories particulières de biens de l'État, règles spécifiques qui peuvent avoir maintenu une immunité plus étendue au profit des biens relevant de ces catégories particulières. Comme développé ci-après, il peut être avancé que tel est le cas des biens des banques centrales étrangères, dont l'immunité d'exécution, aux termes du droit international coutumier, peut être tenue comme s'étendant en effet à l'*ensemble* des biens de la banque centrale, à la différence de l'immunité d'exécution générale de l'État qui ne porte que sur les biens utilisés ou destinés à être utilisés à des fins souveraines. Dans ce contexte, les développements et les références qui, dans les sections 3.B et 3.C de l'avis du professeur Reinisch[21], se rapportent à l'étendue de l'immunité d'exécution générale de l'État ou à l'étendue de l'immunité d'exécution de catégories particulières de biens autres que les biens des banques centrales – notamment les comptes bancaires des missions diplomatiques[22] – nous paraissent ne pas être véritablement et directement pertinents dans le cas d'espèce, lequel concerne exclusivement la situation spécifique des biens d'une banque centrale.

1. Une immunité d'exécution absolue couvrant l'ensemble des biens de la banque centrale

a) Examen de la pratique internationale

23. L'idée selon laquelle l'ensemble des biens de la banque centrale étrangère bénéficient en tout état de cause et en toutes circonstances de l'immunité d'exécution se retrouve à l'article 21, § 1er, c), de la Convention des Nations Unies, lequel se lit comme suit :

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20 G. HAFNER et L. LANGE, « La convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens », *Annuaire français de droit international*, 2004, p. 68 (les derniers mots étant empruntés à la Commission du droit international : point 2 du commentaire du projet d'article 18, « Rapport de la Commission du droit international sur les travaux de sa 43e session », *Annuaire de la Commission du droit international*, 1991, vol. II (2e partie), p. 59).

21 §§ 52-60, 61-65, 81-94 et 96-108 de l'avis du professeur Reinisch.

22 Point sur lequel l'exposé de la jurisprudence n'est d'ailleurs pas tout à fait à jour, en particulier la jurisprudence belge évoquée aux §§ 103-104 de l'avis du professeur Reinisch : aucune référence n'y est faite entre autres aux importants développements que représentent en la matière : Cass., 22 novembre 2012, *Journal des tribunaux*, 2013, p. 290 ; Cass., 11 décembre 2014, R.G. n° C.13.0537.F, disponible sur www.cass.be; et l'article 1412*quinquies* du Code judiciaire.

> « Les catégories de biens d'État ci-après ne sont notamment pas considérées comme des biens spécifiquement utilisés ou destinés à être utilisés par l'État autrement qu'à des fins de service public non commerciales au sens des dispositions de l'alinéa c) de l'article 19 :
> (...)
> c) Les biens de la banque centrale ou d'une autre autorité monétaire de l'État ».

24. Comme le souligne le commentaire du projet d'article 19 élaboré par la Commission du droit international (CDI), qui est devenu l'article 21 de la Convention des Nations Unies, le but du § 1er de la disposition est d' « éviter toute interprétation selon laquelle les biens classés comme appartenant à l'une quelconque des catégories indiquées seraient en fait des biens spécifiquement utilisés ou destinés à être utilisés par l'État autrement qu'à des fins de service public non commerciales »[23], à savoir des biens sur lesquels des mesures de contrainte peuvent être prises. Et le commentaire d'ajouter :

> « Cette protection est jugée nécessaire et opportune, eu égard à la tendance de certaines juridictions à saisir ou à geler les avoirs des États étrangers, notamment les (...) avoirs des banques centrales (...) et catégories particulières de biens méritant également d'être protégés. *Chacune de ces catégories, par définition, doit être considérée comme étant utilisée ou destinée à être utilisée à des fins publiques d'où est exclue toute considération commerciale* »[24] (ital. aj.).

25. Les seules limites à l'immunité d'exécution absolue ainsi reconnue aux biens relevant des catégories particulières visées à l'article 21, § 1er, sont dès lors, comme le confirme l'article 21, § 2, la renonciation expresse à l'immunité (voy. à cet égard *infra*, section B), ou le fait pour l'État d'avoir « réservé ou affecté des biens à la satisfaction de la demande qui fait l'objet de [la] procédure »[25].

26. Cette immunité d'exécution absolue est accordée, selon le *littera* c) de l'article 21, § 1er, aux « biens de la banque centrale », sans autre distinction. Le contraste est frappant, notamment, avec le *littera* a) de l'article 21, § 1er, qui, s'agissant des biens des missions diplomatiques et assimilées, n'accorde la protection absolue qu'aux biens effectivement « utilisés ou destinés à être utilisés dans l'exercice des fonctions de la mission » ; et avec son *littera* b), qui, à côté des « biens de caractère militaire », n'accorde la protection

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23 Point 1 du commentaire, « Rapport de la Commission du droit international sur les travaux de sa 43e session », *Annuaire de la Commission du droit international*, 1991, vol. II (2e partie), p. 61, aussi disponible sur http://legal.un.org/docs/index.asp?path=../ilc/publications/yearbooks/french/ilc_1991_v2_p2.pdf&lang=EFSRAC&referer=http://legal.un.org/ilc/publications/yearbooks/1990_1999.shtml.

24 Point 2 du commentaire, *ibid.*

25 Nous comprenons que cette seconde limite n'est pas en débat entre les parties dans le cas d'espèce. Elle ne sera donc pas discutée dans le présent avis.

absolue qu'aux biens effectivement « utilisés ou destinés à être utilisés dans l'exercice de fonctions militaires »[26]. Le *littera* c), n'exige pas, pour sa part, qu'afin de jouir de la protection absolue il soit établi que les biens de la banque centrale sont – pour paraphraser le *littera* a) ou b) – « utilisés ou destinés à être utilisés dans l'exercice des fonctions de la banque centrale »[27].

27. Si l'intention des auteurs de la Convention avait été d'introduire une telle restriction dans le cas des biens des banques centrales également, cela aurait été fait, en alignant le libellé du *littera* c) sur celui du *littera* a) ou b). Dans le cadre des travaux de la CDI, le Rapporteur spécial avait certes, à la demande de l'Allemagne (soutenue par l'Australie, le Qatar et les cinq pays nordiques), proposé d'ajouter les termes « et utilisés à des fins monétaires » à la fin du *littera* c), mais certains membres de la CDI se sont opposés à une telle insertion si bien que ces termes n'ont pas été inclus « faute d'avoir recueilli un appui suffisant »[28]. Ce rejet de l'amendement proposé confirme, en réalité, que le libellé finalement retenu, qui est aujourd'hui celui de l'article 21, § 1er, c), a pour effet d'immuniser automatiquement tous les biens de la banque centrale, et non seulement ceux qui sont spécifiquement utilisés à des « fins monétaires ».

28. Une telle protection absolue des biens de la banque centrale étrangère, renforcée par rapport à l'immunité d'exécution générale de l'État, peut être justifiée par le caractère typiquement souverain des biens en cause[29], la banque centrale d'un État étant en effet, de manière inhérente, associée au plus près à l'exercice des fonctions régaliennes de

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26 Voy. également le *littera* d), n'accordant la protection absolue qu'aux biens faisant partie du patrimoine culturel de l'État ou de ses archives « qui ne sont pas mis ou destinés à être mis en vente », et le *littera* e), n'accordant la protection absolue qu'aux biens faisant partie d'une exposition d'objets d'intérêt scientifique, culturel ou historique « qui ne sont pas mis ou destinés à être mis en vente » (ce que le point 7 du commentaire oppose aux biens « exposés à des fins industrielles ou commerciales » : « Rapport de la Commission du droit international sur les travaux de sa 43e session », précité, p. 62).

27 Contrairement au professeur Reinisch (voy. §§ 98 et 108 de son avis), nous ne pensons dès lors pas que l'ensemble des biens visés dans la liste de l'article 21, § 1er, soient mis sur un pied d'égalité et soient tous assujettis à une présomption réfragable : le *littera* c) est rédigé de manière spécifique en ce qu'il ne requiert, aux fins de l'octroi de l'immunité absolue, que l'établissement de la qualité des biens concernés en tant que biens d'une banque centrale. Encore une fois, l'on peut partant douter de la pertinence en l'espèce de la jurisprudence existante en matière de saisies de comptes bancaires des missions diplomatiques (avis du professeur Reinisch, §§ 99 et s.).

28 Point 5 du commentaire du projet d'article 19, « Rapport de la Commission du droit international sur les travaux de sa 43e session », précité, p. 62 ; Ch. BROWN et R. O'KEEFE, « Article 21 », *in* R. O'KEEFE et Chr.J. TAMS (eds), *The United Nations Convention...*, *op. cit.*, p. 337.

29 Voy. A. REINISCH, « European Court Practice Concerning State Immunity from Enforcement Measures », *European Journal of International Law*, 2006, p. 826 : « That central bank funds, as typically non-commercial property, are immune from enforcement measures is reflected in the UN Convention ».

l'État puisqu'elle remplit un rôle essentiel dans l'économie nationale[30]. En ce sens, les avoirs de toute nature d'une banque centrale sont, « par définition » comme l'indique la CDI (voy. *supra*, § 24), utilisés ou destinés à être utilisés à des fins publiques non commerciales, et participent même à l'exercice des responsabilités fondamentales de l'État, dans le cadre d'une mission de service public. Par ailleurs, la protection des biens de la banque centrale s'avère particulièrement nécessaire lorsque, de manière parfaitement légitime – par exemple grâce aux revenus tirés de l'exploitation de ressources naturelles nationales –, des réserves sont constituées par l'État au-delà des besoins immédiats de sa population : ces réserves détenues par la banque centrale doivent être mises à l'abri des créanciers. De manière générale, au demeurant, le lien indissociable qui unit les biens des banques centrales à la souveraineté de l'État entraîne le risque que toute saisie ou autre mesure de contrainte sur ces biens « would never be regarded by the defendant state as a purely judicial matter but would instead be viewed as an unfriendly act at the state-to-state level and would therefore have serious diplomatic and political consequences »[31].

29. L'immunité d'exécution absolue des biens de la banque centrale, telle que conçue à l'article 21, § 1er, c), de la Convention des Nations Unies – laquelle n'est, pour rappel, pas encore en vigueur –, est par ailleurs consacrée dans plusieurs législations nationales en matière d'immunités de l'État. De telles législations nationales, on l'a dit, jouent potentiellement un rôle important dans la formation et l'identification du droit international coutumier (voy. *supra*, § 16). En outre, plusieurs des États dont la législation est mentionnée ci-après sont en l'occurrence d'importants centres financiers internationaux, ce qui rend leur pratique d'autant plus pertinente en tant que pratique d' « États particulièrement intéressés » (voy. *supra*, § 16). Sans qu'il s'agisse d'une recension exhaustive, les lois suivantes peuvent être citées à cet égard :

- Afrique du Sud – *Foreign States Immunities Act 1981*[32], Section 15(3) :

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30 Les fonctions d'une banque centrale sont très diverses (elles peuvent du reste varier dans une certaine mesure d'une banque centrale à l'autre) et revêtent une importance fondamentale pour l'économie de l'État concerné : émission de monnaie, définition de la politique monétaire (en vue d'assurer la stabilité des prix, des taux d'intérêt et des taux de change), supervision du système bancaire national, gestion des réserves d'or, gestion des réserves de change, etc. Pour une liste non exhaustive des « functions or activities » d'une banque centrale, voy. X. YANG, *State Immunity in International Law*, Cambridge University Press, 2012, p. 413 et note 270 (p. 669).

