COMMERCIAL TREATIES

HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

EIGHTY-SECOND CONGRESS

SECOND SESSION

ON

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND COLOMBIA, ISRAEL, ETHIOPIA, ITALY, DENMARK, AND GREECE

EXECUTIVES M AND R, EIGHTY-SECOND CONGRESS, FIRST SESSION, AND EXECUTIVES F, H, I, AND J, EIGHTY-SECOND CONGRESS, SECOND SESSION

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COMMERCIAL TREATIES

FRIDAY, MAY 9, 1952

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
SUBCOMMITTEE ON COMMERCIAL TREATIES
AND CONSULAR CONVENTIONS,
Washington, D. C.

The subcommittee met, pursuant to notice, in the committee hearing room, United States Capitol, at 10 a. m., Senator John Sparkman (chairman of the subcommittee) presiding.

Present: Senators Sparkman (chairman of the subcommittee) and Hickenlooper.

Senator SPARKMAN. Let the committee come to order, please.

The members of this subcommittee, in addition to myself, are Senator Fulbright, who is out of town, and Senator Hickenlooper.

The chairman of the Committee on Foreign Relations, Senator Connally, has asked this subcommittee to consider six treaties of friendship, commerce and navigation, now pending before the committee. The treaties now before us are the following:

Executive M (82d Cong., 1st sess.), treaty of friendship, commerce, and navigation with Colombia;

Executive R (82d Cong., 1st sess.), treaty of friendship, commerce, and navigation with Israel;

Executive F (82d Cong., 2d sess.), treaty of amity and economic relations with Ethiopia);

Executive H (82d Cong., 2d sess.), agreement supplementing treaty of friendship, commerce, and navigation with Italy;

Executive I (82d Cong., 2d sess.), treaty of friendship, commerce, and navigation with Denmark; and

Executive J (82d Cong., 2d sess.), treaty of friendship, commerce, and navigation with Greece.

I propose, if it is agreeable to the subcommittee, to ask representatives of the Department of State first to direct their comments to the six commercial treaties and then to the two consular conventions.

In recent years the Senate has given its advice and consent to treaties of friendship, commerce, and navigation with Italy in 1948, Uruguay, 1949, and Ireland, 1950. These postwar treaties are part of the program that the Department of State has been carying on over a period of years seeking to modernize treaties with a number of countries with whom earlier treaties were negotiated in the nineteenth century.

The Department of State, in a recent publication, has described these treaties as—

a charter of the American citizen's rights when he is in a foreign country. They assure him for the most part the fundamental personal liberties that he enjoys in this country. They pledge constant protection and security for his person and property. They allow him to engage in the normal run of business pursuits, whether by himself or in association with others, and in general assure to him the privileges necessary to carry on his business effectively.

The first witness this morning will be Mr. Harold Linder, Deputy Assistant Secretary of State for Economic Affairs. Mr. Linder, will you proceed, please, sir, in your own way?

STATEMENT OF HAROLD F. LINDER, DEPUTY ASSISTANT SECRETARY OF STATE FOR ECONOMIC AFFAIRS, DEPARTMENT OF STATE

Mr. LINDER. Senator, the treaties with Colombia, Greece, Israel, Ethiopia, and Denmark which are now before you bring to nine the number of treaties of this general type which have been signed on behalf of the United States since the war. You will recall that the first two treaties of this series, those with China and Italy, were considered by the committee in 1948 and those with Uruguay and Ireland 2 years later, and that those treaties were approved by the Senate. The treaty with Italy has now been supplemented by an agreement, also before you, designed to bring it abreast of developments reflected in the more recent ones.

SIMILARITIES AND DIFFERENCES BETWEEN THE COMMERCIAL TREATIES

While there are differences among these nine treaties, fundamentally they are alike. The treaties with Columbia, Denmark, and Israel follow closely the treaty with Uruguary, which in turn was a restated form of the one with Italy. The treaty with Greece is also based on the Uruguary model, but with changes in matters of form. The treaty with Ethiopia is a specially adapted version of the document negotiated with the other countries, involving considerable abridgment of the usual provisions and the addition of articles on diplomatic and consular officers no longer usual in this type of treaty. All these treaties also reflect differences of varying extent in matters of detail, both as a result of new or improved provisions which have been developed from time to time by the Department of State, with counsel, of course, from other agencies and as a result of the adjustments that inevitably occur during the give-and-take of negotiation. For example, the basic establishment provisions have been extensively restated in the treaty with Israel, additional provisions on shipping are included in the Greek treaty, and a provision regarding the use of the term "coffee" has been added to the treaty with Colombia. But the general objectives remain the same and, with the departures that may be noted in the case of Ethipoia, all the treaties go about realizing these objectives in essentially the same way.

The more notable differences in the several treaties now before you, both as among themselves and as compared with those previously approved by the Senate, are summarized in the report of the Secretary of State attached in each case to the President's message of transmittal. I want to submit now, for the convenience of the committee, copies of a tabular comparison which indicates in greater detail the similarities and differences of these instruments on a provision-by-provision basis. In my opening remarks I shall not attempt to repeat or elaborate on that information, leaving the discussion of details to be guided by the questions the committee might have. To assist in providing specific information about particu-

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lar provisions, I have with me two officers of the Department who have been immediately responsible for the technical aspects of these treaties.

I have these exhibits.

Senator SPARKMAN. They will be received and made a part of the committee files.

(The exhibits referred to were received and made a part of the committee file.)

Senator SPARKMAN. It was not your idea to have these printed in the record, but simply to be made exhibits?

Mr. LINDER. That is correct.

COMMERCIAL TREATY PROGRAM

The commercial treaty program is the oldest continuing economic program of our Government. It dates back to the beginning of our national independence and has been kept up, with minor interruptions, ever since. As a rule the first treaty concluded with a foreign country has tended to be a treaty of friendship, commerce, and navigation, which sets the framework in which our economic relations can be conducted on a stable basis for the future. The instrument aims at establishing the rule of law in our everyday relations with the country concerned, at protecting our citizens and their property in the foreign country, at promoting our trade, and at reducing discriminations against our shipping. An idea of the enduring character of these treaties may be gained from the fact that the treaty with Denmark now before you is to replace a treaty negotiated with that country in 1826 and the treaty with Colombia will take the place of one signed in 1846.

MODERN PHASES OF THE TREATY PROGRAM

While this is a traditional program with a history of over a century and a half, its modern phase dates from the years immediately after the First World War. At that time, a broadened and revitalized program devoted particularly to the expansion of our foreign trade was developed under the direction of Secretary Charles Evans Hughes. Negotiations were carried on extensively until the outbreak of World War II, resulting in the conclusion of treaties with 12 countries.

While the current program is a continuation of that instituted under Secretary Hughes, remaining similar in fundamentals to what has gone before, the present program reflects new emphasis occasioned by problems which have taken on increased importance in recent years. The consular provisions have been detached in the interest of more effective treatment of each subject matter. The form and content of the treaty has been expanded and revamped; and the pace of negotiation has accelerated. In this connection it may be noted that in the first 6 years after the end of World War I three treaties were concluded. In the same length of time after World War II nine treaties have been signed, although the commitments contained in the current treaties tend to be more far-reaching, and the general international climate is less sympathetic to the free-enterprise premises on which these treaties are based. Moreover, as you will recognize,

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governments all over the world are constantly preoccupied with pressing and critical problems—not exactly an atmosphere conducive to negotiations of agreements of the type now before you.

EMPHASIS ON ENCOURAGING PRIVATE INVESTMENT ABROAD THROUGH GREATER PROTECTION OF THE INVESTOR

Perhaps the most important respect in which the current treaties differ from those of the twenties and thirties is in the greatly increased emphasis on the encouragement of American private investment abroad, by the expansion and strengthening of provisions relating to the protection of the investor and his interests. This development, of course, reflects the process of continuous adjustment to the needs and conditions of the era in which negotiation takes place. The United States came out of the war with a greatly expanded industrial machine and, alone among the major nations of the world, with a surplus of private capital available for export. To encourage the investment of this capital in the production of goods and services abroad was a matter of importance to our domestic economy and to economic development and world prosperity generally. Apart from these purely economic considerations, moreover, foreign investment can strengthen the common defense and promote the prevalence of ideas of individual liberty and individual initiative under law.

The basic aim of these new provisions has been to safeguard the investor against the nonbusiness hazards of foreign operations, an objective emphasized by the Congress in the Act for International Development of 1950. There is no intent here, of course, to shield the investor from the economic risks to which venture capital is subject, a matter which cannot and should not be reached through international agreement. However, there are grave hazards of a nonbusiness nature which have become characteristic in overseas business operations since the war. They assume many forms: Inequitable tax statutes, confiscatory expropriation laws, rigid employment controls, special favors to State-owned businesses, drastic exchange restrictions, and other discriminations against foreign capital. Taken together, they can be a formidable obstacle to the American investor, for they impair from the very start the prospect of fair competition and a reasonable profit. Yet these hazards are not infrequently legal rather than economic, and they can be checked to a substantial extent by treaties which establish mutually agreed standards of treatment for the citizens and enterprises of one country within the territories of another.

RIGHTS OF CORPORATIONS RECOGNIZED

Perhaps the most striking advance of the postwar treaties over earlier treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls.

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Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies. The legal reason inhibiting a more extensive provision for corporations in earlier treaties (namely, the reserved rights of the states as to the admission of foreign corporations) has been solved in the current treaties by a formula which equates the alien corporation to other out-of-state corporations, rather than to the domestic corporation, for purposes of "national treatment" in the United States.

PROBLEMS ARISING OUT OF STATE OWNERSHIP OF ECONOMIC ENTERPRISES

Another significant feature of the postwar treaties of interest to the prospective investor is the body of provisions which deals with problems arising from the state ownership of economic enterprise. There is a growing tendency abroad for the real competitor of private business to be the government itself. The Department of State has, accordingly, endeavored to work out treaty provisions designed to reduce the hazards of unfair competition from state-controlled businesses. These clauses provide assurances of most-favored-nation treatment in the conduct of state-trading operations and in the awarding of government contracts and concessions. They also establish broadened rules governing the carrying out of nationalization programs. There are as well newly developed provisions, found first in the 1948 treaty with Italy, to assure American private business concerns which must compete with foreign state-owned concerns the same economic favors that the latter received from their government, and to assure that state-owned commercial enterprises of the one country engaged in business in the other country will not be immune from taxation, suit, or other normal liabilities by reason of their public character.

PROVISION ON EXCHANGE CONTROL

Another important development in the post-World War II treaties is the provision on exchange controls. The formulation of such a provision poses difficulties. Many foreign countries have a genuine need to protect their limited foreign-exchange reserves in order to insure that the highest-priority needs of their economy are met. At the same time, there is a real need for liberal provisions on withdrawals of earnings that will afford a proper protection to investors. We have sought to achieve a fair balance between the two factors.

OLDER PROVISIONS REVISED

In addition to the innovations introduced to better the climate for investment, substantial improvements have been introduced in provisions of longer standing. The rules on expropriation of property have been worked out in more detail; more explicit assurances have been formulated on basic personal freedoms and protection for the individual; and clauses have been added on freedom of communication and of reporting. Provisions on commercial arbitration and the employment of technical personnel have been added; and traditional

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provisions for nondiscriminatory treatment of shipping have been strengthened.

The continuing process of revamping of the standard provisions has benefited these treaties as a whole, both as to content and language. What we hope constantly to achieve is stronger articles, fewer exceptions and, above all, a document which can give the American citizen who goes abroad, whether for business, pleasure, livelihood, or study, a firm and clear body of rights and privileges.

MUTUALITY OF RIGHTS ACCORDED BY THE TREATIES

So far I have spoken mainly about the rights these treaties assure and the protection they give to American citizens and businesses in foreign countries. However, these treaties are not one-sided. They are drawn up in mutual terms, in keeping with their character as freely negotiated instruments between friendly sovereign equals. Rights assured to Americans in foreign countries are assured in equivalent measure to foreigners in this country. In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law. The exception is that article VII of the supplementary agreement with Italy provides for the development of arrangements not provided for by existing Federal statute regarding totalization of social-security benefits. Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty provisions have been worked out with the same careful regard for the States' prerogatives and policies that has traditionally characterized agreements of this type.

LIMITATIONS AND OBJECTIVES OF THE TREATIES

These documents are concerned primarily with legal conditions and with the effect such conditions may have on economic activities carried on across international boundaries. While they are comprehensive documents, they are not able to remove all legal impediments to investment, owing both to the inherent nature of such a treaty and the complexity of present-day economic affairs. While these treaties are concerned with everyday matters, they are not exclusively economic in nature or purpose; they are also, and perhaps above all, treaties of friendship. Their objectives are the normal objectives of friendship between nations: to protect the foreigner, to maintain good order in everyday affairs, to encourage mutually beneficial relations, to strengthen the rule of law in the dealings of one nation with another. They are practical expressions of good faith and good neighborliness as much as they are legal contracts. Their worth rests as much on their equity and reasonableness as on the number and scope of the privileges they specify; and their spirit, which goes beyond the limits and wording of the treaties themselves, is in every way as important as the letter of the undertakings they actually make.

The Department of State for many reasons regards these treaties as an important element in promoting our national interests and build-

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ing a stronger economy within the free world through the traditional American means of private enterprise; and it is most gratified that your committee is finding time from a very crowded calendar to give them its study and attention.

Thank you, Mr. Chairman.

Senator SPARKMAN. Thank you, Mr. Linder.

ENCOURAGEMENT OF PRIVATE INVESTMENT

Now let me ask you a few questions pertaining to this. You are familiar with the provision in the proposed Mutual Security Act of 1952, written in by the House in the following language—or, rather, reported out by the House committee; the House has not acted on it yet (reading):

> The Department of State shall accelerate a program of negotiating commercial and tax treaties or other arrangements where more suitable or expeditious, which shall include provisions to encourage and facilitate the flow of private investment to countries participating under this Act.

Are these proposed treaties which we have before us now designed to accomplish this purpose?

Mr. LINDER. I think without question, Mr. Chairman, they provide a climate in which private investment can flow. They do not guarantee private investment, but I think it is fair to say that without such treaties certain impediments exist which would retard the flow of investments, and to that extent I think they stimulate them.

Senator SPARKMAN. You think they represent a step forward?

Mr. LINDER. Very definitely.

Senator SPARKMAN. What is the effect of the unconditional most-favored-nation clauses in these treaties?

MOST-FAVORED-NATION CLAUSES AND "NATIONAL TREATMENT"

Mr. LINDER. Well, I have referred to both most-favored-nation clauses and I have also referred to the expression "national treatment." The most-favored-nation clause guarantees to us that we shall receive equivalent treatment to any treatment accorded to any other nation. "National treatment" insures that our own nationals or corporations will receive treatment equal to the treatment accorded to the nationals of the country with which we have the treaty.

Senator SPARKMAN. That is, their nationals in this country?

Mr. LINDER. No; their nationals in their own country.

Senator SPARKMAN. I see; so as to make uniform national treatment.

Mr. LINDER. That is correct.

Senator SPARKMAN. Let me ask you, do some of the treaties contain the most-favored-nation clause and others contain the national-treatment clause?

Mr. LINDER. I think it is fair to say that all treaties contain both. There are times when the most-favored-nation clause is more important than the national-treatment clause, because the country with whom we have the treaty may have accorded rights to other foreigners which are better than the rights they have accorded to their own nationals. On the other hand, there are times when the national-treatment clause is more important, because rights accorded to the nationals of that country may not have been accorded thus far to any

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other foreigner; and, therefore, we strive to get in that case national treatment.

Senator SPARKMAN. And you have worked in these treaties to get the most favored position for our nationals?

Mr. LINDER. We have, sir.

PROTECTION AGAINST NATIONALIZATION

Senator SPARKMAN. Do these treaties give Americans any protection in the case of nationalization of properties affected with American interest?

Mr. LINDER. I think they give a great deal of protection, Mr. Chairman. The basic rule, of course, is that if there is to be nationalization—and we do not feel that we can negotiate a treaty which would deny another government the right to nationalize property—there must be for the American interest prompt, just, and effective compensation.

In addition to that, there must be national treatment or most-favored-nation treatment, whichever is the better from our point of view. In other words, they cannot nationalize us when they do not nationalize other industries engaged, or other businesses engaged, in the same type of business. They can't pick us out so that we become discriminated against.

These standards of as good treatment as their own nationals get, or as good treatment as the national of any other country gets, are not enough. In addition to that, we go back to our basic thing: That there must be full compensation, and that it must be prompt and just and effective, and that it must also contain provisions which will permit the conversion of that compensation from a local currency back into dollars; and, further, in addition to that, we have taken the position—I think most effectively—that countries that propose nationalization must have planned the thing sufficiently so that they are able to meet the conditions of our treaties. They can't just say they are going to nationalize without making provision in advance for that nationalization, without knowing where the money is going to come from, how they are going to nationalize, what the criteria of "just compensation" are going to be; and, in other words, just decide that they are going to nationalize.