31 X. YANG, « Immunity from execution », *in* A. ORAKHELASHVILI (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Elgar Publishing, 2015, p. 410.

32 Disponible sur http://www.dirco.gov.za/chiefstatelawadvicer/documents/acts/foreignstatesimmunitiesact.pdf.

« Property of the central bank or other monetary authority of a foreign state shall not be regarded (...) as in use or intended for use for commercial purposes ».

- Argentine – *Ley 26.961* (6 août 2014)[33], art. 2 :

  « Los activos de un Banco Central extranjero o una autoridad monetaria extranjera gozan de inmunidad de ejecución y/o embargo en los Tribunales Argentinos respecto a cualquier medida coercitiva que pudiera afectar a dichos activos »[34].

  Traduction libre : « Les actifs d'une Banque centrale étrangère ou d'une autorité monétaire étrangère bénéficient de l'immunité d'exécution et/ou de saisie devant les Tribunaux argentins à l'égard de toute mesure de contrainte qui pourrait affecter de tels actifs ».

- Japon – *Act on Civil Jurisdiction over Foreign States 2009*[35], art. 19, § 2 :

  « Paragraph 1 of the preceding article shall not apply to Foreign Central Bank ».

  Art. 18, § 1er : « Foreign States shall not be immune from Jurisdiction as respects the proceedings on enforcement of judgments against property in use or intended for use by the Foreign States for other than government non-commercial purposes ».

  En somme, l'exclusion de l'immunité d'exécution à l'égard des biens affectés à des fins commerciales n'est *pas* de mise s'agissant des biens des banques centrales étrangères[36].

- Pakistan – *State Immunity Ordinance 1981*[37], Section 15(4) :

  « Property of a State's central bank or other monetary authority shall not be regarded (...) as in use or intended for use for commercial purposes ».

- République populaire de Chine (y compris les Régions administratives spéciales de Hong Kong et de Macao) – *Law on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks* (25 octobre 2005), art. 1er :

  « The People's Republic of China grants judicial immunity from measures of constraint such as the attachment of property and execution to the property of foreign central

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33 Disponible sur http://servicios.infoleg.gob.ar/infolegInternet/anexos/230000-234999/233217/norma.htm.

34 Sous réserve toutefois de réciprocité (art. 3).

35 Reproduit dans *Japanese Yearbook of International Law*, 2010, pp. 830-837.

36 Voy. T. NOBUMORI, « Recent Sovereign Immunity Legislation in Japan from a Perspective of Central Banks », *Japanese Yearbook of International Law*, 2010, pp. 294, 296-297.

37 Reproduite dans *Documentation concernant les immunités juridictionnelles des États et de leurs biens*, Nations Unies, 1982, ST/LEG/SER.B/20, p. 20, disponible sur http://legal.un.org/legislativeseries/documents/untlegs0020.pdf.

banks, unless the foreign central banks or the governments of their States waive in written form, or the property is allocated to be used for the attachment of property and execution »[38].

- Royaume-Uni – *State Immunity Act 1978*[39], Section 14(4) :

  « Property of a State's central bank or other monetary authority shall not be regarded (...) as in use or intended for use for commercial purposes ».

  Le caractère absolu de l'immunité ainsi reconnue est largement confirmé dans la jurisprudence du Royaume-Uni[40].

- Singapour – *State Immunity Act 1979*[41], Section 16(4) :

  « Property of a State's central bank or other monetary authority shall not be regarded (...) as in use or intended for use for commercial purposes ».

30. Il convient de préciser que ces législations nationales sont, à l'exception de la loi chinoise, celles d'États qui par ailleurs reconnaissent aujourd'hui que l'immunité d'exécution générale des États étrangers est quant à elle effectivement limitée aux biens utilisés ou destinés à être utilisés à des fins souveraines[42]. Ce qui montre bien le caractère spécifique du régime des biens de la banque centrale, sur le plan de l'étendue de l'immunité. Il paraît dès lors audacieux d'affirmer, comme le fait l'avis du professeur Reinisch, que l'étendue de l'immunité d'exécution générale de l'État serait purement et simplement transposable à l'immunité d'exécution de sa banque centrale[43] : au contraire, des États prennent le soin de prévoir dans leur droit interne que l'immunité d'exécution des banques centrales étrangères est singulière et diffère, quant à son

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38 Traduction libre de L. ZHU, « State Immunity from Measures of Constraint for the Property of Foreign Central Banks: The Chinese Perspective », *Chinese Journal of International Law*, 2007, p. 75. Sous réserve toutefois de réciprocité (art. 3 ; voy. *ibid.*, p. 80).

39 Disponible sur http://www.legislation.gov.uk/ukpga/1978/33.

40 Voy. ainsi *Camdex International Ltd v Bank of Zambia* [1997] 1 All ER 728 (CA) ; *Banca Carige SpA Cassa Di Risparmio Di Genova E Imperia v Banco Nacional De Cuba and another* [2001] EWHC 562 (Ch) ; *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB) ; *AIG Capital Partners Inc & Anr v Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm) ; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2015] EWCA Civ 835.

41 Disponible sur https://sso.agc.gov.sg/Act/SIA1979.

42 On l'a dit, il y a là une règle désormais établie du droit international coutumier, et en réalité tous les États semblent à présent la reconnaître dans leur législation, jurisprudence ou pratique interne, la République populaire de Chine étant précisément sur ce plan l'exception la plus notoire : voy. Hong Kong Court of Final Appeal, *Democratic Republic of Congo and Ors v. FG Hemisphere Associates LLC*, 8 juin 2011, FACV 5-7/2010, *International Law Reports*, vol. 147, p. 376.

43 Avis du professeur Reinisch, § 78 : « [T]he customary standard of a sovereign purpose also applies to distinguish between central bank property that enjoys immunity from execution and property that does not because it serves commercial purposes ».

étendue, de l'immunité d'exécution générale de l'État. Cette dernière n'est donc *pas* transposable en tant que telle à l'immunité d'exécution de la banque centrale.

31. Il résulte de ce qui précède que, dans la pratique étatique, attestée par l'adoption de la Convention des Nations Unies et les lois nationales précitées – dont la promulgation s'étend de 1978 à 2014 et qui relèvent d'États de diverses régions du monde –, la tendance observée est donc d'accorder une immunité d'exécution absolue couvrant en toutes circonstances *l'ensemble* des biens des banques centrales étrangères, quitte à réputer ceux-ci affectés à des fins souveraines *du seul fait qu'ils ont, précisément, la nature de biens d'une banque centrale* – et à exclure, contrairement à ce qui se passe pour l'immunité d'exécution générale de l'État, qu'une destination commerciale soit à leur égard démontrée. Il y a par conséquent de bonnes raisons de penser que tel est, aujourd'hui, l'état du droit international coutumier s'agissant de l'immunité d'exécution des biens de la banque centrale d'un État étranger.

32. À noter que la tendance ainsi observée dans la pratique étatique – dont découle le droit international coutumier – est encore confirmée et renforcée par l'approche d'autres États, dont soit le législateur a adopté une législation ayant pour objectif spécifique et explicite de protéger davantage les biens des banques centrales étrangères (fût-ce par le biais de conditions procédurales strictes entourant la saisie de tels biens, plus que par le biais d'une définition absolue de l'étendue de leur immunité d'exécution), soit les cours et tribunaux ont effectivement reconnu l'immunité d'exécution de tels biens. La pratique de ces autres États est spécifiquement examinée plus loin dans le présent avis (voy. *infra*, §§ 34 et s.). Globalement, la tendance fondamentale est en direction d'une protection juridique accrue des biens de la banque centrale étrangère.

b) Application dans le cas d'espèce

33. Dans ce contexte, l'application des principes dans le cas d'espèce ne devrait pas susciter de difficulté, dès lors qu'il est établi que les avoirs saisis sont ceux d'une banque centrale étrangère, la Banque Markazi. En cette qualité, ces derniers bénéficient en effet, selon le droit international coutumier, d'une immunité d'exécution absolue de plein droit, sans qu'il faille s'interroger plus avant sur leur affectation – ou sur tout autre paramètre dont l'objet serait de limiter l'étendue de l'immunité.

2. Une immunité d'exécution couvrant à tout le moins les biens utilisés ou destinés à être utilisés aux fins de la banque centrale

a) Examen de la pratique internationale

34. Les législations d'un certain nombre d'États, s'écartant comme telles de celles recensées dans la rubrique qui précède, prévoient, au profit des biens des banques centrales, un régime d'immunité dans une certaine mesure restreinte, étant entendu, *primo*, qu'il ne s'agit toutefois pas nécessairement d'un régime assimilé purement et simplement à celui de l'immunité d'exécution générale de l'État, et, *secundo*, que l'étendue limitée de l'immunité se voit dans certaines législations largement contrebalancée par les conditions procédurales strictes auxquelles la saisie est assujettie (nécessité d'une autorisation préalable du juge, charge de la preuve du caractère saisissable imposée au créancier, etc.). Les lois suivantes peuvent être citées à cet égard :

- Belgique – Code judiciaire, art. 1412*quater*[44] :

  « § 1er. Sous réserve de l'application des dispositions impératives d'un instrument supranational, les avoirs de toute nature, dont les réserves de change, que des banques centrales étrangères ou des autorités monétaires internationales détiennent ou gèrent en Belgique pour leur propre compte ou pour compte de tiers sont insaisissables.

  § 2. Par dérogation au § 1er, le créancier muni d'un titre exécutoire peut introduire une requête auprès du juge des saisies afin de demander l'autorisation de saisir les avoirs visés au § 1er à condition qu'il démontre que ceux-ci sont exclusivement affectés à une activité économique ou commerciale de droit privé ».

- Canada – *State Immunity Act 1985*[45], Section 12(4) :

  « (...) [P]roperty of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution ».

- Espagne – *Ley Organica 16/2015 sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las*

44 Inséré par la Loi du 24 juillet 2008 modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des avoirs de banques centrales étrangères et d'autorités monétaires internationales, *Moniteur belge*, 14 août 2008, aussi disponible sur http://www.ejustice.just.fgov.be/loi/loi.htm.

45 Disponible sur http://laws-lois.justice.gc.ca/eng/acts/S-18/.

Conferencias y Reuniones internacionales celebradas en España (27 octobre 2015)[46], art. 20, § 1er, c) :

« De los bienes propiedad del Estado extranjero (...), se consideran en todo caso específicamente utilizados o destinados a ser utilizados para fines públicos no comerciales los siguientes : (...) c) Los bienes del banco central u otra autoridad monetaria del Estado que se destinen a los fines propios de dichas instituciones ».

Traduction libre : « Parmi les biens propriété de l'État étranger (...), sont dans tous les cas considérés spécifiquement comme utilisés ou destinés à être utilisés à des fins publiques non commerciales les biens suivants : (...) c) Les biens de la banque centrale ou autre autorité monétaire de l'État qui sont destinés aux fins propres desdites institutions ».

- États-Unis d'Amérique – *Foreign State Immunity Act 1976*[47], Section 1611(b)(1):

« Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that of a foreign central bank or monetary authority held for its own account (...) ».

Le rapport législatif précise que les termes « held for its own account » visent les « funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states »[48].

La jurisprudence récente a pour sa part interprété les termes « held for its own account » comme incluant nécessairement les biens de la banque centrale étrangère utilisés pour des activités commerciales, jugeant que les fonds déposés sur un compte ouvert au nom de la banque centrale étaient présumés couverts par l'immunité, et que le créancier devait renverser la présomption en établissant que les fonds n'étaient pas utilisés pour les fonctions – commerciales ou non – de la banque centrale[49].

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46 *Boletin Oficial del Estado*, n° 258, 28 octobre 2015, p. 101299, disponible sur https://www.boe.es/boe/dias/2015/10/28/pdfs/BOE-A-2015-11545.pdf.

47 Disponible sur https://www.law.cornell.edu/uscode/text/28/.

48 Voy. X. YANG, *State Immunity in International Law*, *op. cit.*, pp. 411-412.

49 United States Court of Appeals for the Second Circuit, *NML Capital Ltd v Banco Central de la República Argentina*, 5 juillet 2011, 652 F.3d 172, 193-194.

- Fédération de Russie – *Federal Law No. 297-FZ on Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation* (3 novembre 2015)[50], art. 16, § 1er, 5) :

  « Immunity in respect of measures aimed at securing a claim and immunity in respect of execution of a court decision shall be enjoyed by the following property of a foreign state which is under ownership thereof and intended for use or being used by it in its own name in the activities connected with the exercise of sovereign powers thereof : (...) 5) property of the central bank or of other supervisory body of the foreign state whose functions comprise banking supervision »[51].

- France – Code monétaire et financier, art. L. 153-1[52] :

  « Ne peuvent être saisis les biens de toute nature, notamment les avoirs de réserves de change, que les banques centrales ou les autorités monétaires étrangères détiennent ou gèrent pour leur compte ou celui de l'Etat ou des Etats étrangers dont elles relèvent.

  Par exception aux dispositions du premier alinéa, le créancier muni d'un titre exécutoire constatant une créance liquide et exigible peut solliciter du juge de l'exécution l'autorisation de poursuivre l'exécution forcée dans les conditions prévues par la partie législative du code des procédures civiles d'exécution s'il établit que les biens détenus ou gérés pour son propre compte par la banque centrale ou l'autorité monétaire étrangère font partie d'un patrimoine qu'elle affecte à une activité principale relevant du droit privé ».

35. À ces lois nationales peut être ajoutée la jurisprudence de la République fédérale d'Allemagne. Le Bundesgerichtshof considère que les biens d'une banque centrale étrangère bénéficient de l'immunité d'exécution s'ils servent à des fins souveraines (« hoheitlichen Zwecken »)[53]. Il a jugé à cet égard que « [d]ie auf ausländischen Konten verwalteten Währungsreserven eines Staates dienen hoheitlichen Zwecken »[54].

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50 Traduction libre en notre possession ; texte original russe disponible sur http://pravo.gov.ru/proxy/ips/?docbody=&nd=102381335&HHTEJICEAPIIX=.

51 Sous réserve toutefois de réciprocité (art. 4).

52 Disponible sur https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072026&dateTexte=20180212. Inséré par la Loi n° 2005-842 du 26 juillet 2005 pour la confiance et la modernisation de l'économie, *Journal officiel de la République française*, n° 173, 27 juillet 2005.

53 BGH, 4 juillet 2013, n° VII ZB 63/12, §§ 10-14, disponible sur https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=04.07.2013&Aktenzeichen=VII%20ZB%2063%2F12, via « bundesgerichtshof.de ».

54 *Ibid.*, § 13. Voy. également § 15 : « Die von einer Zentralbank gehaltenen Gelder eines Staates dienen auch dazu, die internationale Handlungsfähigkeit des Staates als Hoheitsträger zu gewährleisten (...). Währungsreserven sind sowohl nach nationaler als auch nach internationaler Anschauung maßgeblich für die Fähigkeit eines Staates zur Stützung der eigenen Währung auf den Devisenmärkten. Sie stehen zur Abwicklung des Zahlungsverkehrs in das Ausland sowie letztlich

36. Sur le point ici en cause, les législations précitées, qui n'accordent pas à l'immunité d'exécution de la banque centrale une étendue absolue, sont cependant à manier avec précaution lorsqu'elles émanent d'États ayant signé voire ratifié la Convention des Nations Unies – celle-ci ne fût-elle pas encore en vigueur. La Convention prévoit en effet, comme expliqué plus haut, une immunité d'exécution absolue au profit de l'ensemble des biens de la banque centrale (art. 21, § 1er, c)). L'on peut donc s'interroger sur la portée et la valeur des dispositions précitées des législations belge, espagnole, française et russe qui instaurent au contraire un régime d'immunité restreinte, vu que la Belgique a signé la Convention des Nations Unies en 2005 (et, selon les informations dont nous disposons de la part du Service Public Fédéral Affaires étrangères, se prépare à la ratifier), que l'Espagne a déposé son instrument d'adhésion en 2011, que la France a déposé son instrument d'approbation en 2011, et que la Fédération de Russie l'a signée en 2006. Il y a apparemment une discordance dans la pratique de ces États, entre l'attitude qu'ils adoptent vis-à-vis de la Convention des Nations Unies et celle qu'ils adoptent dans leur législation interne – ce qui réduit le potentiel de la pratique de ces États sur le plan de la détermination du droit international coutumier[55].

37. Par ailleurs, force est de constater que le critère employé par les lois et décisions judiciaires nationales précitées afin de délimiter les biens de la banque centrale qui sont immunisés et ceux qui ne le sont pas varie d'un État à l'autre. Les biens susceptibles de faire l'objet de mesures de contrainte licites sont en effet définis respectivement comme ceux que la banque centrale affecte à des fins autres que des « fins souveraines » (Allemagne), « affecte exclusivement à une activité économique ou commerciale de droit privé » (Belgique), « utilise ou destine à une activité commerciale » (Canada), affecte à des fins autres que les « fins propres de la banque centrale » (Espagne), détient autrement que « pour son propre compte » (États-Unis), utilise ou entend utiliser dans des activités autres que « les activités liées à l'exercice des pouvoirs souverains » de l'État étranger (Fédération de Russie), ou « affecte à une activité principale relevant du droit privé » (France). Il y a, entre ces formulations, des nuances indéniables, qui manifestement ne sont pas dues au hasard et ont au contraire été voulues par les législateurs ou juges nationaux respectifs.

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im Ernstfall der gesamten Volkswirtschaft bei einer Verknappung privater Devisenbestände für den Import lebensnotwendiger Güter zur Verfügung (...) ».

55 La *Draft conclusion 7, § 2*, des « Draft conclusions on identification of customary international law », précitées, prévoit à cet égard ce qui suit : « Where the practice of a particular State varies, the weight to be given to that practice may be reduced ».

38. Dans ce contexte, même en acceptant qu'il puisse être soutenu que le droit international coutumier reconnaît *un principe* d'immunité d'exécution restreinte dans le cas des biens des banques centrales, il faudrait en revanche admettre que, compte tenu des divergences sur ce point dans la pratique des États (favorables à la thèse de l'immunité restreinte), le droit international coutumier ne fournit pas à ce jour de réponse claire et bien établie quant au *critère spécifique* appelé à définir les limites de cette immunité restreinte.

b) Discussion du critère visé dans l'avis du professeur Reinisch

39. Dans son avis, le professeur Reinisch défend l'idée selon laquelle, aux termes du droit international coutumier, l'immunité d'exécution couvre les « central bank assets that serve public purposes such as 'monetary purposes' » (§ 66), ou encore les « assets held for monetary or other sovereign purposes » (§ 110-D).

40. Ce critère n'est cependant pas davantage explicité. En particulier, la notion de « fins monétaires » (« monetary purposes ») n'est pas définie, alors qu'elle ne paraît pas en tant que telle constituer une notion établie dans le droit des immunités de l'État.

41. Plus fondamentalement, la référence à ce critère particulier n'est fondée sur *aucune pratique étatique* relative à l'immunité d'exécution des banques centrales, et notamment sur aucune législation ou jurisprudence nationale en la matière. À dire vrai, parmi les lois et décisions judiciaires examinées ci-avant (voy. *supra*, §§ 34-35), aucune ne fait allusion à un concept de « fins monétaires ».

42. Ce dernier concept semble avoir été inspiré par les commentaires de certains États à l'occasion des travaux de la CDI ayant conduit à l'adoption de la Convention des Nations Unies. Comme indiqué précédemment, l'Allemagne (soutenue par l'Australie, le Qatar et les cinq pays nordiques) avait en effet demandé au Rapporteur spécial qu'il propose d'ajouter les termes « et utilisés à des fins monétaires » à la fin du *littera* c) du projet d'article 19, § 1er, de la CDI – un ajout qui ne fut finalement pas adopté par la CDI (voy. *supra*, § 27). En ce sens, le concept de « fins monétaires » traduirait l'*opinio juris* exprimée à un certain moment par les huit États précités. Force est toutefois de constater que le concept ne semble pas consacré en revanche dans la *pratique effective*

de ces États, là en tout cas où une telle pratique existe – et est connue – en rapport avec l'immunité d'exécution des banques centrales étrangères[56].

43. En outre, la notion de « fins monétaires » n'est pas utilisée par la Résolution de l'Institut de droit international sur « Les aspects récents de l'immunité de juridiction et d'exécution des États »[57], ni par les *Revised Draft Articles for a Convention on State Immunity* de l'*International Law Association*[58]. Elle ne paraît pas non plus avancée comme telle en doctrine.

44. En conclusion, l'on peut donc difficilement conclure à l'existence d'une règle de droit international coutumier consacrant un critère des « fins monétaires » afin de délimiter les biens immunisés et les bien non immunisés des banques centrales – pour autant que, fondamentalement, pareille délimitation s'impose, ce qui n'est le cas que si l'on n'est pas prêt à accepter la thèse, présentée plus haut, de l'immunité d'exécution absolue des banques centrales.

45. Pour le surplus, l'avis du professeur Reinisch soutient que « the securities entitlements held by Bank Markazi at Clearstream are non-governmental assets » et « should not be regarded as immune from execution » vu que « [t]hey stem from principal and interest payments received from bonds acquired by Bank Markazi, i.e., from commercial transactions and not from any activities that relate to 'monetary purposes' » (§ 95). Une telle référence à l'*origine* des biens en cause, en tant que paramètre censé déterminer l'étendue de l'immunité d'exécution, est quasiment inconnue de la pratique internationale, qu'il s'agisse d'ailleurs de l'immunité d'exécution générale de l'État, de celle de sa banque centrale ou de celle d'autres catégories particulières de biens : seule l'affectation ou la destination des biens est à cet égard déterminante. Aucune source ou élément pouvant venir au soutien d'un critère tiré de l'origine des biens n'est d'ailleurs avancé dans l'avis du professeur Reinisch. Et nulle explication n'est donnée de cette

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56 Ainsi, en Allemagne, voy. BGH, 4 juillet 2013, n° VII ZB 63/12, précité, qui n'y fait pas allusion ; en Australie, voy. Sections 35(1), 30, 32(1) et 32(3)(a) du *Foreign States Immunities Act 1985* (disponible sur https://www.legislation.gov.au/Details/C2016C00947), qui n'y font pas plus allusion ; la pratique éventuelle du Qatar ne nous est pas connue ; celle des pays nordiques non plus mais la Finlande, la Norvège et la Suède sont parties à la Convention des Nations Unies, l'on peut donc supposer qu'elles appliqueraient son prescrit, or, comme exposé plus haut, la Convention, loin d'introduire un critère restrictif (« fins monétaires », « fins souveraines » ou autre), prévoit une immunité absolue au profit de l'ensemble des biens des banques centrales ; enfin, le Danemark et l'Islande ont signé la Convention des Nations Unies, l'on peut donc supposer qu'ils n'adopteraient pas une pratique qui irait directement à son encontre, ne serait-ce qu'en raison de l'obligation de ne pas priver un traité signé de son objet et de son but en attendant la ratification (art. 18, a), de la Convention de Vienne sur le droit des traités, du 23 mai 1969).