TAXATION PROVISIONS

Senator SPARKMAN. Do these treaties give protection to Americans and American corporations against discriminatory treatment with respect to taxation?

Mr. LINDER. These are not tax treaties; that is to say, they do not provide for——

Senator SPARKMAN. I understood in your direct statement you did include some reference to taxation.

Mr. LINDER. They do include a guaranty that we will not be taxed in any country, and no American corporation will be taxed, beyond the activities of that corporation within the country. That is to say, if a large American corporation has a subsidiary operating in a foreign country, the only thing the foreign country can tax is the business that is conducted within its territory. To that extent the answer surely is "Yes."

Furthermore, we do have provisions which will insure that we will not be taxed, or our corporations will not be taxed, beyond the tax that is enacted by that government and affects its own nationals, and also we have the guaranties with respect to most-favored nation.

Senator SPARKMAN. In other words, those provisions apply to the matters of taxation as well as they do to anything else?

Mr. LINDER. They do.

REFERENCES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Senator SPARKMAN. Some of these conventions refer to the General Agreement on Tariffs and Trade. Do these references imply in any way to congressional approval of that?

Mr. LINDER. They do not, sir; but I would like to answer, if I may, sir, for the record, that statement a little bit more carefully by reading an excerpt from a letter which we addressed to Senator Millikin in respect to this point. Our letter read:

> The purpose of this kind of provision is not to obtain Senate approval of the general agreement. Its purpose is simply to clarify the relationship between the treaty and the General Agreement on Tariffs and Trade, where the two instruments exist side by side, so as to obviate possible confusion concerning the international rights and obligations of a country which is party to both instruments. The provision is thus in the interests of orderly treaty procedure. Being framed in the form and style of a reservation, to provide for a contingency, it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.
>
> The Senate has already given advice and consent to ratification of two treaties containing a nearly identical clause which also refers to the charter for an international trade organization (Treaty of Friendship, Commerce, and Economic Development with Uruguay, signed November 23, 1949, 81st Cong., 2d sess. * * * and Treaty of Friendship, Commerce, and Navigation with Ireland, signed January 21, 1950). * * * We do not consider that Senate action on these treaties constitutes approval by the Senate of the General Agreement on Tariffs and Trade.

REFERENCES TO COPYRIGHT MATTERS

Senator SPARKMAN. Are there any provisions in these treaties, or any one of them, that affect the copyright laws?

Mr. LINDER. No; there are not.

Senator SPARKMAN. The copyright laws of the United States?

Mr. LINDER. I do not think there are.

Senator SPARKMAN. I believe we have had a letter from the State Department with reference to that, have we not? It might be well to incorporate that in the record at this point.

There will be placed in the record at this point an exchange of letters between Mr. Arthur Fisher, Register of Copyrights of the Library of Congress, and Mr. Adrian S. Fisher, Legal Adviser to the Department of State, under dates of April 23 and May 6, 1952.

> COPYRIGHT OFFICE,
> THE LIBRARY OF CONGRESS,
> *Washington 25, D. C., April 23, 1952.*
>
> Mr. ADRIAN S. FISHER,
> *Legal Adviser, Department of State, Washington 25, D. C.*
>
> DEAR MR. FISHER: There are presently pending before the Senate Foreign Relations Committee treaties of friendship, commerce, and navigation with Colombia, Greece, Israel, Ethiopia, Italy, and Denmark, similar to those ratified within the past few years with Uruguay and Ireland. In connection with these latter two treaties, there appeared in the report of the Senate Foreign Relations

Committee a statement to the effect that neither treaty touched on any question of copyright.

In view of the fact that the six pending treaties have provisions similar to those embodied in the treaties relating to Uruguay and Ireland, it would seem to follow that the pending treaties also do not relate in any manner to questions of copyright. Kindly advise me whether or not my understanding is correct in this respect.

Sincerely yours,

ARTHUR FISHER,
Register of Copyrights.

DEPARTMENT OF STATE,
Washington, May 6, 1952.

Mr. ARTHUR FISHER,
Register of Copyrights, Copyright Office, The Library of Congress.

MY DEAR MR. FISHER: Reference is made to your letter of April 23, 1952, in which you request confirmation of your understanding that certain treaties which are presently pending before the Senate Foreign Relations Committee do not relate in any manner to questions of copyright.

You are advised that your understanding in this respect is correct and that the treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece, and Israel, the treaty of amity and economic relations with Ethiopia, and the agreement supplementing the treaty of friendship, commerce, and navigation with Italy do not relate to copyright matters.

Sincerely yours,

JACK B. TATE,
Acting Legal Adviser.

Senator SPARKMAN. Mr. Linder, in a statement that has been submitted in letter form from the National Foreign Trade Council a suggestion is made for a broader investment clause. Are you familiar with that?

Mr. LINDER. Sir, I saw the letter just as I came in. I really have not had an opportunity to study it.

Senator SPARKMAN. He starts out discussing it on page 5 and continues on page 6. I wonder if you could discuss that and tell us why the State Department has not been able to get this broad coverage.

Mr. LINDER. Mr. Chairman, I am a little loath to discuss it because I have given it only the most superficial reading.

CONVERTIBILITY IN EVENT OF NATIONALIZATION

Senator SPARKMAN. I wonder if I might ask this question, that might at least show it a little more clearly on the record. As I understand, these treaties provide for convertibility in the event of nationalization or taking over.

Mr. LINDER. They do, sir.

Senator SPARKMAN. They provide first for compensation, and that that compensation shall be in dollars rather than in the currency of the country, for the amount that was originally invested in the company. The Foreign Trade Council, as I understand it, recommends that the entire amount that has gone in, the earnings that have been plowed back in, should be covered also.

Mr. LINDER. We think they are covered.

Senator SPARKMAN. You think they are covered by these treaties?

Mr. LINDER. I think they are. As I understand, the way this treaty would be interpreted in case of an expropriation is that this specific clause does not in any way impair just compensation, and just compensation and equitable compensation must be in terms of the value which then exists.

Senator SPARKMAN. The question was raised as to ambiguity in the provision. The Foreign Trade Council particularly points out a qualifying phrase "which they have supplied." The contention of the Foreign Trade Council is that this might be held to apply only to the amount of capital originally supplied, and that it would not cover the investments that had been plowed back.

Now, is it your interpretation that it does cover the reasonable value of the entire capital structure?

Mr. LINDER. Yes, sir; that is my interpretation, and I am sure, while I didn't take an active part in the negotiation of any one of these, that that is clearly understood on the part of each signatory to any of our treaties. I don't think it would make any sense whatever to talk only in terms of an original investment. W. R. Grace & Co. made an investment in Chile 120 years ago, or certainly a long, long number of years ago, and there may have been an accumulation of earnings in that company over a very long period of time. Surely if that property were to be expropriated by the Chilean Government the original investment could not in any sense be regarded as a just and equitable standard for compensation. What must be determined is the value of the property as it exists at the time it is expropriated, and while, as I say, I have a certain reluctance to discuss this in detail (*a*) because I am not a lawyer and (*b*) because I have not read carefully the comment of the Foreign Trade Council, I feel reasonably certain of my ground in stating as I have, that it does cover the investment, as it exists at the time of expropriation.

Mr. HERMAN WALKER, Jr. (Office of Assistant Secretary of State for Economic Affairs). We have a specific clause on expropriation which says:

> Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of the expropriation for determining and effecting such compensation.

Senator SPARKMAN. Now let us go one step further. That is as far as compensation. I wonder if you can point out the clause relating to convertability at the same time.

Mr. LINDER. The clause in the treaty with Colombia, for example, Mr. Chairman, is article XII, section 3. That says—

> If either party imposes exchange restrictions in accordance with paragraph 3 above—

which permits certain types of exchange restrictions necessary to preserve the economy of the country—

> it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other party, of: (a) the compensation referred to in article VI, paragraph 3, of the present treaty—

the one to which I have previously made reference—

> (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions.

This is subsidiary to that, and it guarantees where there is a multiple rate of exchange. If you would like me to read that, I can go on.

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Senator SPARKMAN. Where does this phrase to which the Council points occur?

Mr. WALKER. It is in a different paragraph, sir.

Senator SPARKMAN. I wonder if you could read that sentence. It is hard to tell, when words are just lifted out of context such as this.

Mr. WALKER (reading):

Neither party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

Mr. LINDER. I am informed, sir, that that is supplemental to and in no way restricts or limits the broad basis for compensation which we have just been discussing.

Senator SPARKMAN. Then it is your opinion that the objection raised with reference to that matter by the National Foreign Trade Council is not justified?

Mr. LINDER. Sir, I would say absolutely, except that I have not read every word of the National Foreign Trade Council's letter. I just received it as I came into this room. I would say categorically, with only the reservation that if I find our Legal Adviser has any reservation, he will communicate it to the committee.

Senator SPARKMAN. I wonder if it might not be well simply to have the Legal Department address a letter to us to be put in the record on that question.

Mr. LINDER. We will be happy to do it, sir.

(The following information was subsequently furnished:)

MAY 21, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations, United States Senate.

MY DEAR SENATOR SPARKMAN: I refer to the hearing held by your subcommittee, May 9, on the pending commercial treaties and to the question raised during the course thereof concerning what these treaties provide as to compensation for property which is expropriated, with particular reference to the effect of article VIII of the treaty with Greece. The Legal Adviser's Office has prepared a brief statement, enclosed herewith, which confirms the opinion I expressed in this matter. I offer the Legal Adviser's statement for inclusion at an appropriate place in the record, in order that there not be the slightest doubt about the correct answer to this important question.

Sincerely yours,

HAROLD F. LINDER,
Deputy Assistant Secretary for Economic Affairs.

Enclosure.

STATEMENT OF THE OFFICE OF THE LEGAL ADVISER—MAY 16, 1952

Article VIII of the treaty with Greece, and the similar provision of the other treaties before the subcommittee, is entirely independent of, and in no way modifies, the provisions of article VII, paragraph 3, and comparable provisions of the other treaties, which establishes the rule of compensation applicable when property is expropriated through nationalization or otherwise. Article VII, paragraph 3, of the treaty with Greece states the governing rule in all cases of expropriation, that compensation shall be payable on the basis of the full value of the property taken, at the time of the taking. Compensation based on the value of the initial investment would not meet the standard of the treaty or of international law, if it were less than the value at the time of taking; if the value of the initial investment were greater than the value at the time of taking, a country is obliged only to provide compensation for the value at the time of taking.

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Senator SPARKMAN. I may say that at the end of Mr. Linder's testimony I will insert in the record, if there is not objection, the letter from the National Foreign Trade Council, Inc., addressed to me on May 8.

Senator HICKENLOOPER. Can we identify, at least for my benefit, Mr. Chairman, the National Foreign Trade Council? Of what is it composed?

Mr. LINDER. I prefer to have Mr. Vernon describe it, if I may.

Mr. VERNON. The National Foreign Trade Council is an organization which has been in the field of promoting foreign trade and international investment for rather a long time. I would say they are probably "the" organization in the field at this moment in the United States.

Senator SPARKMAN. It is a well-known and reputable organization?

Mr. VERNON. Well-known and reputable, and its membership looks like a glossary of Standard & Poor's.

Senator HICKENLOOPER. Throughout the United States?

Mr. VERNON That's right.

Senator SPARKMAN. Senator Hickenlooper, do you want to ask Mr. Linder some questions?

We have had Mr. Linder's statement, which was a prepared statement. You have a copy of it there in your file, and I addressed these questions to him.

Senator HICKENLOOPER. There is one line of questioning I would like to address, probably two or three questions, to Mr. Linder. Did you ask Mr. Linder all of these questions?.

Senator SPARKMAN. Yes.

RELATIONSHIP OF TREATIES TO GATT

SENATOR HICKENLOOPER. I am sorry to ask you to repeat, Mr. Linder, but I would like to know, especially, do any of these conventions in any way, and under any circumstances, according to your interpretation and the Department's interpretation, involve us in the General Agreement on Tariffs and Trade?

Mr. LINDER. They do not, sir. I introduced and read, in order to be sure that we were quite explicit about is, a statement which is quoted from a letter which we addressed to Senator Milliken very recently—as a matter of fact, a couple of months ago, the last day of February. If you would like me to do so, I shall be very glad to read that to you again.

Senator SPARKMAN. I may say, Senator Hickenlooper, that we have a letter from the State Department signed by Mr. John M. Leddy, Director, Office of Economic Defense and Trade Policy, in which he brings out the same point, and says (reading):

* * * it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.

Mr. LINDER. Senator, would you prefer that I read this statement?

Senator HICKENLOOPER. If you have already put it in the record, there is no use in putting it in again. Is it already in the record?

Mr. LINDER. I have read it carefully and we will be glad to provide it for the record.

Senator HICKENLOOPER. If you have already read it in the record, there is no use in repeating it here.

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Senator SPARKMAN. Without objection, we will also put this letter in the record, which is to the committee in answer to this particular inquiry.

(The communication is as follows:)

DEPARTMENT OF STATE,
Washington, February 29, 1952.

Mr. CARL MARCY,
Staff Associate, Committee on Foreign Relations,
United States Senate.

DEAR MR. MARCY: This is in response to your inquiry, during our recent telephone conversation, as to what is the Department's view of the provision referring to the General Agreement on Tariffs and Trade in the Treaties of Friendship, Commerce, and Navigation with Denmark (art. XXI, par. 3), Greece (art. XII, par. 4), Israel (art. XXI, par. 3) and Ethiopia (art. XII, par. 6), all of which are now pending before the Senate.

The purpose of this kind of provision is not to obtain Senate approval of the general agreement. Its purpose is simply to clarify the relationship between the treaty and the General Agreement on Tariffs and Trade, where the two instruments exist side by side, so as to obviate possible confusion concerning the international rights and obligations of a country which is party to both instruments. The provision is thus in the interests of orderly treaty procedure. Being framed in the form and style of a reservation, to provide for a contingency, it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.

The Senate has already given advice and consent to ratification of two treaties containing a nearly identical clause which also refers to the charter for an international trade organization (Treaty of Friendship, Commerce, and Economic Development with Uruguay, signed November 23, 1949, 81st Cong., 2d sess., Senate Executive D, art. XVIII, par. 3; and Treaty of Friendship, Commerce, and Navigation with Ireland, signed January 21, 1950 (TIAS 2155), art. XX, par. 2). We do not consider that Senate action on these treaties constitutes approval by the Senate of the General Agreement on Tariffs and Trade.

Sincerely yours,

JOHN M. LEDDY,
Director, Office of Economic Defense and Trade Policy.

(The following additional information was subsequently supplied:)

DEPARTMENT OF STATE,
Washington, May 21, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: I understand that inquiry has been made as to whether the previous statement of the Department of State, with reference to the significance of the provision concerning the General Agreement on Tariffs and Trade, in the various commercial treaties pending before the committee, is applicable specifically to the treaty of friendship, commerce, and navigation with Denmark. The answer is in the affirmative. The additional material found in article XXI, paragraph 3, of that treaty was included for a purely technical reason; namely, to provide for the situation in which Denmark, though not a member of the General Agreement on Tariffs and Trade, was experiencing balance-of-payments difficulties. The additional material is comparable with the additional protocol attached to the treaty of friendship, commerce, and economic development with Uruguay.

As Mr. Linder stated in his testimony before the committee, the Department believes that the provision in the treaty with Denmark does not commit the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade and that Senate approval of this treaty cannot be regarded as constituting Senate approval of the general agreement.

Sincerely yours,

RAYMOND VERNON,
Acting Director, Office of Economic Defense and Trade Policy.

Senator HICKENLOOPER. The whole burden of my question is, are we backing into that by some involved interpretive provision in any

of these trade treaties which would put us in a position where we have committed ourselves to the General Agreement on Tariffs and Trade?

Mr. LINDER. The answer to that is, "No, sir."

GENERAL PURPOSE OF THE TREATIES

Senator HICKENLOOPER. The general purpose of these treaties, as of all the other treaties of friendship, commerce, and so forth of a similar type, I take it, is to guarantee and assure equality of treatment of Americans, American nationals, on a reciprocal basis, that is, reciprocating equitable and fair treatment. These treaties contain certain specified safeguards which the respective nations agree to enforce so far as the activity of the American nationals are concerned in business and trade and so on.

Mr. LINDER. And travel. That is correct.

Senator HICKENLOOPER. That is my understanding of the purpose of the treaties.

NEW FEATURE IN ITALIAN PROTOCOL RELATING TO SOCIAL-SECURITY BENEFITS

Is there anything unusual that you could say in any way differentiates these particular treaties which are before us today in specific provisions from the general provisions of the treaties already in force, historically in force, between the United States and other nations?

Mr. LINDER. I think there is only one.

Senator HICKENLOOPER. I mean, are there any innovations?