57 Session de Bâle, 2 septembre 1991, *Ann. IDI*, vol. 64 (1992-II), p. 389, aussi disponible sur http://www.idi-iil.org/app/uploads/2017/06/1991_bal_03_fr.pdf.

58 *Report of the Sixty-Sixth Conference held at Buenos Aires, Argentina – 14 to 20 August 1994*, p. 21.

soudaine référence à un tel critère, alors que le reste des développements de l'avis porte sur un critère d'*affectation* ou de *destination* des biens. La référence à des « commercial transactions », dans lesquelles les avoirs concernés puisent prétendument leur source, semble introduire une confusion avec l'immunité de *juridiction*, dont l'étendue est en effet à déterminer en fonction de la nature de l'*acte* en cause. Ce passage de l'avis est donc pour le moins ambigu.

c) Le critère des biens utilisés ou destinés à être utilisés aux fins de la banque centrale

46. Comme indiqué ci-avant (voy. *supra*, §§ 37-38), la pratique des États défendant la thèse de l'immunité restreinte de la banque centrale connaît des divergences quant au critère spécifique définissant les biens protégés – ce qui empêche d'affirmer l'existence sur ce point d'une règle claire et bien établie du droit international coutumier.

47. Néanmoins, parmi les sources – *sensu lato* – favorables à un principe d'immunité restreinte[59], deux textes, qui contiennent d'importantes prises de position doctrinales revêtant une autorité toute particulière, doivent être mentionnés, d'autant plus que, sur l'aspect en cause, ils convergent de manière remarquable.

48. Il s'agit, d'une part, de la Résolution précitée de 1991 de l'Institut de droit international sur « Les aspects récents de l'immunité de juridiction et d'exécution des États », dont l'article 4, § 2, c), se lit comme suit :

> « (...) [L]es catégories suivantes de biens d'un État bénéficient de l'immunité d'exécution :
> (...)
> c) les biens de la Banque centrale ou de l'autorité monétaire de l'État utilisés pour leurs besoins propres ou dont l'utilisation à ces fins est prévue ».
>
> Texte anglais original faisant foi :
>
> « The following categories of property of a State (...) are immune from measures of constraint :
> (...)
> c) property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority ».

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59 Ou en tout cas qui ne se satisfont pas purement et simplement de la qualité de biens de la banque centrale pour accorder aux biens concernés le bénéfice de l'immunité d'exécution (comme dans la thèse de l'immunité d'exécution absolue de la banque centrale).

49. Il s'agit, d'autre part, des *Revised Draft Articles for a Convention on State Immunity* adoptés en 1994 par l'*International Law Association*, précités, dont l'article VIII.C.3 se lit comme suit :

> « Attachment or execution shall not be permitted if :
>
> (...)
>
> 3. The property is that of a State central bank held by it for central banking purposes ».

50. Dans ces deux textes, dépourvus de valeur contraignante en eux-mêmes mais qui véhiculent une doctrine particulièrement autorisée, le critère commun mis en évidence est celui des biens *utilisés ou destinés à être utilisés aux fins de la banque centrale* (« purposes of the central bank », « central banking purposes »)[60]. Ce qui paraît sensé car il y a sans doute là une exigence minimale : la banque centrale doit en effet pouvoir compter sur la disponibilité – et donc la non-saisissabilité – de l'ensemble des biens qu'elle utilise ou entend utiliser en vue de la réalisation de ses fins propres, à défaut de quoi elle se trouverait dans l'impossibilité de remplir sa mission de service public étatique.

51. Un critère identique a du reste été choisi récemment par le législateur espagnol : l'article 20, § 1er, c), de la *Ley Organica 16/2015* se réfère aux « bienes del banco central u otra autoridad monetaria del Estado que se destinen a los fines propios de dichas instituciones » (voy. *supra*, § 34) (traduction libre : « biens de la banque centrale ou autre autorité monétaire de l'État qui sont destinés aux fins propres desdites institutions »).

52. C'est également à un tel critère que référence a été faite déjà à l'époque des travaux parlementaires relatifs au *Foreign State Immunity Act 1976* (FSIA) aux États-Unis. La Section 1611(b)(1) du FSIA prévoit ce qui suit :

> « Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if —
>
> (1) the property is that of a foreign central bank or monetary authority held for its own account (...) ».

Comme indiqué précédemment, le rapport législatif précise que les termes « held for its own account » visent les « funds used or held in connection with central banking

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60 Dans la Résolution de l'Institut, la première traduction de « purposes » par « besoins » est sans doute moins heureuse que la seconde, traduisant cette fois par « fins ».

activities », et la jurisprudence emploie le test des « central banking functions »[61] (voy. *supra*, § 34).

53. Si, plutôt qu'une immunité d'exécution absolue, c'est une immunité dans une certaine mesure restreinte qui doit être reconnue au profit des biens de la banque centrale étrangère, les éléments qui précèdent tendent à montrer que les biens couverts par l'immunité sont ceux qui sont utilisés ou destinés à être utilisés aux fins de la banque centrale – ce qui est plus large que l'affectation aux seules « fins monétaires » poursuivies par celle-ci[62].

d) Charge de la preuve

54. Ce n'est pas à la banque centrale de démontrer que les biens en cause sont d'une nature telle que l'immunité d'exécution est applicable – à savoir, démontrer que ces biens sont utilisés ou destinés à être utilisés aux fins de la banque centrale. C'est, à l'inverse, au créancier qu'il revient d'établir que les biens qu'il entend saisir sont d'une nature telle qu'ils ne sont pas couverts par l'immunité – à savoir, établir que ces biens sont utilisés ou destinés à être utilisés à des fins *étrangères* aux fins de la banque centrale.

55. Cette règle relative à la charge de la preuve est explicitement consacrée dans des législations nationales et des décisions de tribunaux internes portant spécifiquement sur l'immunité d'exécution de banques centrales étrangères[63]. Le *critère* employé dans ces législations et décisions afin de délimiter l'immunité peut ne pas être, en lui-même, celui, suggéré plus haut, de l'affectation « aux fins de la banque centrale » ; ce qui importe ici est toutefois la seule question de la charge de la preuve dans la mise en œuvre du critère, quelle que soit l'exacte définition de ce dernier.

56. Ainsi, en France, l'article L. 153-1, alinéa 2, du Code monétaire et financier prévoit, pour rappel, que le créancier peut solliciter du juge de l'exécution l'autorisation de saisir « s'il établit » que les biens de la banque centrale font partie d'un patrimoine qu'elle affecte à une activité principale relevant du droit privé. La Cour de cassation, dans un arrêt du 11

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61 United States Court of Appeals for the Second Circuit, ***NML Capital Ltd v Banco Central de la República Argentina***, 5 juillet 2011, 652 F.3d 172, 195.

62 Sur les fonctions d'une banque centrale, voy. *supra*, § 28.

63 Une très abondante jurisprudence interne (voy. par ex. Cass. fr., *NML Capital Ltd c. République argentine*, 28 septembre 2011, n° 09-72057), ainsi que certaines dispositions législatives (voy. par ex. art. 1412*quinquies*, § 2, *in limine*, du Code judiciaire belge), vont dans le même sens s'agissant de l'immunité d'exécution des comptes bancaires des missions diplomatiques. Elles ne doivent toutefois pas être examinées ici compte tenu de la spécificité de l'immunité des banques centrales sur le plan de l'étendue de l'immunité (voy. *supra*, § 22).

janvier 2018[64], a du reste confirmé la décision de la Cour d'appel de Versailles qui avait jugé à cet égard que « si l'article L. 153-1 met à la charge du créancier une preuve difficile, quant à la nature des fonds et leur affectation, il n'instaure pas une preuve impossible, et dès lors n'apporte pas une restriction disproportionnée à l'article 6 de la Convention européenne des droits de l'Homme »[65].

57. En Belgique, l'article 1412*quater*, § 2, du Code judiciaire prévoit, pour rappel, que le créancier peut demander au juge des saisies l'autorisation de saisir « à condition qu'il démontre » que les avoirs de la banque centrale sont exclusivement affectés à une activité économique ou commerciale de droit privé. Appliquant cette disposition, la Cour d'appel de Bruxelles a rejeté un appel contre une ordonnance par laquelle le juge des saisies avait refusé d'accorder l'autorisation de saisir les fonds déposés sur un compte en banque ouvert au nom d'une banque centrale étrangère, au motif que l'appelant – le créancier – n'avait pas apporté « une preuve suffisante de l'affectation exclusive à une activité commerciale ou économique des fonds visés »[66].

58. En outre, l'article 1412*quinquies* du Code judiciaire belge[67] instaure une insaisissabilité des « biens appartenant à une puissance étrangère » (§ 1er), y compris tout « démembrement » de cette dernière (§ 3, al. 1er)[68]. Les biens des banques centrales étrangères, visés spécifiquement par l'article 1412*quater*, relèvent donc également du champ d'application de l'article 1412*quinquies*[69]. Celui-ci, sur le modèle de l'article 1412*quater*, prévoit que le créancier peut demander au juge des saisies l'autorisation de saisir « à condition qu'il démontre » que, entre autres, les biens sont spécifiquement utilisés ou destinés à être utilisés autrement qu'à des fins de service public non commerciales (§ 2, 3°). La Cour constitutionnelle de Belgique, dans un arrêt du 27 avril 2017, a jugé qu'il n'y avait là aucun « renversement injustifié de la charge de la preuve »,

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64 Cass. fr., *Novoparc Healthcare International Ltd c. Central Bank of Iraq*, 11 janvier 2018, n° 16-10.661, disponible sur https://www.doctrine.fr/d/CASS/2018/C36A1247B7B9DF9B7379C.

65 Versailles (16e ch.), 1er octobre 2015, *La Semaine Juridique*, Ed. gén. n° 15, 11 avril 2016, p. 442.

66 Bruxelles (17e ch.), 19 septembre 2011, *Journal des tribunaux*, 2012, p. 95.

67 Inséré par la Loi du 23 août 2015 insérant dans le Code judiciaire un article 1412*quinquies* régissant la saisie de biens appartenant à une puissance étrangère ou à une organisation supranationale ou internationale de droit public, *Moniteur belge*, 3 septembre 2015, disponible sur http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2015082313 (ignorer la note ajoutée par l'éditeur concernant l'arrêt de la Cour constitutionnelle, cette note n'étant pas correcte).

68 A savoir « un organisme qui agit pour compte d'une puissance étrangère ou d'une de ses entités fédérées à la condition que cet organisme dispose d'une parcelle de souveraineté » (art. 1412*ter*, § 3, al. 2, du Code judiciaire, auquel renvoie l'art. 1412*quinquies*, § 3, al. 2).

69 Fr. DOPAGNE, « L'immunité de saisie des biens de l'État étranger et de l'organisation internationale : notes sur l'article 1412*quinquies* du Code judiciaire », *Journal des tribunaux*, 2016, p. 59.

et a refusé de considérer que « la preuve pesant sur les créanciers serait impossible à administrer ». « Ainsi par exemple », selon la Cour, « la preuve de l'utilisation de biens, de nature immobilière ou mobilière, à des fins étrangères au service public ne paraît pas impossible à rapporter dans tous les cas ». La Cour en a conclu qu'il n'y avait, de ce chef en tout cas, aucune violation de l'article 6 de la Convention européenne des droits de l'homme qui résultait de l'article 1412*quinquies*[70].