Mr. LINDER. Yes. I think there is one in respect of the protocol which we are asking your approval on with Italy, and that exception I alluded to in my statement, and if I may quote it again I would say that article VII of the supplementary agreement with Italy provides for the development of arrangements not provided for by Federal statute regarding totalization of social-security benefits.

I have here for submission a memorandum from the Federal Security Agency which sets that forth more completely than I am able to do. It is a technical problem, but in essence it provides for a consideration by each of the countries of the social-security benefits earned by any national within his own country. In other words, if an Italian had worked in Italy for 10 years and worked in the United States for 15 years there is an adjustment made so that he in effect gets the benefit, in calculating the payments due him by each country under social security, for his years of work in Italy as well as his years of work here, and vice versa. That is the only provision that I believe differs substantially, except for improvements and tightening up both in language and in substance that is the natural result of, we hope, competent negotiation.

Senator HICKENLOOPER. What is the explanation or the justification of that provision, in view of the fact that manifestly at least now, and we assume for a long time in the future—at least now, and probably will be in the future—greatly in excess of the social-security benefits in any other country, so that someone, for instance from Italy, could come over here and work for 15 or 20 years and go

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back to Italy and retire very nicely on those benefits, with the tie-in under the Italian system.

Mr. LINDER. I think, sir, that there has been a general movement all over the industrial world, particularly in Western Europe, to insure that workers who for one reason or other migrate from one country to another are not penalized, and in effect their social security is guaranteed. I think that this is an attempt—I believe it is an attempt—to do the same kind of thing with respect to anybody who comes to this country, or any American who works abroad.

Senator HICKENLOOPER. I merely raise the suggestion that it may be an attempt to internationalize social security.

Mr. LINDER. The Italians do not get the benefits on our scale for the period during which they worked in Italy.

Senator HICKENLOOPER. I would assume not.

Mr. LINDER. They get some sort of combination of the two which has been worked out with each country paying a pro rata share. As I say, sir, in respect of the technical aspects of this, I would like to make available to the committee this statement prepared by the Federal Security Agency.

Senator SPARKMAN. Without objection, we will insert that in the record at this point.

(The statement referred to is as follows:)

STATEMENT PREPARED BY THE FEDERAL SECURITY AGENCY UNDER DATE OF FEBRUARY 14, 1952—EXPLANATION OF THE SOCIAL-SECURITY PROVISIONS (ART. VII) OF THE UNITED STATES-ITALIAN SUPPLEMENTARY AGREEMENT, SIGNED ON SEPTEMBER 20, 1951

At present workers who have some coverage under the old-age and survivors insurance systems of more than one country may suffer losses in their benefit rights. In some cases the individuals involved may fail to meet the eligibility requirements of one or both systems because of gaps in their employment records, and thus no benefits at all may be payable. In order to eliminate these losses, various European countries have entered into agreements with each other in order to protect the benefit rights of workers who have employment in more than one country. The countries with which Italy has already concluded treaties include Belgium, France, and Switzerland. The United States thus far has no international agreement in operation.

While no figures are available on the extent of the movement of workers between the United States and Italy, it seems likely that the number of workers with coverage under the insurance systems of both countries is small. Nevertheless, coordination of the two systems to take care of these cases seems desirable, in order to prevent the hardship which may sometimes occur in the absence of coordination. As the number of cases will not be large, the total administrative burden should not be great.

Article VII of the supplementary agreement provides authority for coordinating social-insurance systems. Following are the major provisions of article VII:

(1) The language of the agreement would authorize the immediate coordination only of the "principal old-age and survivors insurance system" of each country. The coordination could later be extended to special old-age and survivors insurance systems or to insurance systems providing protection against permanent disability.

(2) Service time under both systems would be combined and counted for determining eligibility for benefits under each system.

(3) Service which has already been credited under both systems, if any, would not be included in any combining of employment periods.

(4) Benefits based on combined service would be reduced to take account of the fact that all of the worker's service is counted under each program. This would be done by reducing each benefit amount by the ratio which the period of time spent under the other system bears to the total period of time spent under both systems.

(5) An individual might elect whether or not the coordination provisions shall apply to him.

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(6) The agreement provides that if the Maintenance of Migrants' Pension Rights Convention of 1935 is adopted by both countries, the convention shall supersede any inconsistent provisions in the agreement. (The 1935 convention includes provisions establishing multilateral social-insurance coordination among the countries adopting that convention.)

While the agreement indicates that each system is to base benefits on combined periods of service, it does not specify how such benefit amounts are to be computed. It is contemplated that a method would be used which would not require a crediting under one system of wages received under the other, but only a crediting of service periods. By so doing, the administrative difficulties involved in such problems as the conversion of Italian currency into American, and the reverse, would be avoided.

The basic framework of the coordination is established in the agreement. Precedents already exist for this type of coordination, and we believe that no serious difficulties would be encountered in effectuating the agreement. Each country would bear whatever increased costs would arise under its system as a result of additional payments resulting from the agreement. While we have not been able to make cost estimates, because figures on workers with coverage under both systems are not available, we believe that the additional costs will be small.

The Federal Security Agency favors the coordination provisions contained in section VII of the agreement.

PROTECTION OF AMERICAN BUSINESSMEN IN MOROCCO

Senator HICKENLOOPER. I want to get back, Mr. Linder, if you know anything about this particular matter—it may not be in your bailiwick over there—to a matter which has been before this committee repeatedly in the past. It directly involves a treaty of commerce, trade, and friendship, and has been the occasion for two rather positive positions taken not only by this committee but by the Congress, and which according to my view, which may not be wrong, have been not only ignored but flouted by the Department. That is the Moroccan situation and what apparently has moved this Congress to consider that our American citizens in Morocco have not received the guaranteed equality of treatment under the existing treaty with Morocco. As I say, that may be wrong; I don't know. But it has been sufficiently presented so that it has been the occasion of two actions by this committee and two actions by the Congress on that line. But the situation has not seemed to be improved any.

Are you familiar with that Moroccan situation?

Mr. LINDER. I am not familiar with it, sir. Maybe Mr. Vernon can speak to that.

Mr. VERNON. I think so.

Right at the moment, sir, as you no doubt know, that issue is before the International Court of Justice.

Senator HICKENLOOPER. Yes. And may I say that in my unschooled and probably inadequate opinion, it has no business before the International Court of Justice at all. I have had a little superficial examination of that, and at least in the absence of further proof I do not think it ever had any business being taken to the International Court of Justice, and I don't think we had any business joining in that matter in the Court of Justice. I mean, I just wanted to make my position clear so we will know from what standpoint we are arguing.

Mr. VERNON. Let me give just for a moment or two some of the considerations which led us to conclude that it was not easy to determine just what the rights of the Americans were. The American rights in Morocco accumulated out of a whole series of treaties going back to the eighteenth century. That is when the earliest one was.

Some of the rights depend upon such a complicated issue as the following: Whether, if we have most-favored-nation rights, and if as a result of the most-favored-nation right we get a right which was expressly given to another country, such as England, and then the treaty by which England acquired certain rights is abrogated, do we continue to have the rights which we acquired indirectly through the most-favored-nation treatment, notwithstanding the abrogation of the U. K. treaty with Morocco.

There was also a problem of whether and to what extent custom and usage would give us a right which was not expressly stated in a treaty.

I sat down with our lawyers trying to trace back the effect of the accumulation of these principles upon our rights and came away with the very certain conviction, which was shared by anyone who had to go into this in detail, that at a minimum one could say our rights were complex and far from crystal clear.

We were also concerned that whatever the rights may have been as a result of these longer standing treaties, whether in fact recent agreements under the aegis of the Economic Cooperation Act modified them.

The result was a legal jumble complicated by the fact that it could be interpreted not in terms of domestic law but in terms of the rather more obscure provisions of international law.

In those circumstances we felt, and I think there is room for honest difference of judgment on this, that the best possible approach was to try to get a clarification from the International Court of Justice.

FACTORS IN THE FRENCH MOROCCAN SITUATION

Senator HICKENLOOPER. Our treaty was with Morocco, where the violations were alleged.

Mr. VERNON. That is correct.

Senator HICKENLOOPER. And France took it into the International Court.

Mr. VERNON. On behalf of Morocco. France has a relationship with Morocco which we have recognized by treaty, taking over the responsibility for Morocco's foreign relations; therefore she was within her rights, acting on behalf of Morocco and herself, to bring the suit.

Senator HICKENLOOPER. Nevertheless we have found, on two or three occasions, that the treaty has been violated a number of times. Isn't that true?

Mr. VERNON. I hesitate to rely on my judgment on this, or on my memory on this, because really the jumble of both fact and law is involved. One thing is clear, that a lot of things the Moroccans and French have done have not been right in equity or any abstract concept of justice that you might want to think of, and we have not by any means been happy about the treatment in certain respects that the Americans have received in Morocco. There is no question about that.

Senator HICKENLOOPER. May I ask you this: Have the Moroccans themselves ever refused to comply with the treaty, under their own steam? In other words, aren't the Moroccans perfectly willing to carry out the treaty, but the fact is the French, through their activities there, prevent the Moroccans from carrying out the treaty and the

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French superimpose special advantages to French people in Morocco in trade and otherwise which are not given to American citizens?

Mr. VERNON. That is an awfully difficult one to answer.

This is one of the reasons why it is so difficult to answer: I use this as an illustration rather than the whole group. The currency in which the French Moroccan trade is conducted is the French franc. The Moroccans may be perhaps willing that in imports into Morocco there should be no discrimination against dollars, but in a sense it is not their ox that is gored. The currency that is used for trading in the area is the French franc, and runs on the French franc by reason of, let us say, open imports into the French Moroccan area, and the resulting weakness in the French franc because of the loss of dollars, is a problem which hits France and not Morocco.

I suppose it is true to say that Morocco would be happy if the French permitted all the expenditures of French dollars that would be involved in free imports into Morocco, but I expect it is also true to say that their willingness to permit that is not a reflection of their willingness to extend us favors which France would not be willing to extend us, but rather a knowledge that it does not cost them anything to extend them to us.

Senator HICKENLOOPER. I understand there are some propositions in currency exchange which any country will have to meet equally, and should if there is equality of treatment, but it is the unusual and extraordinary export and import license system and the penalties which are put on American goods and American trade there which are not imposed upon the French, and all those things, which are practical inhibitions and coercive things against Americans operating in Morocco, and treatment which is not accorded with the same severity to the French and perhaps one or two others with French favor.

Mr. VERNON. That is true, sir, and the reverse is true also, that there are areas in which Americans can do things that Frenchmen can't do. That is why in the first instance you have a large American colony trading in Morocco. There are certain products which the Americans may import freely which a Frenchman is prohibited from importing freely.

Senator HICKENLOOPER. Do the French prohibit the Frenchmen from importing them, or do the Moroccans?

Mr. VERNON. The French. That sounds rather curious, but the answer is simply this——

Senator HICKENLOOPER. Why should we be criticized for operating in an area we are privileged to operate in when the French could raise the restrictions and the French could operate in the same area if they wanted to, when it is within their control.

Mr. VERNON. That is true, sir, and what this reflects is the fact that there has been a recognition of American rights, which is the reason in the first instance why Americans are living there and trading there. In some situations the result has been that the French, in recognition of these special treaty rights, have permitted Americans to import a large list of products provided that the Americans found the exchange in some way or another, but have prohibited Frenchmen from importing the same products because they knew perfectly well the exchange the French would use would have to come out, directly or indirectly, of the French reserves in Paris.

Senator HICKENLOOPER. I merely mention the matter. It is not before this committee this morning, but I mention it wondering, after we do get into these treaties of friendship, just how they protect the rights of Americans that are actually guaranteed under the treaty before us. It is a question of where flow the benefits, and I would hope that they would be equitable and give equal benefits to nations that we treat with and, by the same token, that we would be utterly zealous in seeing that American nationals receive their full rights under the treaties we make.

I do not have any more questions.

Senator SPARKMAN. Thank you very much. You will stay here, Mr. Linder, I assume.

Mr. LINDER. If you want me to I will be here.

POSITION OF THE NATIONAL FOREIGN TRADE COUNCIL

Senator SPARKMAN. It might be well to stay. I do not know whether some other questions will come up. It probably will not take very long. I suggest the letter from the National Foreign Trade Council, Inc., under date of May 8, 1952, appear in the record at this point and that it be followed by any comments which the Department of State may wish to submit:

NATIONAL FOREIGN TRADE COUNCIL, INC.,
New York 6, N. Y., May 8, 1952.

Hon. JOHN J. SPARKMAN,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR SIR: The National Foreign Trade Council has been advised that you have been appointed by the chairman of the Senate Foreign Relations Committee, chairman of a subcommittee to take testimony and make recommendation relative to the consent and advice to be given in respect of treaties heretofore signed on behalf of the United States with certain other countries. The treaties concerning which we wish to comment are:

Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Colombia
Treaty of Friendship, Commerce, and Navigation between the United States and Denmark
Treaty of Amity and Economic Relations with Ethiopia
Treaty of Friendship, Commerce, and Navigation between the United States and Greece
Treaty of Friendship, Commerce, and Navigation with Israel
Agreement with Italy supplementing the Treaty of Friendship, Commerce, and Navigation of 1948

We have been advised further that you have designated Friday morning, May 9, 1952, as the time for hearings in this connection. We regret that it appears to be impossible for us to arrange for a witness to be present and testify at that time and in lieu thereof we are respectfully submitting in this communication our views in connection with these treaties.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE REPUBLIC OF COLOMBIA

Under date of October 9, 1951, we wrote Hon. Tom Connally, chairman of the Foreign Relations Committee, giving our views relative to the treaty with Colombia. For your ready reference, we attach hereto a copy of this letter.

The only additional comment which we would like to make with regard to this treaty is to make reference to the paragraphs in this letter entitled, respectively, "The Investment Clause" and "The Restrictive Business Practice Clause." Our views with respect to the investment clause and the restrictive business practice clause are the result of study since October 9, 1951, and were therefore not covered in our letter to Senator Connally.

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TREATY OF AMITY AND ECONOMIC RELATIONS WITH ETHIOPIA

We respectfully urge that the Senate shall not give its favorable advice and consent to the above-entitled treaty. Our reasons for taking this position in respect of this treaty are as follows:

It is apparent from the content and phraseology of this treaty that the obstacles to mutual understanding on several phases of commercial relations were not overcome. In fact, it seems doubtful whether, at the present stage of Ethiopia's economic development, any satisfying mutual convictions, or common ground for stipulations regarding private investment, can be found. Moreover, a recent canvass of representative members of the council has not developed any expression of positive interest in potential investment in that country. Therefore, it seems undesirable to dilute the pattern of our bilateral treaties by resorting in this case to such weak phrases as—

"reasonable opportunity for the investment of capital, and for the establishment of appropriate commercial, industrial, or other enterprises * * *" or "nationals or companies * * * which are permitted to establish or acquire enterprises * * *."

The objections to the second clause of article VIII (1) and to the second sentence of article VIII (4), are contained in the investment clause section.

While there are other features in this treaty which might prove of practical interest to American business, the aggregate advantage would not seem to outweight the disadvantage of establishing an undesirable precedent in our treaty writing, at this juncture.

Since the objectionable weakness of this treaty is confined practically to paragraphs 1, 4, and 5 of article VIII, the Senate might consider giving its advice and consent to the ratification of this treaty, with a reservation deleting paragraph 4 of article VIII in its entirety and the words "are permitted to" from the second line paragraph 5 article VIII, and amending article VIII (1) in accordance with the suggested provisions set forth in the section of this letter entitled "The Investment Clause."

AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION OF FEBRUARY 2, 1948, BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

We respectfully urge that the Senate give its favorable advice and consent to the above entitled agreement or treaty subject, however, to the following comment:

Article I of this pending agreement or treaty appears to be a somewhat watered-down version of the investment clause hereinafter dealt with. It is our belief that the comment in the paragraphs dealing with this matter would apply to article I of this supplemental Italian treaty.

We also call attention to the fact that article XVIII (3) of the Italian treaty of February 2, 1948, is the restrictive business practice clause hereinafter dealt with. It may be that if your committee is favorably disposed toward the recommendation contained in the memorandum attached to this letter entitled "Restrictive Business Practice Clauses in Proposed Treaties with Denmark, Greece, Israel, and Colombia" you would deem it appropriate in connection with the ratification of the supplemental agreement to request the modification of article XVIII (3) of the original treaty.

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND DENMARK, GREECE AND ISRAEL

We respectfully urge that the favorable advice and consent of the Senate be given to the above-captioned three treaties of friendship, commerce, and navigation, subject, however, to the comment contained in our letter of October 9, 1951, dealing with the treaty with Colombia insofar as said comment applies to these treaties and subject further to the comments hereinafter contained relative to the investment clause and the restrictive business practice clause.

THE INVESTMENT CLAUSE

The clause referred to by this caption is article VI of the treaty with Denmark, article VIII of the treaty with Greece, and article VI (4) of the treaty with Israel. The clause in the treaty with Denmark is less complete than the corresponding clauses of the other two treaties.