59. L'avis du professeur Reinisch lui-même, qui défend l'idée d'une immunité restreinte des biens des banques centrales, reconnaît que ceux-ci bénéficient néanmoins d'une *présomption* réfragable d'affectation à des fins monétaires ou autres fins publiques (§§ 66, 110-I et 110-J) – l'affectation qui, dans l'avis du professeur Reinisch, est présentée comme justifiant l'immunité. C'est donc logiquement qu'il indique que la preuve à rapporter – afin de renverser ladite présomption – consiste en « evidence demonstrating that [Bank Markazi's] funds or parts of them in fact do not serve sovereign purposes » (§ 109). La charge de la preuve incombe donc bien en tout état de cause au créancier. Nous pensons simplement, comme expliqué ci-avant, que l'objet précis de cette preuve est plutôt la démonstration de ce que les avoirs en cause sont utilisés ou destinés à être utilisés à des fins étrangères aux fins de la banque centrale.

e) Application dans le cas d'espèce

60. Les avoirs saisis dans le cas d'espèce font partie des réserves de la Banque Markazi en sa qualité de banque centrale de la République islamique d'Iran.

61. Comme toutes les réserves d'une banque centrale, ces avoirs sont utilisés afin d'instiller la confiance sur les marchés financiers et de promouvoir la stabilité des prix. Ces objectifs figurent parmi les objectifs essentiels et prioritaires de la Banque Markazi en tant que banque centrale. Les fins de toute banque centrale comprennent en effet la conduite d'une politique monétaire en vue de la promotion des objectifs économiques nationaux de l'État concerné (voy. *supra*, § 28).

62. Il peut donc sans risque être avancé en l'espèce que les avoirs en cause sont effectivement et exclusivement utilisés, ou à tout le moins destinés à être utilisés, aux fins de la banque centrale, et sont donc couverts par l'immunité d'exécution.

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70 C. const. b., *NML Capital Ltd et Yukos Universal Limited*, 27 avril 2017, n° 48/2017, §§ B.25.2, B.27.1, B.27.2 et B.28, disponible sur www.const-court.be.

63. À dire vrai, dans le contexte ici en cause, les avoirs saisis paraissent même être affectés en réalité à des fins monétaires ou autres fins souveraines, au sens du critère suggéré dans l'avis du professeur Reinisch.

64. Ils ne sont *certainement pas affectés en tout cas à des fins économiques ou commerciales de droit privé*. Il y a lieu de relever en ce sens l'arrêt de la Cour d'appel de Paris du 10 mars 2008, dans une affaire concernant la saisie conservatoire de comptes bancaires de la Banque Markazi en France[71] : l'arrêt a considéré que les créanciers n'avaient pas démontré que les fonds en cause faisaient « partie d'un patrimoine qu[e la banque centrale] affecte à une activité principale relevant du droit privé », au sens de l'article L. 153-1 du Code monétaire et financier français (voy. *supra*, § 34).

65. À cet égard, il convient d'éviter une confusion entre, d'une part, les *fins* de la banque centrale, qui seules sont déterminantes pour apprécier l'immunité d'exécution, et, d'autre part, les *modalités* concrètes selon lesquelles la banque centrale *agit* en vue de la réalisation de ces fins, qui pour leur part ne concourent pas à l'appréciation de l'immunité d'exécution. Ainsi, il n'est pas contesté qu'une banque centrale, comme d'ailleurs d'autres entités exerçant des fonctions de puissance publique, peut à certains égards *agir* comme une entreprise privée, c'est-à-dire accomplir des actes et recourir à des formes ou instruments juridiques accessibles dans le « commerce » de droit privé. Il ne s'ensuit évidemment pas que les avoirs de la banque centrale perdent alors leur *affectation* spécifique aux fins – proprement publiques – de la banque centrale. De manière générale, d'ailleurs, l'immunité d'exécution de l'État en droit international dépend des fins auxquelles le bien est affecté, par opposition à l'immunité de juridiction de l'État qui dépend de la nature de l'acte en cause[72].

66. En tout état de cause, c'est aux demandeurs dans le cas d'espèce qu'il appartient de démontrer que les biens saisis seraient utilisés ou destinés à être utilisés à des fins étrangères aux fins de la Banque Markazi en tant que banque centrale, conformément à ce qui a été dit plus haut quant à la charge de la preuve. Ce n'est pas à la Banque Markazi d'établir qu'elle se trouve dans les conditions pour bénéficier de l'immunité d'exécution, ses biens bénéficiant en effet d'une présomption d'affectation lui valant le bénéfice de l'immunité.

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71 Paris (1e ch.), 10 mars 2008, n° 08/01119, disponible sur https://www.doctrine.fr/d/CA/Paris/2008/SK1D1218DD46A4A1C3E119.

72 Voy. gén. X. YANG, *State Immunity in International Law*, *op. cit.*, pp. 392-394.

67. Pour le surplus, comme indiqué précédemment, l'origine des biens saisis est indifférente (voy. *supra*, § 45). Pour autant que de besoin, cependant, il convient de souligner que les avoirs saisis dans le cas d'espèce ont été acquis par la Banque Markazi grâce aux revenus générés par la vente, par la *National Iranian Oil Company* contrôlée par le Ministère iranien du Pétrole, de pétrole iranien – à savoir une ressource naturelle nationale sur laquelle la République islamique d'Iran jouit bien évidemment d'une pleine et entière « souveraineté permanente », et dont elle décide donc souverainement et librement de l'usage « dans l'intérêt du développement national et du bien-être de la population »[73]. Il n'y a donc en tout état de cause, à l'origine des avoirs saisis en l'espèce, aucune transaction commerciale de droit privé, mais tout au contraire une opération consistant en l'exercice, par un État souverain, et dans le cadre même de cette souveraineté, du droit de libre disposition qu'il détient sur ses ressources naturelles nationales.

B. La renonciation à l'immunité d'exécution

1. Principes applicables

68. Il n'est pas contesté que l'État étranger, y compris sa banque centrale, peut renoncer à son immunité d'exécution, rendant par là-même licites des mesures de contrainte sur ses biens couverts par l'immunité (dans les limites éventuelles fixées par la renonciation elle-même).

69. Selon le droit international coutumier en vigueur, cette renonciation doit impérativement être expresse, ce qui signifie que l'État concerné doit avoir explicitement et clairement manifesté son consentement à ce que des saisies ou autres mesures de contrainte soient pratiquées sur ses biens jouissant en principe de l'immunité d'exécution. La renonciation ne peut donc être simplement implicite, c'est-à-dire déduite du comportement plus général de l'État concerné. À défaut d'être expresse, la renonciation n'est pas juridiquement valable, et ne peut partant produire son effet propre de justification des mesures de contrainte. Le juge du for qui donnerait effet à une renonciation alléguée qui ne serait pas expresse, et qui sur cette base autoriserait ou validerait une mesure de contrainte sur des biens immunisés, méconnaîtrait l'immunité d'exécution de l'État étranger et engagerait de ce fait la responsabilité internationale de l'État dont il est l'organe.

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73 Voy. Résolution 1803 (XVII) de l'Assemblée générale des Nations Unies du 14 décembre 1962 (« Souveraineté permanente sur les ressources naturelles »), spéc. § 1er. Disponible sur http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/1803(XVII).

70. L'exigence d'une renonciation expresse à l'immunité d'exécution en tant que règle de droit international coutumier a, fondamentalement, été reconnue par la Cour internationale de Justice dans l'arrêt précité *Allemagne c. Italie* :

> « [I]l existe au minimum une condition qui doit être remplie pour qu'une mesure de contrainte puisse être prise à l'égard d'un bien appartenant à un Etat étranger : que le bien en cause soit utilisé pour les besoins d'une activité ne poursuivant pas des fins de service public non commerciales, ou que l'Etat propriétaire ait *expressément consenti* à l'application d'une mesure de contrainte, ou encore que cet Etat ait réservé le bien en cause à la satisfaction d'une demande en justice »[74].

Appliquant cette règle, la Cour a jugé ce qui suit :

> « [L]'Allemagne n'a d'aucune manière *expressément consenti* à l'application d'une mesure telle que l'hypothèque en cause »[75].

71. Ce prononcé de la CIJ se situe sur le plan du droit international coutumier. La Cour était en effet, pour rappel, appelée à se prononcer sur la base de ce droit[76].

72. Un examen de la pratique internationale – au-delà même des quatre décisions de cours suprêmes nationales auxquelles la Cour fait référence[77] – confirme au demeurant sans ambiguïté que la règle de droit international coutumier identifiée par la CIJ est en effet solidement ancrée dans la pratique effective des États dans leur immense majorité, et correspond à leur *opinio juris*.

73. En premier lieu, l'exigence d'une renonciation expresse à l'immunité d'exécution est explicitement consacrée dans les principaux instruments internationaux multilatéraux régissant la matière :

- Convention des Nations Unies[78], art. 19, a) :

> « Aucune mesure de contrainte postérieure au jugement, telle que saisie, saisie-arrêt ou saisie-exécution, ne peut être prise contre des biens d'un État en relation avec une procédure intentée devant un tribunal d'un autre État excepté si et dans la mesure où : a) L'État a expressément consenti à l'application de telles mesures dans les termes indiqués : i) Par un accord international ; ii) Par une convention d'arbitrage ou un contrat

74 P. 148, § 118 (ital. aj.). L'avis du professeur Reinisch ne cite ce passage déterminant de l'arrêt qu'en note de bas de page n° 7.
75 P. 148, § 119 (ital. aj.).
76 Voy. p. 122, §§ 54-55, de l'arrêt.
77 P. 148, § 118.
78 Sur son statut et sa prise en compte dans le cas d'espèce, voy. *supra*, §§ 17-19.

écrit ; ou iii) Par une déclaration devant le tribunal ou une communication écrite faite après la survenance du différend entre les parties »[79].

- Convention européenne sur l'immunité des États du 16 mai 1972[80], art. 23 :

  « Il ne peut être procédé sur le territoire d'un Etat Contractant ni à l'exécution forcée, ni à une mesure conservatoire sur les biens d'un autre Etat Contractant, sauf dans les cas et dans la mesure où celui-ci y a expressément consenti par écrit ».

- Déclaration sur les immunités juridictionnelles des biens culturels appartenant à un État – qui pour rappel prévoit explicitement que ses dispositions sont « [e]n conformité avec le droit international coutumier tel que codifié par la Convention [des Nations Unies] »[81] :

  « [L]es biens d'un État faisant partie de son patrimoine culturel ou de ses archives ou faisant partie d'une exposition d'objets d'intérêt scientifique, culturel ou historique qui ne sont pas mis ou destinés à être mis en vente ne peuvent être soumis à aucune mesure de contrainte telle que saisie, saisie-arrêt ou saisie-exécution, dans un autre Etat ; et

  par conséquent, de telles mesures de contrainte peuvent seulement être prises si les autorités nationales compétentes de l'État propriétaire des biens renoncent expressément à l'immunité pour des biens clairement spécifiés, ou si les biens ont été réservés ou affectés par cet État à la satisfaction de la demande qui fait l'objet de la procédure concernée ».

74. En deuxième lieu, l'exigence d'une renonciation expresse à l'immunité d'exécution est consacrée dans la très grande majorité des législations nationales existant dans le domaine des immunités de l'État :

  - Afrique du Sud – *Foreign States Immunities Act 1981*, Section 14(2) :

    « Subsection (1) [la règle générale d'immunité d'exécution] shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state's immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection ».

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79 L'art. 18, a), prévoit *mutatis mutandis* la même règle s'agissant des mesures de contrainte antérieures au jugement.

80 STE n° 074, ratifiée par le Grand-Duché de Luxembourg le 11 décembre 1986, disponible sur https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/09000016800730da. En tant que telle, cette Convention n'est bien sûr pas applicable dans le cas d'espèce, la République islamique d'Iran n'y étant pas partie.