Reference is also made to the fact that the substance of this clause is contained in article I of the agreement supplementing the Italian treaty. A corresponding

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clause is also to be found in the 1949 treaty with Uruguay (art. IV), the 1950 treaty with Ireland (art. V) and the 1951 treaty with Colombia (art. VI (4)).

For ready reference we quote as follows the clause as it appears in the treaty with Greece:

"ARTICLE VIII

"Neither party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts and technology needed for economic development."

This provision is a version of a provision of the Bogota agreement which has never been submitted to the Senate for ratification. The Habana charter of the International Trade Organization also contained a similar provision but this likewise has never received approval of the Senate.

The treaty committee of the National Foreign Trade Council has pointed out to us that this clause prohibits only "unreasonable or discriminatory measures * * *" which impair acquired rights and that the implication in the clause is that by measures which are neither unreasonable nor discriminatory the Government of one party to the treaty may properly impair within its territory the acquired rights of nationals of the other party to the treaty.

In our opinion, the importance of the defect in this clause as pointed out above is emphasized by recent developments in Iran. The Government of that country, because it apparently believed nationalization to be desirable as a national policy, enacted legislation to nullify the Government's contract with the Anglo-Iranian Oil Co. and thereby impaired, in fact actually destroyed, important acquired rights of that company in Iran.

A second dangerous implication in the phraseology employed is based upon the qualifying phrase "which they have supplied." As applied to capital, it suggests that only as to the amount of capital originally "supplied" by remittance of foreign funds, would the stipulations of this article provide any security. Historically, American direct investment has grown tremendously not only from funds remitted for investment, but by reinvestment of earnings within the foreign country. There should be no ambiguity or misunderstanding on the point that the investor's interests are to be protected as well in respect of this "plow-back" as in respect of the original "remitted" capital. That this is not an academic issue is clear from the discussions in progress with the Government of Brazil regarding the service of American investments in that country. Unfortunately, we have no modern commercial treaty with that nation; but if we had one reading as does the Bogota stipulation quoted above, it would be a very precarious assurance of equitable treatment.

In view of what are felt to be deficiencies in clarity of this article, we respectfully urge that the investment clause as it appears in pending treaties now under consideration by the United States Senate be so amended as to give additional protection to rights acquired by American nationals in foreign countries. If the government of a foreign country having a treaty of friendship, commerce, and navigation with the United States of the post World War II type takes property of an American national for public purposes, it must pay due compensation with respect thereof. It is urged for your consideration that if the government of a foreign country takes the measures which would destroy or impair the rights or interests of an American national irrespective of the purposes underlying such destruction or impairment, corresponding payment should be made.

If the first part of the investment clause could be so modified as to read: "Neither party shall take measures that would impair the rights or interests within its territories of nationals and companies of the other party except on payment of prompt, adequate, and effective compensation" we feel that a desirable result would be accomplished.

We also feel that the balance of article VIII of the treaty with Greece, reading: "* * * nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts, and technology needed for economic development."
should be deleted in its entirety. It is to be assumed that it would be the United States which would be inhibited by this language from unreasonably impeding nationals and companies of the other party from obtaining on equitable terms

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the capital skills, etc., referred to. It seems to us that the meaning of the phrases "unreasonably impede" and "equitable terms" are so obscure and the implications thereof so broad as to make the inclusion of such a provision in a treaty entirely inappropriate and undesirable from the point of view of the United States. This language or a modification thereof is contained in the treaties with Colombia (art. VI–4), Israel (art. VI–4), Ethiopia (art. VIII–4) and Italy (art. I of the supplemental treaty with Italy). It does not appear in the treaty with Denmark.

THE RESTRICTIVE BUSINESS PRACTICE CLAUSE

The restrictive business practice clause to which we refer has, we believe, been incorporated substantially without change in all of the post World War II treaties of friendship, commerce, and navigation commencing with the 1948 treaty with Italy and it reads (treaty with Denmark, art. XVIII–1) as follows:

"1. The two parties agree that business practices which restrain competition, limit access to markets or foster monpolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordinlgy each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."

The National Foreign Trade Council believes firmly in the principles of private enterprise and business conducted on a competitive basis. Until recently it had viewed the restrictive business practice clause as being merely a comdemnation of practices contrary to the letter and spirit of existing American law.

More recent study of this provision and particularly of the second sentence has caused us to revise our ideas. At the present time, taking into consideration the fact that treaties duly entered into become under the Constitution the supreme law of the land, and bearing in mind the delicate relationship established by the Constitution between the powers of Congress and the powers of the Executive, we have come to have real apprehension that this clause as now drafted may result in transferring to the executive branch of our Government certain powers heretofore reserved to Congress.

Attached hereto please find a memorandum dealing with this subject in some detail which we believe will be of interest to your committee.

Respectfully submitted.

WILLIAM S. SWINGLE, *President.*

RESTRICTIVE BUSINESS PRACTICE CLAUSES IN PROPOSED TREATIES WITH DENMARK, GREECE, ISRAEL, AND COLOMBIA

Article XVIII–1 of the proposed treaty of friendship, commerce, and navigation with the Kingdom of Denmark, now under consideration by the Committee on Foreign Relations of the Senate of the United States, contains a provision designed to eliminate harmful effects upon commerce between the United States and Denmark arising from business practices which restrain competition, limit access to markets or foster monopolistic control as follows: [1]

"ARTICLE XVIII

"1. The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement, or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."

The second sentence of the provision quoted above gives cause for particular concern in that it would bind the United States "to take such measures as it deems appropriate with a view to eliminating such harmful effects." There is at least room for the construction that each party commits itself to enact measures which will eliminate the harmful effects of restraints on competition, leaving

[1] A counterpart of this clause appears in the proposed treaties with Greece (art. XIV), Israel (art. XVIII), and Colombia (art. XVIII).

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only to the discretion of the parties the choice of the measure or measures which will be appropriate for this purpose. Since a treaty constitutes the supreme law of the land,[2] it may certainly be argued that the United States could be held liable before an international tribunal should it fail to take some measure or measures, whether by act of Congress or by executive action, to carry out the mandate of the treaty with Denmark.[3]

Presumably, the consultation agreed to under article XVIII–1 would take place with the executive branch of our Government[4] and the executive branch, rather than Congress, would be directed to take "such measures as it deems appropriate with a view to eliminating such harmful effects." Thus read, it may be argued that the provision in question would result in a surrender by Congress to the executive branch of our Government of a portion of its powers regulating our foreign commerce which is now entrusted to Congress under article II of the United States Constitution. Following this line of argument to its logical conclusion, it seems clear that the Executive would not be required to seek congressional approval of measures which it deemed appropriate to the extent that such measures were within the general power of the Executive to carry into effect. For example, the administration could through the Office of International Trade impose export restrictions, thus forcing industry to abandon or change any practice which had been a subject of complaint.

Again, following this line of argument, the executive branch in fulfilling the obligations assumed under the proposed treaty, would not in any way be limited by the existing antitrust laws of the United States,[5] but in fact the executive branch would be committed to take such measures as it might deem appropriate with a view to eliminating harmful effects from "business practices which restrain competition, limit access to markets, or foster monopolistic control * * *" whether or not such practices in a particular case were in violation of the antitrust laws of the United States. In effect, therefore, the executive branch of the Government would be committed to different criteria from the existing criteria applicable to American enterprises at home or abroad.

If a treaty were not involved, there is little question but that it would be unconstitutional for Congress to delegate its antitrust powers in the manner contemplated.[6] However, a treaty made under the authority of the United States becomes the supreme law of the land[7] and there is support for the proposition that that which Congress may not do under the Constitution, i. e., the delegation of its power to regulate commerce, may still be accomplished pursuant to a treaty entered into "under the authority of the United States."[8]

The full import of the congressional surrender of power over foreign commerce which is inherent in article XVIII (1) of the proposed treaty is perhaps more pointedly revealed by the potential impact of this article on existing legislation. There are in effect today a number of laws enacted by Congress which grant some form of antitrust exemption to activities affecting our foreign commerce which might be construed to be restrictive practices within the meaning of article XVIII (1). For example, the Capper-Volstead Act[9] permits persons engaged in the production of agricultural products to market such products in interstate and foreign commerce by means of marketing agencies in common. Let us suppose the Government of Denmark were to make the contention that agreements establishing such collective marketing agencies pursuant to the Capper-Volstead Act were adversely restricting trade between the United States and Denmark. Under article XVIII (1) the executive branch of our Government, according to the argument stated above, would be obligated to take measures to eliminate the harmful effects of such restrictive practices, including, if desired, the withdrawal of approvals previously extended to the collective marketing agreements. Since the provisions of the treaty supersede the laws of Congress previously enacted,[10] the Executive action would overrule the prior congressional determination that

[2] United States Constitution, art. VI.

[3] Hackworth, Digest of International Law, vol. V, p. 164 et seq.; Preuss, Proceedings of the American Society of International Law, Washington, D. C., April, 1951, p. 82, 98–99.

[4] The Executive has exclusive supervision of international relations—*U. S.* v. *Curtiss-Wright Export Corporation* (299 U. S. 304, 81 L. Ed. 255 (1936)); *U. S.* v. *Carrollo* (30 F. Supp. 3 (D. C. Mo. 1939)); *U. S.* v. *Bereno* (60 F. Supp. 520 (D. C. Md. 1943)).

[5] *Ware* v. *Hylton* (3 Dall. 199, 1 L. Ed. 568 (U. S. 1796)).

[6] *Panama Refining Company* v. *Ryan* (293 U. S. 388, 79 L. Ed. 446 (1935)).

[7] United States Constitution, art. VI.

[8] *Missouri* v. *Holland* (252 U. S. 416, 430–435 (1920)); *U. S.* v. *Curtiss-Wright Export Corporation*, supra, note 3.

[9] Act of February 18, 1922, ch. 57, 42 Stat. 388; 7 U. S. C., secs. 291, 292.

[10] *Ware* v. *Hylton* (3 Dall. 199, 1 L. Ed. 568 (U. S. 1796)).

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such collective marketing agreements were not harmful to our foreign commerce and should be permitted by law.[11]

If, on the other hand, it is not intended to interfere with the power of Congress to regulate our foreign commerce or to open the way to the nullification of the congressional enactments described above (and there is no indication of a contrary intent), article XVIII (1) should be amended so as to eliminate any question on this score. For that purpose revision along the following lines is suggested:

"Accordingly each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects: *Provided, however,* That in order to accomplish the aforesaid purposes the United States of America shall be obligated to take only measures heretofore or hereafter enacted by Congress."

While existing treaties of friendship, commerce, and navigation with Italy (art. XVIII) and Ireland (art. XVIII (1)) contain similar "restrictive business practice" provision,[12] it is not too late to prevent a more widespread use of the clause as originally drafted. The amendment suggested above may, as a matter of first impression, appear to be too one-sided in favor of the United States. However, the United States is the only country in the world, with the possible exception of France, where a treaty can become a part of the supreme law of the land without the necessity of implementing laws enacted by the legislative body.[13] It seems necessary, therefore, by specific reference in the treaty clause to make it clear that the measures to be adopted by the United States must be those which are enacted by Congress.

OCTOBER 9, 1951.

Hon. TOM CONNALLY,
Chairman, Foreign Relations Committee,
United States Senate, Washington, D. C.

DEAR SIR: The National Foreign Trade Council, on the basis of a report from its treaty committee, has reviewed the provisions of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Colombia executed April 26, 1951, which is now before the Senate Foreign Relations Committee and desires respectfully to urge that the Senate give its advice and consent thereto as provided by the Constitution. The National Foreign Trade Council feels that the State Department should be commended for its activity in negotiating a treaty of freindship, commerce and navigation the provisions of which are in general along lines meeting in a substantial manner the views of the members of the council.

On the assumption that provisions of the treaty with Colombia will serve as a model for corresponding provisions in other treaties to be negotiated, the council's treaty committee has formulated as to certain provisions thereof the following suggestions the adoption of which it is believed would be desirable:

Article III, paragraph 1, and article VI, paragraph 1.—The words "in no case less than that required by international law" should be added at the end of each of these paragraphs. This phrase has appeared in most other commercial treaties to which the United States is a party and in the judgment of your committee is

[11] Other examples of existing laws which permit some form of exemption from our antitrust laws to activities affecting our foreign commerce are:
(1) Shipping Act of 1916 (act of September 7, 1916, ch. 451, 39 Stat. 728, as amended; 46 U. S. C., secs. 801, 812, 814, 815) permits rate agreements between common carriers by water.
(2) Webb Export Trade Associations Act (act of Apr. 10, 1918, ch. 50, 40 Stat. 516; 15 U. S. C., secs. 61–65) permits export-trade associations.
(3) Merchant Marine Act of 1920 (act of June 5, 1920, ch. 250, 41 Stat. 988; 46 U. S. C., sec. 861), permits an association of marine insurance companies for the purpose of apportioning risks.
(4) Civil Aeronautics Act of 1938 (act of June 23, 1938, ch. 601, 52 Stat. 977; 49 U. S. C., secs. 488, 489, 491, 492, 647, 648) permits rate agreements and pooling or apportioning earnings, laws, traffic, service, or equipment.
(5) Interstate Commerce Act (act of Feb. 4, 1887, ch. 104, 24 Stat. 739, as amended; 49 U. S. C., secs. 5, 5a, 20a, 213, 228, 327) permits rate and pooling agreements between common carriers.
(6) Fishing Cooperative Marketing Act (act of June 25, 1934, ch. 742, 48 Stat. 1213; 51 U. S. C., secs. 521, 522) permits persons engaged in the fishery industry to enter into contracts and agreements providing for marketing agencies in common.

[12] See also agreements for economic cooperation with Italy, France, Denmark, occupied Germany (French and British zones), Greece, Iceland, Ireland, Belgium, Netherlands, Luxemburg, Norway, Sweden, United Kingdom, Thailand, Trieste, and Turkey.

[13] Holman, International Proposals Affecting So-Called Human Rights, Law and Contemporary Problems, vol. 14, No. 3 (1949), p. 487.

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important in that it suggests what we believe to be a significant principle, namely, that international law does require governments to give protection of the person and the property of nationals of another country.

Article III, paragraph 2.—The words "of his choice" should be added at the end of this paragraph. This paragraph indicates that a national of one country accused of crime in the other country may enjoy the right, among others, of obtaining "the services of competent counsel." Obviously he should have the right to elect such counsel.

Article VII, paragraph 1, and article VIII, paragraph 1.—The proposal of the National Foreign Trade Council Committee on Insurance relating to the specific inclusion of "insurance" in the enumerated enterprises entitled to national or most-favored-nation treatment should be approved and accepted. The insurance committee advised that specific reference to insurance not having been made in existing treaties with some countries, the State Department has been unable to make adequate representations on behalf of American companies doing business in such countries when discriminatory laws or practices were adopted and enforced.

Article IX, paragraph 4.—Neither the use of the words "particular types of activity" nor the reference to article VIII, paragraph 1 is clear. It is recommended that this paragraph be clarified.

Article X.—This article does not but should deal with copyrights as well as trademarks, etc. (It was recommended that, if Colombia is not a member of the International Conference for the Protection of Industrial Property, it should become a member.)

Article XIV.—It is suggested that a new paragraph, reading as follows, be added to follow paragraph 2 of this article:

"Neither party shall impose any prohibition or restriction or discriminatory tax preventing or hindering the importer or exporter of goods of either country from obtaining insurance on such goods in transit in companies of their own choice."

Article XXVI, paragraph 4.—This paragraph provides for terminating on 1 year's written notice the provisions of paragraph 1 of article XIV assuring most-favored-nation treatment as to customs duties and other related matters. It therefore avoids the necessity of denouncing the entire treaty because of a change in policy affecting customs duties which might be inconsistent with the relevant treaty provision. The treaty committee believes that the freedom of action thus granted to both parties is desirable and should be commended.

The committee would also take this opportunity to refer again to the need for treaty provisions specifically assuring American enterprises operating abroad the right to secure entry for and utilize the services of American nationals in administrative, technical, and confidential capacities. This subject was discussed in a letter to Senator Connally from the council, dated April 23, 1951, as well as in a letter to the former chairman, Senator Vandenbrerg, dated June 1, 1948.

Very truly yours,

(Signed) ROBERT F. LOREE,
Chairman, National Foreign Trade Council.

(Communications of the Department of State relative to the foregoing letter from the National Foreign Trade Council:)

MAY 15, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: There is enclosed herewith a memorandum concerning the pending Treaty of Amity and Economic Relations with Ethiopia, as requested during the course of hearings before your subcommittee last Friday, May 9, in light of the objection expressed by Mr. Swingle, president of the National Foreign Trade Council, in his letter of May 8 to you. The memorandum has been prepared for the record.

Comments regarding the points raised in Mr. Swingle's letter with reference to certain clauses in the pending treaties with Colombia, Denmark, Greece, and Israel and the supplementary agreement with Italy, will be forwarded separately.