81 Voy. *supra*, § 19.

- Australie – *Foreign States Immunities Act 1985*[82], Section 31(1) :

  « A foreign State may at any time by agreement waive the application of section 30 [la règle générale d'immunité d'exécution] in relation to property, but it shall not be taken to have done so by reason only that it has submitted to the jurisdiction ».

  Les travaux préparatoires ne laissent aucun doute sur le fait que l'intention du législateur était d'exiger une renonciation expresse :

  « Unlike immunity from jurisdiction, there should be no scope for waiver of immunity from execution arising by implication »[83].

- Belgique – Code judiciaire, art. 1412*quinquies*, § 2, 1°[84] :

  « [L]e créancier (...) peut introduire une requête auprès du juge des saisies afin de demander l'autorisation de saisir les avoirs d'une puissance étrangère (...) à condition qu'il démontre qu'une des conditions suivantes est remplie : 1° si la puissance étrangère a expressément (...) consenti à la saisissabilité de ce bien ».

- Fédération de Russie – *Federal Law No. 297-FZ on Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation* (3 novembre 2015), art. 15, 1) :

  « A foreign state shall enjoy immunity in respect of execution of a court decision, except if : 1) the foreign state has explicitly expressed its consent to taking the appropriate measures (...) »[85].

- France – Code des procédures civiles d'exécution, art. L. 111-1-2, al. 1er, 1°)[86] :

  « Des mesures conservatoires ou des mesures d'exécution forcée visant un bien appartenant à un Etat étranger ne peuvent être autorisées par le juge que si l'une des conditions suivantes est remplie : 1° L'Etat concerné a expressément consenti à l'application d'une telle mesure ».

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82 Disponible sur https://www.legislation.gov.au/Details/C2016C00947.

83 Voy. X. YANG, *State Immunity in International Law*, *op. cit.*, pp. 391-392 et note 186 (p. 663).

84 Qui pour rappel couvre les avoirs des banques centrales bien que ceux-ci soient par ailleurs visés spécifiquement par l'article 1412*quater* (lequel n'évoque pas pour sa part la question de la renonciation).

85 Voy. également, dans le même sens, art. 14, 1), s'agissant des « measures aimed at securing a claim ».

86 Disponible sur https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000025024948. Inséré par la Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite « Loi Sapin 2 », *Journal officiel de la République française*, n° 287, 10 décembre 2016. Voy. gén. B. TRANCHANT, « L'immunité étatique et l'exécution en France des sentences arbitrales internationales. Observations suite à l'entrée en vigueur de la loi 'Sapin 2' », *Revue générale de droit international public*, 2017, pp. 837-862.

Voy. aussi art. L. 111-1-3 : « Des mesures conservatoires ou des mesures d'exécution forcée ne peuvent être mises en œuvre sur les biens, y compris les comptes bancaires, utilisés ou destinés à être utilisés dans l'exercice des fonctions de la mission diplomatique des Etats étrangers ou de leurs postes consulaires, de leurs missions spéciales ou de leurs missions auprès des organisations internationales qu'en cas de renonciation expresse et spéciale des Etats concernés ».

- Japon – *Act on Civil Jurisdiction over Foreign States 2009*, art. 17, § 1er :

  « Foreign States shall not be immune from jurisdiction as respects the proceedings on provisional measures or enforcement of judgments against their property if they have expressly consented to the taking of such measures (...) ».

- Pakistan – *State Immunity Ordinance 1981*, Section 14(3) :

  « Subsection (2) [la règle générale d'immunité d'exécution] does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally: Provided that a provision merely submitting to the jurisdiction of the courts shall not be deemed to be a consent for the purposes of this subsection ».

- République populaire de Chine (y compris les Régions administratives spéciales de Hong Kong et de Macao) – *Law on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks* (25 octobre 2005), art. 1er :

  « The People's Republic of China grants judicial immunity from measures of constraint such as the attachment of property and execution to the property of foreign central banks, unless the foreign central banks or the governments of their States waive in written form, or the property is allocated to be used for the attachment of property and execution ».

- Royaume-Uni – *State Immunity Act 1978*, Section 13(3), et

  Singapour – *State Immunity Act 1979*, Section 15(3) :

  « Subsection (2) above [la règle générale d'immunité d'exécution] does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection ».

75. En Espagne, si la *Ley Organica 16/2015*, précitée, envisage une renonciation implicite à l'article 17, § 1er, elle précise aussitôt en son article 18, § 2, que la seule hypothèse de renonciation implicite en réalité admise est celle de l'État ayant réservé des biens à la satisfaction de la demande objet de la procédure[87]. Quant à la *Ley 26.961* argentine, précitée, elle n'évoque pas la question de la renonciation à l'immunité.

76. L'avis du professeur Reinisch (§ 31) se réfère à la législation canadienne et à la législation américaine, présentées comme autorisant une renonciation implicite. Ces législations sont cependant largement minoritaires sur ce point, en comparaison des législations mentionnées ci-avant. Plus fondamentalement, il convient de noter qu'elles prévoient en tout état de cause toutes deux, en *dérogation* à leur règle générale prévoyant effectivement la possibilité d'une renonciation implicite, une *règle spéciale concernant l'immunité d'exécution des banques centrales étrangères*, et cette règle spéciale, qui n'est pas mentionnée dans l'avis du professeur Reinisch, *exige bel et bien une renonciation expresse* :

- Canada – *State Immunity Act 1982*, Section 12(5) :

  « The immunity conferred on property of a foreign central bank or monetary authority by subsection (4) does not apply where the bank, authority or its parent foreign government has explicitly waived the immunity (...) ».

- États-Unis – *Foreign State Immunity Act 1976*, Section 1611(b)(1) :

  « Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if — (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution (...) ».

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87 Art. 17, § 1er : « Los órganos jurisdiccionales españoles se abstendrán de adoptar medidas de ejecución u otras medidas coercitivas contra bienes del Estado extranjero, tanto antes como después de la resolución judicial, salvo que dicho Estado lo haya consentido, de manera expresa o tácita ». Traduction libre : « Les organes juridictionnels espagnols s'abstiendront d'adopter des mesures d'exécution ou d'autres mesures de contrainte contre les biens de l'État étranger, aussi bien avant qu'après le règlement judiciaire, sauf là où un tel État y a consenti, de manière expresse ou tacite ».
Art. 18, § 2 : « Se considera que existe consentimiento tácito a los efectos del artículo anterior únicamente cuando el Estado extranjero ha asignado bienes de su propiedad a la satisfacción de la demanda objeto del proceso ». Traduction libre : « Il est considéré qu'il existe un consentement tacite aux fins du précédent article uniquement lorsque l'État étranger a affecté des biens lui appartenant à la satisfaction de la demande objet de la procédure ».

La jurisprudence confirme d'ailleurs que c'est bien cette règle spéciale de la Section 1611(b)(1) qu'il y a lieu d'appliquer en matière d'immunité d'exécution des banques centrales[88].

77. En troisième lieu, l'exigence d'une renonciation expresse à l'immunité d'exécution est largement consacrée dans la jurisprudence des cours et tribunaux internes. Pour se limiter aux décisions de cours suprêmes, et à la jurisprudence récente, les arrêts suivants peuvent être cités, qui tous trois ont jugé que la Convention des Nations Unies, en tant qu'elle exigeait une renonciation expresse (art. 19, c)), reflétait une règle de droit international coutumier :

- Cour constitutionnelle de Belgique, *NML Capital Ltd et Yukos Universal Limited*, 27 avril 2017, n° 48/2017, §§ B.13.3[89] (jugeant d'ailleurs que l'exigence d'une renonciation expresse n'emporte pas de violation du droit d'accès au juge protégé par l'article 6 de la Convention européenne des droits de l'homme : §§ B.13.1, B.18.1 et B.28) ;

- Cour suprême des Pays-Bas (*Hoge Raad*), *Morning Star International Corporation c. République du Gabon et État néerlandais*, 30 septembre 2016, n° 16/01153, § 3.4.6[90] ;

- Cour de cassation de France, *NML Capital c. République argentine*, 28 mars 2013, n[os] 10-25.938, 11-10.450 et 11-13.323[91] (jugeant d'ailleurs, dans les deuxième et troisième arrêts, que l'exigence d'une renonciation expresse n'emporte pas de violation du droit d'accès au juge protégé par l'article 6 de la Convention européenne des droits de l'homme).

78. Il convient sans doute d'accorder plus de poids à ces trois décisions récentes de cours suprêmes qu'aux deux décisions de 1980 citées dans l'avis du professeur Reinisch en

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88 United States Court of Appeals for the Second Circuit, *NML Capital Ltd v Banco Central de la República Argentina*, 5 juillet 2011, 652 F.3d 172, 190 : « [T]he analysis of the immunity of a foreign central bank's property begins with s 1611(b)(1) ».

89 Disponible sur www.const-court.be.

90 Disponible sur https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:2236&showbutton=true&keyword=gabon.

91 *Journal du droit international*, 2013, p. 899, aussi disponibles respectivement sur :
- https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251601&fastReqId=1731591151&fastPos=3
- https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251609&fastReqId=970504478&fastPos=2
- https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251612&fastReqId=1477662302&fastPos=1.

faveur de l'admissibilité d'une renonciation implicite, décisions émanant pour l'une d'une *district court* (des États-Unis)[92] et pour l'autre d'une cour d'appel (de Suède)[93].

79. Quant à l'arrêt *Creighton c. Qatar* de 2000 de la Cour de cassation de France[94] – un arrêt rendu avant l'adoption de la Convention des Nations Unies –, sur lequel s'appuie également l'avis du professeur Reinisch (§ 34), s'il est exact qu'il peut être lu comme s'étant fondé sur une renonciation implicite à l'immunité d'exécution – inférée en l'occurrence de « l'engagement pris par l'État signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la Chambre de commerce international » –, force est en revanche de constater que son enseignement sur ce point n'a pas prospéré dans la jurisprudence française subséquente, tout au contraire[95]. Il a même fait l'objet récemment d'un revirement net à l'occasion d'un arrêt de la Cour de cassation du 13 mai 2015, rendu dans un contexte similaire d'exécution d'une sentence arbitrale que l'État s'était contractuellement engagé à exécuter[96]. Dans cet arrêt, dit « *Commissinpex* », la Cour juge en effet que « le droit international coutumier n'exige pas une renonciation autre qu'expresse à l'immunité d'exécution ». Cet attendu est principalement destiné à rejeter l'argument – invoqué par l'État débiteur et accepté par la Cour d'appel dans l'arrêt querellé – selon lequel la renonciation à l'immunité d'exécution devrait, dans le cas des biens affectés au fonctionnement de la mission diplomatique, être non seulement expresse mais aussi « spéciale » – une question qui n'est pas en cause ici. Il n'en demeure pas moins que, en statuant dans les termes précités, la Cour de cassation affirme clairement que le droit international coutumier exige une renonciation expresse à l'immunité d'exécution – fût-ce en jugeant dans le même temps que ce droit n'exige pas que la renonciation revête un autre caractère. Des commentateurs experts de la matière ont du reste souligné qu'il y avait là en effet un revirement par rapport à l'arrêt *Creighton c. Qatar* ayant admis la possibilité d'une renonciation implicite[97]. L'avis du professeur Reinisch se révèle, de ce

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92 Note 27 de l'avis du professeur Reinisch.

93 Note 34 de l'avis du professeur Reinisch.

94 Cass. fr., *Société Creighton Ltd c. Ministre des Finances de l'État du Qatar et autre*, 6 juillet 2000, n° 98-19068, *Journal du droit international*, 2000, p. 1054, aussi disponible sur https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007043044&fastReqId=513084311&fastPos=1.

95 Voy. spéc. les trois arrêts du 28 mars 2013 de la Cour de cassation, cités *supra*, § 77, qui exigent une renonciation expresse.

96 Cass. fr., *Société Commissions import-export c. République du Congo*, 13 mai 2015, n° 13-17751, *Journal du droit international*, 2015, p. 141, aussi disponible sur https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030600444&fastReqId=146447995&fastPos=1.

97 Note de S. EL SAWAH et Ph. LEBOULANGER sous l'arrêt, *Journal du droit international*, 2015, p. 150.

point de vue, ambigu lorsqu'il décrit l'arrêt *Commissimpex* comme « no longer demand[ing] an express and specific waiver » (§ 36) : en effet, c'est *uniquement l'exigence d'une renonciation spéciale* qui est abandonnée par la Cour de cassation, celle d'une renonciation expresse se voit tout au contraire affirmée[98]. Telle est au demeurant, pour rappel, la position prise depuis lors par le législateur français, qui a prévu que la renonciation devait en tout état de cause être expresse[99]. Et cela n'a pas en soi été remis en cause dans l'arrêt du 10 janvier 2018 rendu par la Cour de cassation de France dans cette même affaire *Commissinpex* à la suite de l'entrée en vigueur de ces nouvelles dispositions législatives[100].

80. En quatrième lieu, l'exigence d'une renonciation expresse à l'immunité d'exécution est consacrée dans la Résolution précitée de 1991 de l'Institut de droit international sur « Les aspects récents de l'immunité de juridiction et d'exécution des États » (art. 5, § 1er).

81. Pour leur part, les *Revised Draft Articles for a Convention on State Immunity* adoptés en 1994 par l'*International Law Association*, précités, admettent une renonciation implicite (art. VIII.A.1). Il s'agit toutefois d'un texte non contraignant, de nature doctrinale tout au plus, et qui manifestement s'avère extrêmement isolé à la lumière de l'ensemble des sources précitées.

82. De la pratique recensée ci-avant, il peut sans conteste être conclu, vu l'unanimité des diverses sources, qu'à ce jour le droit international coutumier exige que la renonciation à l'immunité d'exécution de l'État étranger, y compris sa banque centrale, soit expresse afin d'être valable.

83. Une conséquence immédiate de cette exigence est que, comme l'énonce la CIJ dans l'arrêt *Allemagne c. Italie*, au titre donc du droit international coutumier, « l'éventuelle renonciation par un État à son immunité de juridiction (...) ne vaut pas par elle-même renonciation à son immunité d'exécution »[101].

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98 En outre, le § 38 et la note 41 de l'avis du professeur Reinisch contiennent une méprise par rapport à la lecture de l'arrêt *Commissinpex* : ce qui y est écrit et cité est présenté comme étant la position de la Cour de cassation, alors qu'il s'agit en fait de l'exposé d'un moyen *du demandeur en cassation* (comme le confirme le fait que le texte cité en note 41 commence par l'expression « ALORS QUE »).

99 Voy. art. L. 111-1-2, al. 1er, 1°), et art. L. 111-1-3 du Code des procédures civiles d'exécution, *supra*, § 74.

100 Cass. fr., *République du Congo c. Société Commissions import-export*, 10 janvier 2018, n° 16-22.494, disponible sur https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/3_10_38342.html. L'arrêt ne discute que la question de l'exigence d'une renonciation spéciale, non en cause dans le cas d'espèce.

101 Pp. 146-147, § 113. Voy. aussi not. art. 20 de la Convention des Nations Unies.

2. Application dans le cas d'espèce

84. Les demandeurs dans le cas d'espèce (à savoir la procédure en validation de saisie-arrêt) soutiennent que la Banque Markazi a renoncé à son immunité d'exécution. Ils déduisent une telle renonciation du fait que la Banque Markazi a introduit une action devant le Juge des référés afin de contester la saisie, sans, affirment-ils, invoquer d'emblée l'immunité d'exécution.

85. Avant tout, force est de constater que la renonciation alléguée en l'espèce s'inscrit dans le cadre de la procédure en référé. Dès lors, son effet, si fondamentalement elle devait en avoir un, devrait à notre avis resté limité à cette procédure (pour autant que cela ait quelque sens), sans qu'il puisse s'étendre à d'autres instances – notamment la procédure en validation ici en cause –, ces autres instances fussent-elles liées d'une certaine manière à la procédure en référé.

86. En tout état de cause, il nous paraît clair qu'en application de la règle de droit international coutumier exigeant que la renonciation à l'immunité d'exécution soit expresse, la renonciation vantée en l'espèce, qui ne répond pas à cette condition, ne saurait être tenue pour valable, et partant ne saurait se voir reconnaître un effet justificatif de la saisie en cause.

87. De manière plus spécifique, il peut être observé que la Banque Markazi n'a accompli aucun acte ou démarche qui figure parmi ceux classiquement regardés comme manifestant le consentement exprès à l'adoption de mesures de contrainte sur les biens protégés par l'immunité. Ainsi, s'agissant de la renonciation expresse effectuée une fois le litige né, l'article 19, c), iii), de la Convention des Nations Unies prévoit qu'elle doit prendre la forme, soit d'une « déclaration devant le tribunal »[102] lorsque celui-ci est déjà saisi, soit à tout le moins d'une « communication écrite faite après la survenance du différend entre les parties ». D'après les informations dont nous disposons, ni l'une ni l'autre n'a été faite en l'occurrence.

88. Il faut en tout cas se garder de toute confusion avec l'immunité de juridiction, qui dans certaines circonstances précises – qui ne doivent pas être examinées dans le présent avis car elles ne relèvent pas de son objet – peut en effet pour sa part être considérée comme ayant fait l'objet d'une renonciation du fait de l'initiation d'une procédure par le titulaire

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102 Une « déclaration expresse » : I. PINGEL-LENUZZA, *Les immunités des États en droit international*, Bruylant, 1998, p. 314.

de l'immunité. Il n'en va pas de même de l'immunité d'exécution, ce qui se comprend aisément puisque celle-ci se situe sur un autre plan – la protection des biens – et ne saurait donc être impactée directement par l'attitude que l'État prend par rapport à l'immunité de juridiction.

89. En tout état de cause, il faut rappeler que, selon le droit international coutumier, une renonciation éventuelle à l'immunité de juridiction n'implique pas en soi qu'il a aussi été renoncé à l'immunité d'exécution.

90. Par ailleurs, il serait surprenant, voire illogique, qu'une renonciation à l'immunité d'exécution puisse être déduite spécifiquement de l'introduction d'une action destinée, précisément, à obtenir la mainlevée d'une saisie, fût-ce en ne s'appuyant explicitement dans un premier temps que sur une autre base juridique. En effet, la renonciation impliquerait par définition que le titulaire de l'immunité est prêt à voir la saisie sortir ses effets, ce qui par hypothèse *n'a pas pu être l'intention* puisqu'une action est tout au contraire mue afin de contester cette saisie. En ce sens, il semble que ce qui compte n'est pas tant le fait que l'immunité d'exécution soit explicitement invoquée comme telle *in limine litis*, que le fait que son titulaire diligente effectivement les procédures appropriées en temps utile afin de faire libérer les avoirs saisis, quitte à soulever l'immunité d'exécution à un stade ultérieur en cours de procédure. En conclusion, il n'y a selon nous pas eu renonciation implicite, même en admettant – en amont – qu'une renonciation implicite à l'immunité d'exécution peut par principe être valable.

C. L'incidence, sur l'immunité d'exécution, du droit d'accès au juge

91. Le Pacte international relatif aux droits civils et politiques du 16 décembre 1966 (PIDCP), auquel sont parties le Grand-Duché de Luxembourg ainsi que la République islamique d'Iran, garantit le droit de toute personne d'avoir accès à un juge, dans le cadre du droit à un procès équitable protégé par l'article 14, § 1er.

92. Il en est de même de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 (CEDH), dans le cadre du droit à un procès équitable protégé par l'article 6, § 1er. La République islamique d'Iran n'y est cependant pas partie, et ne peut donc se voir imposer le respect d'obligations qui découleraient spécifiquement de la CEDH.

93. La question se pose de savoir si le droit d'accès au juge ainsi garanti aux particuliers est susceptible d'avoir un impact sur l'applicabilité de l'immunité d'exécution de la Banque

Markazi, au cas où il serait établi que les demandeurs dans le cas d'espèce peuvent effectivement se prévaloir, devant les tribunaux luxembourgeois, dudit droit d'accès au juge – ce qui suppose, pour le PIDCP, qu'ils relèvent de la « compétence » du Grand-Duché au sens de l'article 2, § 1er, du PIDCP, et, pour la CEDH, qu'ils relèvent de la « juridiction » du Grand-Duché au sens de l'article 1er de la CEDH.

94. Dès lors en effet que l'on admet que le droit d'accès au juge inclut le droit à l'exécution des décisions de justice en tant que prolongement nécessaire de l'accès au juge proprement dit – ce qui est en tout cas la position de la Cour européenne des droits de l'homme dans le cadre de l'article 6 CEDH[103] –, il paraît exister un conflit entre l'immunité d'exécution et le droit d'accès au juge.

95. Il est difficile d'identifier, dans le droit international, une règle qui se prêterait spécifiquement à la résolution d'un tel conflit entre la norme de droit international coutumier qu'est l'immunité d'exécution et la norme de droit international conventionnel qu'est le droit d'accès au juge, même dans l'hypothèse (qui est celle du PIDCP) où les deux États sont parties au traité prévoyant le droit d'accès au juge.

96. Dans un tel contexte, il peut à tout le moins être renvoyé à la jurisprudence pertinente relative à ce conflit spécifique.

97. En premier lieu, la Cour internationale de Justice a décidé, dans son arrêt *Allemagne c. Italie*, qu'

> « [e]lle ne voit, dans la pratique des Etats dont découle le droit international coutumier, aucun élément permettant d'affirmer que le droit international ferait dépendre le droit d'un Etat à l'immunité de l'existence d'autres voies effectives permettant d'obtenir réparation. Ni le droit interne relatif à ces questions ni la jurisprudence des tribunaux internes qui ont eu à connaître d'exceptions fondées sur l'immunité ne permettent de conclure que le droit à une telle immunité serait subordonné à pareille condition préalable. Les Etats n'ont pas davantage énoncé une telle condition dans la convention européenne ou la convention des Nations Unies »[104].

98. Cette décision concerne, formellement, l'immunité de juridiction de l'État. Il nous semble que rien n'empêche de l'étendre à l'immunité d'exécution de l'État. La Cour de cassation de Belgique s'est du reste prononcée en ce sens (même si, à la différence de la CIJ, la Cour de cassation paraît ne pas avoir statué sur le terrain du droit international coutumier,

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103 Voy. not. *Hornsby c. Grèce*, 19 mars 1997, n° 18357/91, § 40, disponible sur https://hudoc.echr.coe.int.

104 P. 143, § 101.

mais au titre d'un contrôle de compatibilité de l'immunité d'exécution avec l'article 6 CEDH) :

> « Le droit d'accès aux tribunaux garanti par l'article 6, § 1er [CEDH], tel qu'il est interprété par la Cour européenne des droits de l'homme, ne peut avoir pour effet de contraindre un État de passer outre contre son gré à la règle de l'immunité d'exécution des États, qui vise à assurer le fonctionnement optimal des missions diplomatiques et, plus généralement, à favoriser la courtoisie et les bonnes relations entre États souverains.
>
> Le moyen, qui soutient que l'atteinte portée aux droits fondamentaux par l'immunité d'exécution des États n'est admissible au regard dudit article 6, § 1er, que si la personne contre laquelle l'immunité est invoquée dispose d'autres voies raisonnables pour protéger efficacement les droits que lui garantit la Convention, manque en droit »[105].