Sincerely yours,

HAROLD F. LINDER,
Acting Assistant Secretary for Economic Affairs.

Enclosure: Memorandum with attachment.

MEMORANDUM

There follow the State Department's comments upon the letter of May 8, 1952, from Mr. Swingle, president of the National Foreign Trade Council, to Senator Sparkman, regarding the pending treaty of Amity and Economic Relations with Ethiopia.

The State Department considers the treaty with Ethiopia to be an outstandingly good one, in all the circumstances, and particularly urges its approval. It contains provisions of great value (1) to our diplomatic and consular establishments in Ethiopia, certain of which, as indicated in one of the exchanges of notes attached to the treaty, go beyond what the Ethiopian Government is normally prepared to grant; (2) to our citizens in Ethiopia, the exchange of notes regarding the special rights of Americans before Ethiopian justice being especially noteworthy; and (3) to the growth of our trade and the development of other American interests in Ethiopia. As the first treaty of the sort that Ethiopia has concluded with any nation since the war, it may be regarded as having considerable political significance.

The objection of the National Foreign Trade Council to this treaty seems to be based principally or entirely on the ground that it does not go far enough in obligating Ethiopia to receive American investment. However, this lack of commitment concerning the entry of investment capital was not, as suggested in Mr. Swingle's letter, a failure to overcome an obstacle to mutual understanding. On the contrary, it was evident that, in Ethiopia's existing circumstances, Ethiopia could not be expected to undertake treaty limitations upon her right to regulate the entry of foreign investment. No benefit was to be gained from attempting in this treaty to force Ethiopia to accept American investment, especially as no American would likely wish to venture his capital in Ethiopia anyhow except with the express sanction of the Ethiopian Government. The treaty does, of course, contain valuable assurances, of the sort normally sought in one of these treaties, concerning the protection of investments which are actually made now or hereafter in Ethiopia.

The State Department does not regard this treaty as at all "diluting the pattern of our bilateral treaties," as suggested in Mr. Swingle's letter. It is specially designed for a country like Ethiopia; not for a country of Western Europe. It is to be judged by its many positive accomplishments in relation to Ethiopia rather than by its omissions. As it stands, it is a stronger treaty than most nations commonly make with one another. It represents a great advance over our existing commercial treaty (that of 1914) with Ethiopia, and should serve well until Ethiopia reaches the stage of being able to enter into a still more ambitious treaty.

DEPARTMENT OF STATE,
Washington, May 16, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: There is enclosed a memorandum, as requested during the course of the hearing held by your subcommittee on Friday, May 9, concerning questions raised by Mr. Swingle, president of the National Foreign Trade Council, in his letter of May 8 to you with reference to the pending treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece, and Israel and the supplementary agreement with Italy. A memorandum concerning the National Foreign Trade Council's views on the treaty with Ethiopia has been sent under separate cover.

This Department gives most careful consideration to the suggestions which the Foreign Trade Council offers from time to time with a view to making the treaties a more effective instrument of American foreign policy. However, as will appear from the attached memorandum, we are unable to concur in the advisability of the changes which the council now proposes be made in the several instruments pending before the committee. Agreement on these treaties has been reached after lengthy and often difficult negotiations conducted at the instance of the United States Government and on the basis of United States proposals; and it would not appear advantageous to risk reopening negotiations for the purpose of securing nonessential changes, especially in clauses already appearing in hitherto approved treaties. None of the changes suggested by the council

appears necessary, and at least one appears to be contrary to the interests of the United States.

If there are any further materials you might require, please do not hesitate to call on us, for we are most anxious to be of whatever assistance we can in facilitating the committee's consideration of these treaties.

Sincerely yours,

HAROLD F. LINDER,
Acting Assistant Secretary for Economic Affairs.

MEMORANDUM

There follow comments of the State Department on the two points raised in the letter of May 8 from Mr. Swingle, president of the National Foreign Trade Council, concerning the pending treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece and Israel, and the supplementary agreement with Italy.

So-called investment clause.—The quoted provision, as found in article VIII of the treaty with Greece, is one of the least of many clauses relating to investment in the treaty. It first occurred, in a larger form, in the 1949 treaty of friendship, commerce, and economic development, with Uruguay (art. IV), heretofore approved by the Senate; and it was not then criticized by the National Foreign Trade Council in the letter which it sent to the Senate, recommending approval of the Uruguay treaty (letter to Senator Connally, from Mr. Thomas, then president of the organization, dated March 6, 1950). The Uruguay version, however, contained one passage which has been abandoned in the current treaties, in light of further study and in response to a particular objection subsequently raised by the National Foreign Trade Council: namely, a stipulation that neither party should "without appropriate reason deny opportunities and facilities for the investment of capital by nationals and companies of the other party."

The State Department does not agree with the objections or the recommendation contained in the National Foreign Trade Council's letter.

The National Foreign Trade Council recommendation, as set forth in bottom of page 6 of its letter, is that the treaty rule requiring prompt, just, and effective payment of compensation for expropriated property, including interests in property (as, art. VII, par. 3, of the Greek treaty), be extended to require compensation in the event of any "measures that would impair the rights or interests" of any kind which nationals of one country may have in the other. This Department does not believe that this recommendation represents a commitment which the United States could, for its part, undertake. This is for the reason that such a provision would appear to require compensation in circumstances in which the United States Government does not under the Constitution and laws of the United States pay compensation. While the United States, of course, pays compensation for property and property interests which it takes, it does not pay compensation for all "losses" which Government action may cause. For example, the Federal Government does not pay compensation for so-called "consequential damages" occasioned by a condemnation of property, notwithstanding that the condemnation may cause the private owner considerable losses in the nature of consequential damages. There is no obligation upon the United States Government to compensate a distiller for the loss of business brought on by a prohibition law; nor a utility company for the economic consequences of the formation of a Government-supported rural electrification system; nor individuals or business concerns for the loss of prospective profits resulting from price control laws. There are many other instances of Government-caused losses, or alleged losses, which the United States Government under the Constitution and laws declines to make good. The State Department cannot recommend a treaty provision which would go beyond established United States policy in this connection and grant foreign nationals more favorable treatment than citizens receive in the United States.

The Department of State recognizes the limitations of the provision represented by article VIII of the Greek treaty. However, it is believed to serve a useful purpose in that it affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests. A given measure of a foreign government might, for example, be fully consistent with the national treatment or most-favored-nation treatment rules of the treaty, and also short of expropriation, but yet arbitrary and unreasonable as it affected some vested American interest in the country concerned. In that event, the only treaty ground for protest might be general

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language such as found in articles I and VIII of the Greek treaty. It remains, however, that the real protection of an American investment abroad rests for the most part on the more specific provisions of the treaty; the clause in question does not qualify these more specific provisions, but is merely something additional.

The concluding passage of the provision (relative to impediments on the outflow of investment capital, as quoted on the top of page 7 of the letter in reference) is not phrased in a way to create a source of embarrassment to the United States. The commitment is merely not unreasonably to impede the outflow of free enterprise investment capital. There is no undertaking positively to encourage the outflow of capital or to supply any capital. All commitments in the treaty are, on the other hand, subject to a broad national security reservation. This passage, therefore, would appear to be a moderate assertion of this Government's favorable attitude toward the private investment process which it is among the major aims of the treaty as a whole to foster and protect.

Restrictive business practices clause.—This clause, which has appeared in several previously approved treaties, is designed to enlist the cooperation of foreign governments in the congressionally approved efforts of this Government to reduce and remove the adverse effects of cartels and other restrictive practices on international trade.

It will be observed that the clause is not self-executing, and it is also cautiously worded otherwise. The commitments are (1) to consult, i. e., to hold discussions, and (2) to take such action as each party deems appropriate, in its own discretion and in its own way, with a view to eliminating the harmful effects of defined practices on international trade. While the holding of consultations would be an executive function, any action that the United States might see fit to take would be the normal combination of congressional, executive, and judicial action that exists apart from the treaty. The clause has, furthermore, been drafted in such manner as to avoid conflict with the Webb-Pomerene Act and the other enactments which represent exceptions to the basic antitrust law of the United States. The clause is not regarded as creating new substantive antitrust law or new procedures of antitrust enforcement in the United States.

It may be stated categorically that the restrictive business practices clause is not in any way designed to enhance executive power or to alter established congressional-executive-judicial relationships in the formulation and execution of antitrust policy. In the State Department's view, the Executive would be bound, in carrying out the clause, to proceed in conformity with statutes duly enacted by the Congress; and there is no intent to authorize the contrary. A proviso spelling out the internal processes by which the United States acts is therefore unnecessary; it would also appear to be inappropriate in an international instrument, since it is not the concern of a foreign government.

(The following additional comments of the National Foreign Trade Council were subsequently received and incorporated in the record:)

NATIONAL FOREIGN TRADE COUNCIL, INC.,
New York 6, N. Y., May 12, 1953.

Hon. JOHN J. SPARKMAN,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR SIR: * * *

With reference to article VII of the supplementary treaty with Italy we enclose a memorandum in relation to the social security benefits under the laws of the two countries. We believe this may be helpful to your committee in the study of this provision.

Very truly yours,

WILLIAM S. SWINGLE, *President.*

MEMORANDUM ON ARTICLE VII OF THE SUPPLEMENTARY TREATY WITH ITALY

Article VII of the proposed Italian agreement provides for combining coverage under the social-security systems of the two countries in accordance with certain broad principles which do not spell out any of the details of how such a combining provision would operate in actual practice. For some time we have been trying to ascertain whether or not the Federal Security Agency has developed any concrete plans for implementing the agreement if and when it is ratified. Our efforts in this direction have been unproductive. Without such information, it is impossible

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to evaluate the effect of the proposed agreement on our domestic social-security program.

The following example will illustrate the type of questions in connection with any such proposal. Assume that an Italian workman enters the United States after 15 years of coverage under the Italian social-security law. He obtains employment in the United States and dies, leaving a widow and children, after working for only 1 year in employment covered by the Social Security Act. Ordinarily, in order for his widow and children to be eligible for survivor benefits, the wage earner must have had insured employment in 6 of the 13 quarters preceding his death. Would the employment under the Italian scheme be considered in determining the eligibility of the widow and children under the United States Social Security Act? If survivor payments are to be made under both laws, how would the proportion of the respective payments be determined?

It seems to us that it is almost impossible to develop a fair and equitable arrangement for combining coverage under United States and foreign social-security schemes which are so radically different in their concepts. Lacking any information as to how the proposed agreement would be implemented, however, makes it extremely difficult at this stage to do more than raise these questions and to insist on complete information as to the types of cases in which the agreement would be applicable and the mechanics which would be employed in its operation.

It should also be noted that this is a precedent-setting agreement, since the President's message states, "Another provision incorporated for the first time in an agreement to which the United States is a party is that contained in article VII." This raises the question as to whether or not it is the policy of the United States to extend this type of agreement to other countries. This fact alone should warrant the Senate Foreign Relations Committee making careful and exhaustive investigation into the possible implications of such agreements for our domestic social-security program.

EXPLANATION OF HOW THE UNITED STATES-ITALIAN TREATY MIGHT OPERATE IN CERTAIN TYPES OF CASES—MAY 15, 1952

The provisions of the United States-Italian agreement establish the general method of coordinating benefits which is to be used. The following is a brief explanation prepared by the Social Security Administration as to how benefit coordination might be brought about as regards the old-age and survivors insurance benefits of the two countries.

There would be eligibility for coordination only if (1) the worker had at least 3 years of employment after 1937 under each system, and (2) the worker gains insured status under one or both programs by reason of the combination of periods of service.

When there is eligibility for coordination, the worker, or his surviving dependents, may elect whether or not to have the coordination provisions apply. If coordination is elected, the workers' combined service periods would be used in determining his benefit rights, or those of his survivors, under each system.

Each system would use combined periods of service in determining eligibility for benefits. Each system would use its own qualifying requirements in determining who could receive benefits. While each system would determine benefit amounts on the basis of combined service, it would not be necessary to transfer information about the level of earnings—transfers of records of service would be sufficient.

After the initial benefit computation on the basis of combined service, each system would reduce the benefit according to the relative amounts of service under the two systems.

Attached are appendix I, giving the insured status requirements of the two programs, and appendix II, giving illustrations of cases which might arise under coordination. While the illustrations go into some detail in describing the benefits payable under the United States system, they present only in rough outline enough information about the benefits payable under the Italian system to show how the basic principles would operate.

The illustrative cases in appendix II are organized according to the insured status of the worker before and after the totalization of his periods of service under the two systems. There are nine possible types of cases which may arise, based on the effect of the coordination upon the worker's insured status. The following table shows these nine categories of cases:

	Country in which worker has insured status		Date benefits under coordination could first be paid, under our proposals
	Before coordination	After coordination	
First	Neither	Neither	Never.
Second	do	Italy	July 1963.
Third	do	United States	July 1957.
Fourth	do	Both countries	Do.
Fifth	Italy	Italy	Never.
Sixth	do	Both countries	July 1957.
Seventh	United States	United States	Never.
Eighth	do	Both countries	Effective date of agreement.
Ninth	Both countries	do	Never.

As shown in the table above, group eight cases are the only cases in which benefits can be paid as soon as the coordination becomes effective. The earliest date for the beginning of benefit payments in any of the other groups of cases is July 1957. The reason why these benefit payments cannot be made earlier is explained for each type of case in appendix II, under "Comments."

Appendix II contains illustrations of cases which might arise in each of the groups in which there might be eligibility for benefits under coordination.

The coordination plan is not expected to affect in any substantial manner the actuarial status of the insurance system. While it is not possible to estimate the cost of coordination to either the Italian or the United States system, it is expected that, since only a very few cases will be affected, the cost will be negligible. Whatever small additional expenditures may be involved would be justified in view of the contributions paid on behalf of the persons affected, who now contribute to the United States system but do not work long enough to draw benefits.

APPENDIX I.—INSURED STATUS REQUIREMENTS OF THE ITALIAN AND UNITED STATES PROGRAMS AS OF MAY 7, 1952

Insured status requirements of United States program

Individual dies, or reaches age 65, in—	Number of years of service which will meet the requirements of the United States system—Dies, or reaches age 65	
	January through June	July through December
1953 or earlier	1½	1½
1954	1½	1½
1955	2	2¼
1956	2½	2¾
1957	3	3¼
1958	3½	3¾
1959	4	4¼
1960	4½	4¾
1961	5	5¼
1962	5½	5¾
1963	6	6¼
1964	6½	6¾
1965	7	7¼
1966	7½	7¾
1967	8	8¼
1968	8½	8¾
1969	9	9¼
1970	9½	9¾
1971 or later	10	10

Also, a worker who has worked under the United States system for roughly 1½ years out of the 3 years immediately preceding his death may be insured on the basis of such employment for some types of survivorship protection. The children under age 18, and the widow caring for such children, may qualify under this last 3-year provision.

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INSURED STATUS REQUIREMENTS OF ITALIAN PROGRAM

For old-age benefits under the Italian system, the insured status requirement is taken as being 15 years of coverage. The Italian insured status requirement for survivor benefits is taken as being a total of 5 years of coverage, with the additional requirement that 1 year's coverage must have been in the 5 years immediately preceding death. These requirements follow the general approach of the actual, more detailed provisions of the Italian system. (It will be noted that the "recency" test of the Italian program for survivorship protection is an additional requirement which must be met, while the recency test of the United States system is an alternative method of meeting the insured status requirements of the program.)

APPENDIX II.—ILLUSTRATIVE CASES SHOWING OPERATION OF COORDINATION UNDER UNITED STATES-ITALIAN TREATY

Group 2. Not insured under either system without coordination; insured under the Italian system with coordination:

B works for 3 years, from 1950 through 1952, under the United States system. He works for 4 years, from 1960 through 1963, under the Italian system. He dies in July 1966.

Without coordination, B cannot of course meet the length of service requirement of either system. With coordination his 7 years of combined service are sufficient to meet the length of service requirement of the Italian program but not of the United States program. (As shown in the preceding table 7¼ years would be required under the United States system; the alternative requirement for limited survivorship protection, as noted, would be 1½ years of employment during the 3 years immediately preceding his death.)

With coordination, the benefits for B's survivors under the Italian system would first be computed based on the 7 years of service under the two systems. They would then be reduced to four-sevenths of this amount, as four-sevenths of B's service was under the Italian system.

Comment.—It might be noted that there could be no cases in group 2 until after June 1963, and then only in survivor cases. Group 2 cases could never arise before July 1963 because a worker who meets the 3-year qualifying requirements would also be able to meet the United States insured status requirement which applied before that date. There could be no retirement cases in group 1 even after the middle of 1963, as anyone meeting the Italian length of service requirement could also meet that of the United States system. There could be some survivor cases after June 1964, as after that date the survivorship requirements of the Italian system would be more liberal in some ways than those of the United States system.

Group 3. Not insured under either system without totalization; insured under the United States system, but not the Italian system, with totalization:

C works under the Italian system for 6 years, from 1944 to 1949. He works under the United States system for 6 years, from 1956 through 1961. He reaches age 65 and retires in January 1966.

As the length of service requirement under the United States system is 7½ years for an individual reaching age 65 in January 1966 C is not insured under the United States system without coordination. He is not of course insured under the Italian system without coordination. With coordination the 12 years of combined service would still not meet the Italian requirement of 15 years, but would meet the United States requirement.

It is assumed that C received wages of $200 per month while under the United States system, and that he had a wife age 65 or over when he retired. The amount of his monthly old-age benefits under the United States system based upon totalized service would be $40 under the initial computation, and his wife's benefit would be $20. The 1951 new start would be used in computing his average monthly wage and benefit amount in the computation. As C's Italian service is before 1951 it has no effect on the computation of the average monthly wage, as periods before 1951 were not used in the computation.

C's benefit and that of his wife are then reduced to one-half of the amount as originally computed, as one-half of his total service was under the United States system. The reduced monthly benefit for C is $20, and his wife's benefit is $10. These amounts would be paid under the United States system.

Comment.—The Social Security Administration proposed that when the new start is used in determining the average montly wage, under the United States system, the benefit reduction under the United States system should be based on

the relative amounts of service after January 1, 1951, unless insured status depends on the use of Italian service before January 1, 1951, in which case the reduction would be based on the relative lengths of service periods after January 1, 1937. As C's insured status does depend upon Italian service before 1951 the reduction in this case is based on the total service under the two systems after January 1, 1937.

Group 3 cases could not arise before the middle of 1957, as a worker with the required 3 years of service under the United States system would meet the insured status requirements of the program until that date. After that date there would be both retirement and survivor cases falling in group 3.

Group 4. Not insured under either system without coordination; insured under both systems with coordination:

D works for 4 years, from 1952 through 1955, under the United States system. He works for 4 years, from 1956 through 1959, under the Italian system. He dies in January 1960.

Without coordination, D cannot meet the insured status requirements of either system. (As shown in the table, the United States requirement for a worker who dies in January 1960 would be 4½ years.) With coordination, D would meet the insured status requirements of both programs.

The benefits for D's survivors under the Italian system would first be computed based on the combined 8 years of service under the two systems. They would then be reduced to one-half of this amount, as one-half of D's service was under the Italian system.

It is assumed that D received wages of $200 per month while under the United States system, and that he was survived by a widow and two children under age 18. The amount of the monthly benefits based on combined service would be, under the initial computation: widow, $44.30; first child, $36.90; second child, $36.90. The 1951 "new start" would of course be used in computing his average monthly wage in the computation. The benefit amounts would then be reduced to one-half of the amounts as originally computed, as one-half of D's total service was under the United States system. The reduced benefits, as payable to D's survivors, would be: widow, $22.20; first child, $18.50; second child, $18.50.

Comment.—Group 4 cases could not arise before the middle of 1957. (As in group 3 cases, a worker with the required 3 years of service under the United States system would meet the insured status requirements of this program until that date.) After June 1957, both retirement and survivor cases could arise in group 4.

Group 6. Insured under Italian system only without coordination; insured under both systems with coordination:

F works under the Italian system for 20 years, from 1951 through 1970. He works under the United States system for 7 years, from 1971 through 1977. He reaches age 65 and retires in January 1978.

F meets the Italian length of service requirements without coordination. He does not meet the United States requirement (10 years for workers reaching age 65 after 1970) without coordination, but does meet the United States requirements with coordination.

Without coordination, F would qualify for benefits under the Italian system based on 17 years of service. With coordination, he would qualify for benefits computed on the combined total of 24 years of service and then reduced to seventeen twenty-fourths of this amount, as seventeen twenty-fourths of F's service was under the Italian system.

It is assumed that F received wages of $200 per month while under the United States system, and that he had a wife aged 65 or over when he retired. The amount of the monthly benefits based on combined service would be, under the initial computation: F's own benefit, $65; his wife's benefit, $32.50. The benefit amounts would then be reduced to seven twenty-fourths of the amount as originally computed, as seven twenty-fourths of F's total service was under the United States system. The amounts of the reduced benefits would be: F's own benefit, $19; his wife's benefit, $950. These are the benefits which would be paid under the United States system.

Comment.—Group 6 cases could not arise until July 1957, when the insured status requirements of the United States system first exceed 3 years. After that date, both survivor and retirement cases could fall in this group.

Group 8. Insured under United States system only without coordination; insured under both systems with coordination:

H works under the Italiam system for 10 years, from 1937 through 1946. He works under the United States system for 6 years, from 1947 through 1952. He reaches age 65 and retires in January 1953.

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Even without coordination, H is insured under the United States system, as the length of service requirement for a worker who retires in January 1953 is but 1½ years of service. With coordination, his combined total of 16 years of service enables him to also meet the Italian requirements.

With coordination, F would qualify for benefits under the Italian system computed on the combined total of 16 years of service, and then reduced to ten-sixteenths of this amount, as ten-sixteenths of H's service was under the Italian system.

It is assumed that H received wages of $200 per month while under the United States system, and that he had a wife aged 65 or over when he retired. The amounts of the monthly benefits based on combined service would be, under the initial computation: H's own benefit, $65; his wife's benefit, $32.50. This computation would be based on the 1951 "new start," and H's average monthly wage would be based on his wages in 1951 and 1952.

In this case, there would be no reduction in the benefit amounts as originally computed, if our suggestions are adopted. As H did not depend on Italian service before 1951 for insured status, the reduction, if any, would be based on the relative service periods after 1950. However, as there is no Italian service after 1950 in this case, there would be no benefit reduction.

Comment.—This group of cases is of particular interest, as it is the only type of case, under our proposals, in which benefits could be paid under coordination before the middle of 1957. Thus, for the first few years under the agreement, the only benefits payable by reason of the coordination would be those payable under the Italian system.

In the case of H the amounts of the benefits payable under the United States system were not affected. However, the benefits payable under the United States system in group 8 cases will ordinarily be lowered if there was Italian service after 1950, or if the worker's insured status depends on Italian service before 1951.

Senator SPARKMAN. Mr. Roy Leifflen?

Mr. LEIFFLEN. Yes, sir.

Senator SPARKMAN. Will you come around, Mr. Leifflen?

For the record, will you give your name and the capacity in which you appear, to the reporter?

STATEMENT OF ROY LEIFFLEN, REPRESENTING THE ASSOCIATION OF MARINE UNDERWRITERS OF THE UNITED STATES

SAFEGUARDS AGAINST DISCRIMINATION IN MARINE INSURANCE ADVOCATED

Mr. LEIFFLEN. My name is Roy Leifflen, and I am appearing as counsel for the Association of Marine Underwriters of the United States, which is an organization comprised of 35 of the leading insurance companies engaged in the marine-insurance business in this country. I have a prepared statement in support of the position of the American marine underwriters, that the United States should, in treaties of commerce and friendship, provide adequate safeguards against the growing prevalence of discrimination in the field of marine insurance which prevents American marine-insurance companies from competing for the marine insurance on imports and exports.

In connection with the treaties under consideration today, insofar as we know, only Colombia and Italy have discriminatory laws or practices, but we are primarily interested in setting a pattern because it seems to us it is far better to include a prohibition against discrimination in a commercial treaty rather than to wait until a country enacts discriminatory laws or regulations and then attempts by diplomatic negotiation to have them abrogated.

I have already submitted copies of my statement, Senator, but I will be glad to read it if you wish.

Senator SPARKMAN. It is not necessary at all. The statement will be printed in full in the record.

(The statement of Mr. Roy Leifflen is as follows:)

STATEMENT ON BEHALF OF THE ASSOCIATION OF MARINE UNDERWRITERS OF THE UNITED STATES

This statement is submitted in support of the position of American marine underwriters that the United States should in treaties of commerce and friendship provide adequate safeguards against the growing prevalence of discrimination in the field of marine insurance which prevents American marine insurance companies from competing for the marine insurance on imports and exports.

At the outset we wish to emphasize that the American marine insurance market believes firmly in the principle of free competition in marine insurance and seeks only the right to compete for the marine insurance.

The problem of discrimination, which is largely a development of the postwar period, and which threatens the development of international trade itself, has become a subject of international concern, both on the private and political level.

Private insurance interests in the Western Hemisphere have in the course of three hemispheric conferences recognized the importance of eliminating such practices. At the First Hemispheric Conference, held in New York City in 1946, a resolution was presented by the Chilean delegation relative to the "Guarantee of freedom to private enterprise in the insurance field." The resolution was approved and its principle reaffirmed in the Second Hemispheric Conference held in Mexico City in 1948 and in the Third Hemispheric Conference, held in Santiago, Chilea, in October 1950.

Similarly, the proposed charter of the International Trade Organization, provides:

"ART. 53. The members recognize that certain services such as transportation, telecommunications, insurance and banking, are substantial elements of international trade, and that any restrictive business practices in relation to them have harmful effects similar to those described in par. 1 of Art. 46."

Last year the International Chamber of Commerce presented the question before the Transport and Communications Commission of the United Nations Social and Economic Council. That Commission passed Resolution 12 by a vote of 10 to 3 (Russia, Poland, and Byelorussia voting against) which recognized that discriminatory measures against marine insurance may interfere with the free flow of international trade and recommended a study of the situation by the Social and Economic Council. This resolution was approved by the Council in July.

The International Union of Marine Underwriters, having among its membership the marine insurance associations of nearly all the free countries of the world, likewise passed a resolution condemning such practices at its annual meeting held in September of last year in Switzerland.

It is submitted therefore that there is abundant evidence of the serious proportions which these practices have reached, and it is felt that the United States should take a realistic approach to the problem in negotiating future treaties of commerce and friendship.

In addition to conforming to current international opinion evidenced by the foregoing, such action would conform to congressional policy that a strong American marine insurance market is essential to the national economy and defense of this country. The House Committee on Merchant Marine and Fisheries recently stated:

"The Congress has several times in the past forcefully stated its position with regard to fostering the growth of the American marine insurance market" (H. Rept. 220, 81st Cong., 1st sess., on H. R. 1340).

The committee was referring to the principle, first enunciated in the declaration of policy of the Merchant Marine Act of 1920 and more recently in the Merchant Ships Sales Act of 1946 (Public Law 371, 79th Cong., act of March 8, 1946), that:

"It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American owned merchant marine * * * supplemented by efficient American owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services."

The Congress has consistently recognized that a strong American marine insurance industry can only exist in an atmosphere of free international competi-

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tion. Legislation dealing with marine insurance has never sought to protect American marine insurance industry from foreign competition but to place it in a position to compete on equal terms internationally. The action requested herein is similarly designed to preserve that free international competition which Congress has recognized is essential to a strong marine insurance industry.

Discrimination in marine insurance in its several forms, including laws, regulations, taxes and duties, has either directly or indirectly required marine insurance on imports and exports to and from foreign countries to be placed in the national markets, thus effectively preventing American companies not admitted to do business in the foreign country from competing for the business, as well as preventing the importer and exporter from selecting the most advantageous and economic insurance, and in many cases, causing delay, uncertainty, and confusion.

In protected marine insurance markets higher rates are usually charged because there is no international competition. The added expense is, of course, passed directly to the ultimate consumer of the goods. Similarly, the delay, uncertainty, and confusion directly inhibit the flow of goods in international trade.

The treaties of friendship and commerce with Colombia, Israel, and Denmark (art. XIV, subsec. 3), Ethiopia (art. XIII, subsec. 2), Greece (art. XVII, subsec. 1) provide:

"Nationals and companies of either party shall be accorded national treatment and most favoured nation treatment with respect to all matters relating to importation and exportation."

There is nothing on this point in the agreement supplementing the treaty with Italy and the original treaty contains narrower language.

The foregoing clause fails to afford any guaranty against the discriminatory practices in question. It does not prevent a party to such treaty from requiring its own nationals to place their marine insurance in the national market, thus preventing the free selection by the parties to international transactions of the most favorable insurance market. Moreover, if a party to such treaty thus restricts its own nationals in the selection of the insurance market it may similarly restrict the nationals of the United States.

For this reason, and for the reason that the gravity and prevalence of such discriminatory practices require affirmative language in order to assure their elimination, the following or similar words should be inserted following the above quoted words or in some other appropriate place in commercial treaties:

"Neither Party shall impose any prohibition or restriction or discriminatory tax preventing or hindering the importer or exporter of goods of either country from obtaining marine insurance on such goods in companies of either Party."

This matter has heretofore been discussed with the Department of State and a memorandum similar to this one has been submitted to the Department. Although the Department has adopted a sympathetic attitude toward the position of American marine insurance underwriters it has not inserted in a commercial treaty any provisions which would enable the American marine insurance underwriters to compete for this insurance in the traditional American manner.

It is, therefore, respectfully requested that if the Senate ratifies these treaties it be on the understanding, condition, or reservation that the clause suggested herein be made an integral part of the treaties.

DISCRIMINATORY PRACTICES OF ITALY AND COLOMBIA ON MARINE INSURANCE

Senator SPARKMAN. You state that two countries have discriminatory provisions in their legislation. What two countries are they?

Mr. LEIFFLEN, Colombia and Italy.

Senator SPARKMAN. Italy and Colombia are involved in these treaties. In what way are those provisions discriminatory?

Mr. LEIFFLEN. Colombia practices its discrimination through its laws and through the office of exchange control, penalizing importers and exporters who place insurance in companies not authorized to do an insurance business in the Republic of Colombia.

Italy, insofar as we know, has no statutory discriminatory provision, but it exercises discrimination by means of its foreign exchange control board.

Senator SPARKMAN. Do you feel that the provisions in the presently proposed treaties are not sufficiently tight on that?

Mr. LEIFFLEN. I don't think it covers the situation at all, Senator, for this reason: Even the so-called national treatment which Mr. Linder was talking about is not effective. If, say, Colombia imposes a restriction on its own nationals with respect to where they place insurance, we cannot expect them under the national treatment clause to give any better treatment to an American importer or exporter who is dealing with merchants, buyers or sellers in the Republic of Colombia.

Senator SPARKMAN. Let me ask this question, to see if I understand just what you mean. You mean a shipper from New York shipping goods into Colombia, if he took out insurance on the goods he was shipping with a New York insurance company, how would Colombia interfere with that?

Mr. LEIFFLEN. There are various types of contracts of purchase and sale. Insurance is a term of the contract between the buyer and the seller, and in some types the insurance is taken out by the Colombian purchaser or seller, and if he is required by Colombian law to take it out in a Colombian insurance company, you have one of the terms of the sale dictated by a government which is historically—and that is the way we like to see it continue—is a matter of open negotiation between the buyer and the seller in a competitive market.

Senator SPARKMAN. There would be nothing to prohibit the shipper in the case I gave, from taking out his insurance in New York, and that certainly could not be interfered with by Colombia.

Mr. LEIFFLEN. That is right.

Senator SPARKMAN. The question would be if insurance was to be provided by the buyer in Colombia, or in the event of shipping out of Colombia if it was to be provided by the shipper in Colombia. Then it would have to be taken by a Colombian company; is that right?

Mr. LEIFFLEN. Yes, sir, that is right. In some cases it goes further. For instance, in Argentina there is a law that if the goods coming into Argentina or going out of Argentina are at the risk of the Argentine purchaser or seller, as the case may be, the insurance must be taken out with an Argentine insurance company or else there is a large penalty.

That also has an effect on the terms of the contract which takes one term of the contract out of the sphere of free negotiation between the buyer and seller, and that is what the American insurance companies want to provide against, because historically it is a free market.

Senator SPARKMAN. You believe that in negotiating these agreements that should be one matter that should be included in the negotiations?

Mr. LEIFFLEN. Yes, sir, in negotiating commercial treaties we think our Department of State should endeavor to include a prohibition against governmental interference with the placement of marine insurance so it will be left to the buyer and seller to decide who is to take out the insurance and in what market, exactly like the financing, what the terms will be—10 days, 30 days, 2 months; the method by which the commodity will be packed. All those matters are, we feel, as advocates of private industry and business, matters which should not be dictated by any government.

Senator SPARKMAN. Senator Hickenlooper, have you any questions on this point?

Senator HICKENLOOPER. Mr. Chairman, I think I understand the position.

NATIONAL TREATMENT WITH RESPECT TO THE PRACTICE OF PROFESSIONS

I would like to ask Mr. Linder some questions. This note was just sent me by a member of the Senate who asked me to inquire into it, and it is here. This has to do with article VIII in the treaty with Israel. I have just asked Mr. Marcy to check the other treaties. Perhaps you can tell me whether the same article is in any of the other treaties.

The entire article VIII apparently is an attempt to give great latitude and privilege to the nationals of either party to use their own technical and professional experts within the territory of the other; and then, in paragraph 2 of article VIII, it reads as follows:

Nationals of either party shall not be barred from practising the professions within the territories of the other party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other party.