La Cour constitutionnelle de Belgique a adopté la même position :

> « [L]e respect des articles 10 et 11 de la Constitution, combinés avec les dispositions invoquées par les parties requérantes, n'impose pas au législateur de prévoir que l'immunité d'exécution des biens des puissances étrangères n'est effective que lorsqu'il est démontré que le créancier dispose d'une autre voie raisonnable pour faire valoir ses droits, dès lors qu'une telle exigence n'est, en l'état actuel, imposée ni par la Convention européenne des droits de l'homme, ni par la coutume internationale, ni par la Convention des Nations Unies du 2 décembre 2004 »[106].

99. Sur la base de ce qui précède, l'immunité d'exécution de la Banque Markazi, comme toute immunité étatique, doit être réputée *indifférente à l'existence de voies alternatives* à la disposition des demandeurs, et ne saurait partant être écartée même s'il devait être établi que de telles voies sont inexistantes.

100. En deuxième lieu, la jurisprudence de la Cour européenne des droits de l'homme. Celle-ci, en réalité, ne fait pas elle-même dépendre l'admissibilité des immunités de l'État au regard de l'article 6 CEDH de l'existence de voies alternatives raisonnables à la disposition du particulier – alors qu'elle accorde généralement de l' « import[ance] » à de telles voies alternatives s'agissant de l'immunité de juridiction *des organisations internationales*[107]. Plutôt, elle considère que l'immunité de l'État, qui « poursuit le but légitime de respecter le droit international afin de favoriser la courtoisie et les bonnes

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105 Cass. b., *NML Capital Ltd c. République d'Argentine*, 11 décembre 2014, C.13.0537.F, disponible sur http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20141211-4.

106 C. const. b., *NML Capital Ltd et Yukos Universal Limited*, 27 avril 2017, n° 48/2017, § B.14.5, disponible sur www.const-court.be.

107 Voy. not. *Waite et Kennedy c. Allemagne*, 18 février 1999, n° 26083/94, § 68 ; *Klausecker c. Allemagne*, 6 janvier 2015, n° 415/07, § 64. Disponibles sur https://hudoc.echr.coe.int.

relations entre États grâce au respect de la souveraineté d'un autre État », n'entraîne pas de restriction disproportionnée au droit d'accès au juge, ni n'implique que ce droit soit « atteint dans sa substance même », aussi longtemps que l'immunité « reflèt[e] des principes de droit international généralement reconnus en matière d'immunité des États », ou encore appartient aux « limitations généralement admises par la communauté des nations comme relevant de la doctrine de l'immunité des États ». Cette approche est fermement établie concernant l'immunité de juridiction de l'État[108]. Elle l'est également, bien que dans un nombre à ce jour plus restreint d'affaires, concernant l'immunité d'exécution de l'État[109].

101. En somme, le critère qu'utilise la Cour européenne, afin de s'assurer de la compatibilité de l'immunité de l'État avec le droit d'accès au juge, est celui de la conformité de l'immunité reconnue par le juge national aux « principes de droit international généralement reconnus en matière d'immunité des États », à savoir en substance le droit international coutumier : le juge national ne peut, sans violer l'article 6 CEDH, octroyer à l'État étranger une immunité plus large que ce que commande le droit international coutumier. Dans ce schéma, c'est, ultimement, à la Cour de Strasbourg qu'il revient de déterminer le contenu et la portée du droit international coutumier. Dans ce cadre, la Cour européenne accorde un poids considérable au texte de la Convention des Nations Unies (et du projet d'articles de la CDI ayant servi de base à son adoption) en tant qu'indicateur fiable de l'état du droit international coutumier, même si cette orientation dans sa jurisprudence a à ce jour surtout été appliquée à des dispositions de la Convention des Nations Unies relatives à l'immunité de juridiction[110].

102. En troisième lieu, les décisions des tribunaux internes. L'on se limite ici aux cours suprêmes s'étant prononcées récemment sur le conflit entre immunité d'exécution de l'État étranger et article 6 CEDH. Leur jurisprudence s'inspire largement de celle de la

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108 Voy. *Al-Adsani c. Royaume-Uni*, 21 novembre 2001, n° 35763/97, § 56 ; *Fogarty c. Royaume-Uni*, 21 novembre 2001, n° 37112/97, § 36 ; *McElhinney c. Irlande*, 21 novembre 2001, n° 31253/96, § 37 ; *Cudak c. Lituanie*, 23 mars 2010, n° 15869/02, § 57 ; *Sabeh El Leil c. France*, 29 juin 2011, n° 34869/05, § 49 ; *Wallishauser c. Autriche*, 17 juillet 2012, n° 156/04, § 59 ; *Oleynikov c. Russie*, 14 mars 2013, n° 36703/04, § 57 ; *Radunovic et autres c. Monténégro*, 25 octobre 2016, nos 45197/13, 53000/13 et 73404/13, § 64 ; *Naku c. Lituanie et Suède*, 8 novembre 2016, n° 26126/07, § 86. Tous disponibles sur https://hudoc.echr.coe.int.

109 Voy. *Kalogeropoulou e.a. c. Grèce et Allemagne*, 12 décembre 2002, n° 59021/00, p. 9 ; *Manoilescu et Dobrescu c. Roumanie et Russie*, 3 mars 2005, n° 60861/00, § 80. Disponibles sur https://hudoc.echr.coe.int. Dans les deux affaires, l'immunité d'exécution est finalement jugée compatible avec l'article 6 CEDH ; et dans le premier cas, alors même que les actes de l'État à l'origine de la procédure étaient constitutifs de crimes de droit international.

110 Voy. *supra*, les réf. en note 12. Voy. néanmoins la mention de l'art. 19 de la Convention des Nations Unies, relatif à l'immunité d'exécution, dans *Manoilescu et Dobrescu c. Roumanie et Russie*, précité, §§ 75, 80-81.

Cour de Strasbourg et fait ainsi application du critère de conformité de l'immunité au droit international général afin de vérifier l'atteinte ou non au droit d'accès au juge. Pour rappel, ont ainsi été explicitement jugées compatibles avec l'article 6 CEDH, car reflétant le droit international coutumier :

- la règle imposant au créancier la charge de la preuve du caractère saisissable des biens (voy. *supra*, §§ 54 et s.) :
  - Cass. fr., *Novoparc Healthcare International Ltd c. Central Bank of Iraq*, 11 janvier 2018[111] (du reste spécifiquement dans le cas de l'immunité d'exécution d'une banque centrale) ;
  - C. const. b., *NML Capital Ltd et Yukos Universal Limited*, 27 avril 2017[112].
- la règle exigeant que la renonciation à l'immunité d'exécution soit expresse (voy. *supra*, §§ 68 et s.) :
  - Cass. fr., *NML Capital c. République argentine*, 28 mars 2013[113] ;
  - C. const. b., *NML Capital Ltd et Yukos Universal Limited*, 27 avril 2017[114] ;
  - voy. également, bien que le contrôle soit opéré au regard du droit à l'exécution des décisions juridictionnelles résultant de l'article 16 de la Déclaration de 1789, Cons. const. fr., 8 décembre 2016, décision n° 2016-741 DC[115].

103. En conclusion, dans le cas d'espèce, vu que l'immunité d'exécution dont jouit la Banque Markazi à l'égard des biens saisis, y compris l'absence de validité de la renonciation implicite alléguée, reflètent effectivement « des principes de droit international généralement reconnus en matière d'immunité des États », à savoir en substance le droit international coutumier (voy. *supra*, sections A et B), la vérification du critère de conformité utilisé dans la jurisprudence strasbourgeoise et celle des cours suprêmes nationales ne devrait pas susciter de problème, et l'immunité devrait donc être regardée

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111 N° 16-10.661, disponible sur https://www.doctrine.fr/d/CASS/2018/C36A1247B789DF9B7379C.

112 N° 48/2017, §§ B.25.2, B.27.1, B.27.2 et B.28, disponible sur www.const-court.be.

113 N°s 11-10.450 et 11-13.323, disponibles respectivement sur :
- https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251609&fastReqId=970504478&fastPos=2
- https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251612&fastReqId=1477662302&fastPos=1.

114 N° 48/2017, §§ B.13.1, B.18.1 et B.28, disponible sur www.const-court.be.

115 §§ 61-74, disponible sur http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-741-dc/decision-n-2016-741-dc-du-8-decembre-2016.148310.html.

comme n'emportant pas de restriction disproportionnée au droit d'accès au juge puisé dans l'article 6 CEDH.

IV. CONCLUSIONS

104. Nos conclusions peuvent être synthétisées comme suit :

A. S'il est vrai que l'immunité d'exécution générale de l'État est aujourd'hui restreinte aux biens affectés à des fins souveraines, l'immunité d'exécution des banques centrales est en revanche, selon le droit international coutumier, absolue, dans le sens où elle s'étend à l'ensemble des biens de la banque centrale en toutes circonstances.

B. La limitation de l'immunité d'exécution générale de l'État ne peut donc être appliquée en l'espèce. L'ensemble des biens de la Banque Markazi, y compris les avoirs saisis en l'espèce, bénéficient au Grand-Duché de Luxembourg de l'immunité d'exécution en leur qualité de biens d'une banque centrale étrangère.

C. S'il devait néanmoins être considéré que le droit international coutumier prévoit plutôt un principe d'immunité d'exécution restreinte dans le cas des biens des banques centrales, il y aurait alors lieu de faire application, afin de délimiter l'étendue de l'immunité, du critère des biens utilisés ou destinés à être utilisés aux fins de la banque centrale.

D. Un critère d'affectation aux « fins monétaires » de la banque centrale ne correspond pas, à cet égard, à la pratique des États.

E. L'origine des avoirs en cause ou la nature des transactions sous-jacentes ne sont pas davantage reconnues par le droit international coutumier comme des critères pertinents en la matière.

F. La charge de la preuve incombe au créancier, à qui il revient d'établir que les biens qu'il entend saisir ne sont pas couverts par l'immunité d'exécution. Ce n'est pas à la banque centrale de démontrer qu'elle se trouve dans les conditions pour pouvoir revendiquer l'immunité, ses biens jouissant en effet d'une présomption d'affectation lui valant le bénéfice de l'immunité.

G. En tant que biens affectés à la réalisation des objectifs essentiels de la Banque Markazi dans le cadre de sa mission de service public, les avoirs saisis en l'espèce sont utilisés ou à tout le moins destinés à être utilisés aux fins de la banque centrale, et donc couverts en tout état de cause par l'immunité d'exécution.

H. Selon le droit international coutumier, la renonciation à l'immunité d'exécution de l'État, y compris sa banque centrale, doit être expresse, à défaut de quoi elle n'est pas valable.

I. La renonciation alléguée en l'espèce n'est donc pas valable et ne peut justifier la saisie pratiquée.

J. Le droit d'accès au juge, garanti aux particuliers par l'article 14 PIDCP et l'article 6 CEDH, pour autant qu'il puisse être invoqué en l'espèce, ne suppose aucunement que, pour que l'immunité d'exécution de l'État – y compris sa banque centrale – soit jugée compatible avec lui, le particulier ait à sa disposition des voies alternatives raisonnables.

K. Il n'est pas porté atteinte au droit d'accès au juge dès lors que l'immunité d'exécution de l'État – y compris sa banque centrale – reflète des principes de droit international généralement reconnus en matière d'immunité des États. Tel est le cas en l'espèce, si bien que l'immunité d'exécution de la Banque Markazi n'emporte pas violation du droit d'accès au juge.

Bruxelles, le 16 mars 2018

Frédéric Dopagne

Annexe

Principales publications
Frédéric Dopagne

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