Now, as I read that, it would mean that nationals of Israel having first been properly admitted here and having met any examinations for professional or technical competence that may apply to American citizens, can go on indefinitely practising their professions here and remain aliens at all times.

Mr. LINDER. No. Do you want me to reply, sir?

Senator HICKENLOOPER. I say, that is the way I would interpret that No. 2, and I would like to comment on that.

First, is a similar provision to article VIII in the treaty with Israel in any other treaty?

Mr. WALKER. It has been in our treaties since 1923.

Mr. LINDER. And it does not carry the implication that you read into it. It rather means that a citizen of Israel or any other country with whom we have such an agreement may, upon being properly admitted to the United States, not be barred by reason of being a citizen of Israel from doing what anybody else in this country may do. In the case of certain provisions that is a matter regulated by the State and, as I understand it, a citizen of Israel, if he wants to practice medicine in, say, Florida or New York, he has to do whatever the requirements of those States are.

Senator HICKENLOOPER. I am not familiar with this subject. I mean, I can't make any positive allegation, but it runs in my mind that there are a number of States that have a flat prohibition against licensing of an alien to practice certain professions or businesses which require a specific professional license. This would abrogate that, I take it.

Mr. WALKER. Insofar as the alienage requirement is concerned, that is correct. That has been treaty policy since 1923. It has been in most treaties since then. This is a more explicit statement of the rule that has been in effect. It is national treatment on the practice of professions.

(The following information was subsequently supplied by the Department of State:)

Eight treaties (those with Austria, El Salvador, Germany, Honduras, Hungary, Liberia, Norway, and Uruguay) provide for national treatment generally; and two (Italy and Ireland) so provide except for the practice of law, which in turn is covered by a most-favored-nation clause. Five of the remaining six also contain national-treatment clauses, but subject to qualifications. The treaty with Poland

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excepted professions reserved to citizens by laws in force on June 15, 1931; and provided further for most-favored-nation treatment on condition of reciprocity. The treaty with Finland contains the reservation "insofar as may be permitted by local law," but supplements this with a most-favored-nation clause. The treaties with China, Estonia, and Latvia contain an exception for professions "reserved exclusively to nationals of the country," without specifying whether a profession can be considered exclusively reserved to citizens if open to other aliens by virtue of a treaty with any third country. The treaty with Siam merely provides for most-favored-nation treatment on condition of reciprocity.

Senator HICKENLOOPER. Therefore I would interpret it that if an alien, under the provisions in these treaties, who is an engineer or a doctor or a lawyer or of any other profession, once has a proper entry into this country; that is, if he is here under proper entry, then the fact that he is an alien would not bar him—that alone—from the practicing of his profession if he could meet the educational standards or whatever the standards are within the area met by Americans.

Mr. LINDER. He would be required to meet all standards except the one of citizenship.

Senator HICKENLOOPER. And therefore a State law in conflict with that would fall under this treaty.

Mr. LINDER. And under other treaties that we have had for many years.

(The following information was subsequently furnished:)

MAY 16, 1952.

Hon. JOHN J. SPARKMAN,
United States Senate.

MY DEAR SENATOR SPARKMAN: I have been informed by Acting Assistant Secretary of State Linder that some questions have arisen concerning article VIII, paragraph 2, of the Treaty of Friendship, Commerce, and Navigation with Israel (Executive R), Eighty-second Congress, first session, which is now being considered by the subcommittee of which you are the chairman. This article reads as follows:

"2. Nationals of either Party shall not be barred from practising the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other Party."

This article means that a national of Israel shall not be barred from practicing a profession in the United States merely because of his alienage. As the article states, he must comply with State laws regarding qualifications, residence, and competence in his profession which a State applies to any citizen of the United States. If a State, for example, requires a written examination, residence in the State, etc., before it will grant a license to a physician, the particular foreign national must meet all such requirements. The only requirement, if it exists in any State, which may not be imposed, is that the individual concerned be a United States citizen.

Counterparts of this provision granting national treatment with respect to the practice of professions are contained in at least 10 treaties between the United States and other countries to which the advice and consent of the Senate have been given after full consideration. These are the treaties between the United States and Germany of 1923 (art. I, par. 1); with Austria of 1928 (art. I, par. 1); with El Salvador of 1926 (art. I, par. 1); with Honduras of 1927 (art. I, par. 1); with Hungary of 1925 (art. I, par. 1); with Liberia of 1938 (art. I, par. 1); with Uruguay of 1949 (art. V, par. 1 (a)); with Ireland of 1950 (art. VI, par. 1 (a), excepting only law); and with Italy of 1948 (art. I, par. 2 (a), excepting only law)., It is also contained in the treaty with Colombia (Executive M, 82d Cong., 1st sess., art. VII, par. 1), which is presently being considered by your committee.

The practice of the United States Government,to include national treatment provlions respecting the practice of professions in bilateral friendship and commerce treaties has thus been followed for nearly 30 years, and has been repeatedly merce treaties has thus been followed for nearly 30 years, and has been repeatedly approved by the Senate in its advices and consents to ratifications of these treaties. The practice was established and has been followed because it is in the interest of the Government and people of the United States. Americans are engaged in

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business and professions all over the world. They have requested, and the United States Government has deemed it appropriate to support, efforts to protect them in their right freely to pursue legitimate business and professional activities without discrimination on account of their American citizenship. Since firm commitments in treaties between foreign countries and the United States respecting this right is the most effective manner by which those rights may be secured, the United States has sought and achieved the execution of treaties with foreign countries which contain such commitments.

Since treaties involve reciprocal obligations, the United States cannot expect to secure the protection of rights of American citizens to practice professions abroad, or to engage in other gainful pursuits, without being prepared to accord reciprocal treatment in the United States to nationals of the particular foreign country. Fortunately, the United States is able to accord reciprocity with minimum interference with local legislation, since our country has always been hospitable to persons contribute to the building of a healthy and expanding economy. As a consequence of this traditional hospitality, there are on the whole few and relatively minor legal restrictions imposed by local laws on account of alienage, far fewer than are to be found in the laws of almost all other countries. As a result, by these reciprocal treaty commitments, the United States has gained most of the advantages for American citizens. A reversal of this established United States practice would be a retrogressive step inconsistent with and harmful to the interests of the United States and of American citizens.

Sincerely yours,

JACK B. TATE,
Acting Legal Adviser.

NATIONAL TREATMENT WITH RESPECT TO SCIENTIFIC, EDUCATIONAL, RELIGIOUS AND PHILANTHROPIC ACTIVITIES

Senator HICKENLOOPER. Article VIII, section 3:

Nationals and companies of either party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party. Nothing in the present treaty shall be deemed to grant or imply any right to engage in political activities.

Is that an innovation in treaties?

Mr. LINDER. No, sir; it is not. It was in the Uruguayan Treaty and the Italian and Irish treaties.

Senator HICKENLOOPER. It is not in the other treaties heretofore, historically?

Mr. LINDER. I don't know how far back, but I know it was in those three treaties.

Senator HICKENLOOPER. Well then, as I understand it, in these treaties that we have formerly adopted, and in these treaties that are now proposed, any organization or group of people from any of the treaty countries can come here and they have a guaranteed right under this treaty to form such organizations engaged in scientific, educational, religious, or philanthropic activities as they please so long, I assume, as they do not violate criminal laws of some kind. But there is very little limit to this thing.

Mr. LINDER. As I understand it, Senator, it says that they may do the same things that a national of this country may do in that respect, and that we may do the same things as a national of their country may do, and that in any event, if any other foreign country is given more advantageous treatment, we shall share in that treatment and, by the same token, if we give more advantageous treatment to a third country they will have the benefit of that more advantageous treatment.

Senator HICKENLOOPER. I was not aware that that provision had been in existence with other countries. It has fascinating possibilities.

Mr. LINDER. It has on the whole been one that we have sought. We have sought it for our missionary activities, and I think it has been harder for us to obtain rather than the reverse.

Senator HICKENLOOPER. That is all, thank you.

As I say, this inquiry was made on the request of another Senator, asking that I inquire into this matter.

Senator SPARKMAN. May I ask a simple question for the record? An alien is a person who was born abroad and has not been naturalized?

Mr. LINDER. That is right.

Senator SPARKMAN. After he is naturalized he is no longer an alien?

Mr. LINDER. That is correct.

(The following communications were received for insertion subsequent to the hearing:)

THE SECRETARY OF COMMERCE,
Washington 25, D. C., May 12, 1952.

Hon. TOM CONNALLY,
Chairman, Committee on Foreign Relations,
United States Senate, Washington 25, D. C.

DEAR MR. CHAIRMAN: I am glad to have this opportunity again to endorse the program for the negotiation of modernized general commercial treaties with interested foreign countries.

Aside from certain refinements and variations in detail, I understand that four of the five commercial treaties that have been concluded during the past year — those with Colombia, Greece, Israel, and Denmark — contain substantially the same provisions as the general commercial treaties with Ireland and Uruguay, to which the Senate gave its consent in 1950. The fifth, that with Ethiopia, is an abridged form designed to achieve the same general objective. In addition, there is the Italian supplementary agreement which is intended to bring the 1948 treaty with that country abreast of later developments.

American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions of these treaties. These provisions include the ones which concern the protection of their persons and property in the other countries involved, the permitted range of their activities in those areas, the conditions of their investment and withdrawal of funds, and the treatment of imports and exports.

As you may know, the Department of Commerce has recently been giving special attention to the problems of facilitating mutually profitable private United States investments in foreign countries. The conditions under which foreign enterprises may be established and operated in the various countries, the obligations which they must assume, and the rights of which they can feel assured, are outstanding among these problems. It is therefore particularly gratifying that the modernized commercial treaties contain explicit provisions on these questions. In our opinion, they should go far toward creating — so far as governmental agreements can — that much desired favorable climate necessary to attract American capital and technology.

These commercial treaties can do no more, of course, than establish the standards to be applied reciprocally by the contracting governments in these matters. Various other favorable conditions must be present before individual firms will launch ventures where these assurances can come into play. However, our discussions with American businessmen have revealed their belief that the conclusion of commercial treaties of the type now before your committee is one of the most useful steps the Government can take to aid private United States foreign investors. I am sure they will welcome your approval of these treaties.

Sincerely yours,

CHARLES SAWYER,
Secretary of Commerce.

Annex 224

AMERICAN ARBITRATION ASSOCIATION,
New York 20, N. Y., May 14, 1952.

Hon. TOM CONNALLY,
Chairman, Committee on Foreign Relations,
United States Senate, Washington, D. C.

MY DEAR SENATOR: Your committee is considering the treaties of commerce, friendship and navigation which the United States recently concluded with Denmark, Israel, Colombia, and Greece, and the agreement supplementing the commercial treaty with Italy.

All these treaties contain a provision facilitating the mutual enforcement of arbitration agreements and awards in commercial disputes between citizens of the respective countries. The State Department is to be highly commended for introducing this modern feature in bilateral treaties, thus making a real contribution to the advancement and use of arbitration.

This association, which has been dealing with international commercial arbitration in the interests of American trade and commerce for more than 25 years, considers this provision of the treaties a valuable feature and a successful effort in the protection of American trade interests.

The standard arbitration provisions in these treaties will guarantee the American trader the effective use of arbitration abroad. When, on the other hand, execution of awards rendered in a foreign country is sought in any State of the Union, they are subject to the law prevailing in the respective State and have to comply with its requirements. Thus, the rights of the States of the Union are preserved, in regard to the application of their arbitration laws.

The association welcomes the efforts, as embodied in the treaties, to secure the enforcement of arbitration agreements and awards in the interests of American trade. It recommends in this respect favorable consideration of the treaties.

Very sincerely yours,

A. C. CROFT, *President.*

(NOTE.—The subcommittee then considered the consular conventions. This portion of the hearing was printed as appendix to Ex. Rept. 8, 82d Cong., 2d sess., Consular Conventions with Iceland and with Great Britain.)

Senator SPARKMAN. Thank you very much.

(The hearing was adjourned at 12:10 p. m.)

×

Annex 224

Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments

Following is the text of a letter addressed to Acting Attorney General Philip B. Perlman by the Department's Acting Legal Adviser, Jack B. Tate:

MAY 19, 1952.

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring

the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:
JACK B. TATE
Acting Legal Adviser

U.S., Mexico Extend Migrant Labor Agreement

[Released to the press June 12]

The United States and Mexico exchanged diplomatic notes on June 12 extending the Migrant Labor Agreement of August 11, 1951. The agreement, which was due to expire on June 30, 1952, has been extended for a period of time not beyond December 31, 1953, unless terminated sooner by not less than 30 days' notice in writing by either of the two countries.

The Migrant Labor Agreement of 1951 was negotiated pursuant to Public Law 78 of the Eighty-second Congress which authorized the Secretary of Labor to recruit agricultural workers from Mexico in order to assist in the harvesting of crops in the United States.

In extending the present agreement, certain important amendments and additions have been made which are consistent with the interests of both countries. (Copies of the Migrant Labor Agreement of 1951, as amended, are available in the Department of Labor press room.)

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Treaty Art. XI-one. Proposed amendment would destroy effectiveness provision and establish bad precedent US commercial policy. Department prefers drop all trade provisions to substantive change or deletion monopoly provisions especially view Iran's reliance government monopolies. Mention this case Iran committed similar provision 1943 Trade Agreement but be guided Deptel 1012. Suggest commercial considerations as defined in text offer enough latitude enable Iran ward off undesirable possibilities envisaged.

Art. XI-2-b. Delete QUOTE concessions and other UNQUOTE.

Art. XI-4. Department considers specific references to public enterprises including examples as making clear application paragraph and desires retain original language which carefully worked out legal experts.

Since Congressional policy now makes aliens admitted permanent residence liable compulsory military service, Department cannot consider treaty provision for exemption.

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Annex 226

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Origin

Info:

Department aware cumulative negative responses may jeopardize negotiation and has sought diligently find means accommodate Iranian views. Embassy must realize however many provisions draft treaty express fundamental policy principles which vitiated by ill considered changes and effect could not be limited U.S.-Iranian relations.

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Example trade provisions constitute body rules laboriously worked out over long period prevent most known methods discrimination. Bilateral barter and clearing agreements among most objectionable discriminatory devices. Exception for such devices undermines whole concept nondiscriminatory regulation trade. Similarly Article XI-one-A basic rule restrain discriminatory practices state entities and seeks apply rules of market place same as followed by private traders.

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~~Provision~~. Introduction broad concept economic considerations opens door to discrimination. Has comparable provision in 1943 Trade Agreement caused difficulties with Russians? If these changes authorized in case Iran difficult deny them other countries, and Department hindered maintaining consistent commercial policy applicable all countries. If Embassy convinced trade provisions unacceptable Iran without fundamental changes, propose deletion Article VIII, IX (1-2), and XI (one).

40

Article III-one).

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EDT/CB:VGSetser:rpn 12/18/54

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Article III-one. Embassy for first time makes explicit that exchange assuring notes ~~xxxxxxx~~ rights Iranian public corporations in US would be secret. Such device out of question, not only for general policy reasons but specifically because Article 102 UN Charter requires Members register and publish agreements. Would Iran consider a mutual limitation of treaty rights to private corporations? US laws do not in fact discriminate against public corporations, and treaty would accord no rights to Iranian public corporations not now provided by law. No assurance acceptability this device, but will consider if desired.

Article XI-4. Iranian amendment objectionable because it eliminates obvious indication paragraph contains waiver sovereign immunity. If how can it be interpreted and applied? provision not specific that it relates State entities, Embassy may accept Iranian wording provided QUOTE for the reason that it is publicly owned or controlled UNQUOTE is added after QUOTE enjoy UNQUOTE.

Hoover, Acting
~~H.D.~~ HOOVER

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Annex 227

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

79-2641

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,

Plaintiff-Appellee

VS.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN

Defendant-Appellant

An Appeal From the United States
District Court for the
Northern District of Texas, Dallas Division

BRIEF FOR APPELLANTS THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN

D. L. Case and
John M. Skrhak, Jr.
JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
4300 First National Bank Bldg.
Dallas, Texas 75202
214/655-2911

Attorneys for Appellants
The Social Security Organization
of the Government of Iran, The
Ministry of Health and Welfare
of The Government of Iran, and
The Government of Iran

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

79-2641

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,

Plaintiff-Appellee

VS.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN

Defendant-Appellant

CERTIFICATE REQUIRED BY
FIFTH CIRCUIT LOCAL RULE 13(a)

The undersigned, counsel of record for Defendant-Appellants The Social Security Organization of the Government of Iran, The Ministry of Health and Welfare of the Government of Iran and The Government of Iran certifies that the following listed parties have an interest in the outcome of this appeal:

(1) The Government of Iran

(2) The Ministry of Health and Welfare of the Government of Iran

(3) The Social Security Organization of the Government of Iran

(4) The Iranian Air Force and Navy

(5) The Ministry of Defense for the Government of Iran

(6) Jackson, Walker, Winstead, Cantwell & Miller

(7) Abourezk, Shack and Mendenhall

(8) Whitman and Ransom

(9) Electronic Data Systems Corporation of Iran

(10) Electronic Data Systems, Inc.

(11) Electronic Data Systems World

(12) Hughes & Hill

(13) Kaye, Scholer, Fierman, Hayes and Handler

These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a).

D. L. Case
John M. Skrhak, Jr.

Attorneys for the Defendant-Appellants

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

79-2641

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,

Plaintiff-Appellee

VS.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN

Defendant-Appellant

REQUEST FOR ORAL ARGUMENT

The undersigned counsel of record for Defendant-Appellants respectfully request that this appeal be set for oral argument immediately after all the Briefs have been filed. The millions of dollars that have been frozen as a result of the Plaintiff's conduct and its potential effect on U.S. foreign relations and America's traditional status as a secure place for international transactions justifies oral arguments so that the issues can be further refined and fully developed before this honorable Court.

D. L. Case
John M. Skrhak, Jr.

Attorneys for Defendant-Appellants

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NO. 79-2641

IN THE

UNITED STATES COURT OF APPEALS

FOR

THE FIFTH CIRCUIT

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,	)	Plaintiff-Appellee
v.	)	
THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, AND THE GOVERNMENT OF IRAN.	)	Defendants-Appellants

Appealed From The United States District Court
For The Northern District of Texas

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES PRESENTED

This case arises under the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §1602 et seq. (hereinafter sometimes referred to as the "Act"). This is an appeal from the District Court's preliminary injunction of June 11, 1979 and memorandum opinion of June 21, 1979. The Appellants (hereinafter sometimes referred to collectively as the "Defendants") are the Government of Iran, a

foreign state with which the United States has normal diplomatic relations, and two of its governmental agencies: the Social Security Organization of the Government of Iran, and the Ministry of Health and Welfare of the Government of Iran. This interlocutory appeal is authorized by 28 U.S.C. § 1292(a).

The District Court, on June 11, 1979 entered a preliminary injunction against the Government of Iran enjoining it from removing or transferring any funds from the Marine Midland Bank in New York. (R. Excerpts, pp. 42-43) Additionally, the District Court's "Memorandum Opinion" of June 21, 1979 (R. Excerpts, pp. 44-66) overruled the motions to dismiss of the Social Security Organization of the Government of Iran and the Ministry of Health and Welfare of the Government of Iran and thereby refused to dissolve the preliminary injunctions of March 12, 1979 that had enjoined these two governmental agencies of the Government of Iran from removing any property or assets from the United States.

By this appeal the Defendants submit the following:

1. The preliminary injunctions are void due to lack of personal jurisdiction since the Defendants have not been served with process in compliance with the Foreign Sovereign Immunities Act of 1976.

2. The District Court did not have jurisdiction to enter the preliminary injunctions against the Defendants since:

a. Electronic Data Systems Corporation Iran's claim against the Defendants is not within any exception to the doctrine of sovereign immunity

b. Defendants have not waived their sovereign immunity with respect to Electronic Data Systems Corporation Iran's claim.

3. The District Court did not have jurisdiction over the Government of Iran with respect to the Electronic Data Systems Corporation Iran's claim of

interference of contractual rights since the Foreign Sovereign Immunity Act expressly grants to foreign states, immunity from jurisdiction by United States courts for any claim arising out of interference with contract rights.

4. The preliminary injunctions should be dissolved since they violate the Foreign Sovereign Immunities Act's ban on prejudgment attachments.

5. The legal justification for the preliminary injunctions against the Defendants was to prevent the removal of assets from the Courts jurisdiction in order that Electronic Data Systems Corporation Iran might be able to satisfy any judgment that it might eventually obtain. Said preliminary injunctions should be dissolved since the assets and funds which the Defendants have been enjoined from removing are exempt from execution under the Foreign Sovereign Immunities Act.

6. The funds in the Marine Midland Bank in New York are not subject to execution, under the Foreign Sovereign Immunities Act since:

a. The funds are of a military character under the control of the Iranian Ministry of Defense;

b. Funds belonging to a foreign government or one of its agencies are not subject to execution to satisfy a judgment against another agency of that same foreign government.

7. The District Court abused its discretion in requiring only nominal security of Electronic Data Systems Corporation Iran for the preliminary injunctions.

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition In The Court Below

On February 23, 1979 suit was filed by Electronic Data Systems Corporation Iran (hereinafter "Plaintiff") against the Social Security Organization of the Government of Iran (hereinafter "SSO"), the Ministry of Health and Welfare of the Government of Iran (hereinafter "Ministry"), the Government of Iran and ITEL Corporation.[1] (R. Excerpts, pp. 1-11)

On March 12, 1979 the District Court entered a preliminary injunction against the SSO and the Ministry enjoining them from removing any assets from the United States during the pendency of this matter. (R. Excerpts, pp. 17-20)

On April 2, 1979 Plaintiff applied to the Court for a temporary restraining order and preliminary injunction enjoining the Government of Iran from transferring or removing any of its funds from the Marine Midland Bank in New York during the pendency of this matter. The temporary restraining order was granted and the Court set for hearing, Plaintiff's request for a preliminary injunction. (R. Excerpts, pp. 22-25, 36-38)

On April 12, 1979, the Government of Iran, the SSO and the Ministry all filed motions to dismiss wherein it was asserted that the Court did not have personal or subject matter jurisdiction over those Defendants and that service of process on those Defendants was improper and not in accordance with the requirements of the Foreign Sovereign Immunities Act. (R. Excerpts pp. 39-40)

On June 11, 1979 the Court granted Plaintiff's request for a preliminary injunction and enjoined the Government of Iran from directly or indirectly removing or transferring from the Marine Midland Bank of New York any funds maintained in its name, held in trust for or otherwise belonging to or claimed by the Government of Iran. (R. Excerpts pp. 42-43)

In a memorandum opinion dated June 21, 1979 (R. Excerpts pp. 44-66) the District Court overruled the motions to dismiss filed by the SSO and the Ministry (R. Excerpts pp. 50-51) and carried the Government of Iran's motion to dismiss, pending Plaintiff's efforts to serve the Government of Iran. (R. Excerpts pp. 51-55)

Notice of appeal was given by the Defendants on June 28, 1979, (R. Excerpts p. 67) and on July 3, 1979 as a prerequisite to seeking a stay of preliminary injunctions from this Court, Defendants filed with the District Court its' Motion to Stay Preliminary Injunctions Pending Appeal (R. Excerpts pp.68-69), which was overruled on July 11, 1979. (R. Excerpts p. 70)

The Court in its memorandum opinion of June 21, 1979 sustained Plaintiff's request for an immediate and expedited trial setting and set the matter for trial for August 20, 1979, with a discovery deadline of July 10, 1979 (R. Excerpts p. 63). As a result of Defendants' Motion for Continuance which was objected to by the Plaintiff, the Court reset the trial on the merits for November 19, 1979. (R. Excerpts p. 71)

II. Statement Of Facts

Plaintiff brought this suit against the SSO, the Ministry and the Government of Iran seeking damages in excess of $20 million as a result of certain alleged breaches of a data processing systems contract dated November 22, 1976. The parties to the contract were the Plaintiff, the SSO and the Ministry. It was asserted in Plaintiff's sworn Complaint (R. Excerpts pp. 1-2) that the SSO and Ministry were both " 'an agency or instrumentality of a foreign state' as those terms are defined in 28 U.S.C. §1603", of the Foreign Sovereign Immunities Act.

(An "agency or instrumentality of a foreign state" is defined in §1603 of the Act as "a separate legal person, corporate or otherwise" which is an organ of or owned by a foreign state.) The Government of Iran was not a party to the contract of November 22, 1976, but the Complaint alleged that the Government of Iran was responsible for the alleged breaches because it had wrongfully interfered with the contract and had allegedly induced the SSO and the Ministry to breach the contract. (R. Excerpts p. 7)

Upon the filing of the Complaint, Plaintiff requested a temporary restraining order and a preliminary injunction, to restrain the SSO and the Ministry from directly or indirectly removing any of their assets or property from the United States during the pendency of this legal proceeding. No injunctive relief was requested or granted with respect to the Government of Iran. Additionally upon filing of the Complaint, it was requested by the Plaintiff that the Clerk withhold service of process on the Government of Iran. (R. Excerpts p. 14)

On the same date that the suit was filed the District Court authorized service on the SSO and the Ministry through the State Department in the manner set forth in The Foreign Sovereign Immunities Act, 28 U.S.C. §1608(a)(4), (R. Excerpts pp. 12-13) and granted the temporary restraining order requested by Plaintiff.

On February 26, 1979, the Clerk of the Court transmitted to the Secretary of State a copy of the summons with the complaint to be served on the SSO and the Ministry pursuant to §28 U.S.C 1608(a)(4) of the Foreign Sovereign Immunities Act. It was requested by the Clerk in the letter of transmittal that the Secretary of State return to the Clerk a certified copy of the "diplomatic

note" required by that section, indicating when the papers were transmitted by the Secretary of State to the SSO and the Ministry. (R. Excerpts p. 15) The Court's records reflect that the State Department reportedly received the letter of the Clerk on February 28, 1979, however, the Court's records do not reflect that prior to the entry of the preliminary injunction against the SSO and the Ministry that the State Department had ever forwarded to the SSO and the Ministry the summons and complaint, or transmitted to the Clerk the requested certified copy of the diplomatic note indicating if or when the papers were in fact transmitted to the SSO and the Ministry. The Clerk's letter of February 26, 1979 did not purport to transmit to the State Department, a summons and complaint for service on the Government of Iran nor was any reference made in that letter with respect to service on the Government of Iran. (R. Excerpts p. 15)

On March 12, 1979, the District Court entered an ex parte preliminary injunction enjoining the SSO and the Ministry from transferring or removing any of its assets or properties from the United States. The preliminary injunction was contingent on the Plaintiff posting a $100,000 bond. The Court further held that the preliminary injunction would be dissolved if the SSO and the Ministry posted a $20 million bond. (R. Excerpts p. 17-20) The SSO, the Ministry, and the Government of Iran had not been served at this time and thus did not appear or participate at this hearing.

On March 12, 1979, the same day that the preliminary injunction was entered against the SSO and the Ministry, the Plaintiff evidently realized that service through the State Department was not authorized for governmental agencies of a foreign state under the Foreign Sovereign Immunities Act, or that service through the State Department had not been perfected or received by the

SSO or Ministry. Accordingly, it was requested that the Court enter an order providing that the SSO and the Ministry were to be served with process by registered mail pursuant to 28 U.S.C. 1608(b)(3)(C). This request was granted by the District Court. (R. Excerpts p. 21)

On April 2, 1979 Plaintiff applied to the District Court for a temporary restraining order and preliminary injunction against the Government of Iran. (R. Excerpts pp. 22-25) The basis of that application was an affidavit from Plaintiff's counsel that he had discovered while taking an ex parte deposition of the assistant manager of Bank Sepah, an Iranian bank in New York, that the Government of Iran was allegedly "secreting assets" in excess of $8 million by transferring funds to another New York bank. (R. Excerpts p. 26) Attached to said affidavit of Plaintiff's counsel was an excerpt (R. Excerpts pp.28-34) from a deposition excerpt of a William F. Bolen, the assistant manager for Bank Sepah. Said deposition reflected that Bank Sepah had accounts in the name of the Iranian Air Force and Navy but that both of these accounts were closed on March 26 and 28, 1979 as a result of a request from the Iranian consulate to transfer the funds in those accounts to the Marine Midland Bank in New York. Said deposition excerpt further reflected that the transfer of these funds was approved and verified by the Ministry of Defense for the Government of Iran. (R. Excerpts p. 33)

The application for the temporary restraining order and preliminary injunction requested that the Government of Iran be enjoined and restrained from transferring any funds from the Marine Midland Bank. The Court granted the temporary restraining order and set bond for the Plaintiffs at $10,000. (R. Excerpts pp.36-38)

On the same date that the temporary restraining order was granted with respect to the Government of Iran, Plaintiff filed a "certificate of counsel" with the Court indicating that they had made no attempt or effort whatsoever to give notice of this application for the temporary restraining order to the Government of Iran. (R. Excerpts p. 35) At no time prior to the entry of the preliminary injunction or the Court's memorandum opinion of June 21, 1979, had the Plaintiff even attempted to serve the Government of Iran with process. (R. Excerpts pp. 54-55)

On April 12, 1979, the Government of Iran, the SSO and the Ministry all filed motions to dismiss wherein it was asserted that the Court did not have personal or subject matter jurisdiction over those Defendants and that service of process on those Defendants was improper and not in accordance with the requirements of 28 U.S.C. §1608 of the Foreign Sovereign Immunities Act. (R. Excerpts pp. 39-40)

A hearing was held on Plaintiffs application for a preliminary injunction on May 3, 1979, and on May 4, 1979 the Court entered an order extending the temporary restraining order against the Government of Iran until it had ruled on Plaintiff's application for a preliminary injunction. (R. Excerpts p. 41)

At the preliminary injunction hearing, Plaintiff presented testimony that in November of 1976 it entered into an agreement with the SSO and the Ministry to provide data processing systems and services for Iran's social security and national health insurance programs. The agreement that was introduced into evidence at the hearing reflected that Plaintiff was to render all of its services in Iran, and that the SSO was to provide all necessary hardware. The agreement also expressly gave the SSO the right to terminate the contract at any time, without

cause. All notices under the agreement to either party were to be sent to them at addresses in Iran. In the event of force majeure (including "war," "strikes," "civil disturbance"), either party "will be excused" from the performance of the agreement. The parties were required to mediate disputes arising out of the agreement, and in the event of nonagreement, disputes were to be settled "according to the Iranian law through referring to the competent Courts." The testimony at the preliminary injunction hearing indicated that Plaintiff terminated the contract by reason of the fact that the SSO and the Ministry were allegedly in default of the payments pursuant to that contract and had failed to provide more effective measures to assure the safety of Plaintiff's employees, all as a result of civil war, strikes and rioting against the Imperial Government of Iran.

On June 11, 1979 the Court granted the Plaintiff's application for preliminary injunction and enjoined the Defendant Government of Iran from directly or indirectly removing or transferring from the Marine Midland Bank of New York any funds maintained in its name, held in trust for or otherwise belonging to or claimed by the Government of Iran. Said order also provided that the preliminary injunction would be dissolved upon the execution and filing by the Government of Iran of a bond in the sum of $20 million and that the preliminary injunction would become effective upon the Plaintiff filing with the Clerk a bond in the sum of $10,000. (R. Excerpts pp. 42-43)

In a memorandum opinion dated June 21, 1979 the District Court overruled the motions to dismiss filed by the SSO and the Ministry (R. Excerpts pp. 51, 54) and carried the Government of Iran's motion to dismiss, pending Plaintiff's efforts to serve the Government of Iran (R. Excerpts pp.54-55).

With respect to service on the Government of Iran, the Court recognized that Congress intended to provide the "exclusive" procedure for service on a foreign state such as the Government of Iran and that Plaintiff had not in fact ever attempted service on the Government of Iran, in the more than three months following the filing of the suit (R. Excerpts p. 53). Nevertheless, the Court held that despite the lack of any attempt to serve the Government of Iran the Court had jurisidiction to preliminarily enjoin the Government of Iran, since it had notice of the preliminary injunction. (R. Excerpts p. 56)

With respect to service on the SSO and the Ministry, the District Court noted that it had authorized service pursuant to §1608(b)(3)(C) on the Foreign Sovereign Immunities Act on these two Defendants on March 12, 1979, the same date that these Defendants were preliminarily enjoined, by mailing from France a copy of the summons and the complaint to the SSO and the Ministry in Tehran, Iran (R. Excerpts p. 51). The Court held that thus service "was attempted" on those Defendants in compliance with the Foreign Sovereign Immunities Act and that although there was no proof of receipt of service on those Defendants, nevertheless "its absence will not mandate dismissal at this time", even though this method of service has been authorized more than three months prior to the Court's memorandum opinion. (R. Excerpts p. 51)

On June 12, 1979, the Plaintiff also obtained from the District Court for the Southern District of New York, an attachment order, directing the New York County Sheriff to levy upon and seize all funds belonging to the Defendants at the Marine Midland Bank. As a result of that attachment order, funds in excess of $15 million have been levied upon and deposited in a bank account in the name of the New York County Sheriff. That matter is now pending in the Court of

Appeals for the Second Circuit and oral argument on that appeal is scheduled for October.

SUMMARY OF THE ARGUMENT

The Plaintiff has openly and deliberately ignored and flaunted every substantive provision of the Foreign Sovereign Immunities Act and has obtained preliminary injunctions at a time when service was not even attempted much less perfected on any of the Defendants. Consequently the SSO and the Ministry have been illegally restrained from conducting any financial transactions in the United States and all of their assets in the United States have been frozen pending litigation of the Plaintiff's claim. Moreover in excess of $15 million have been frozen in the Marine Midland Bank of New York and neither the Government of Iran nor any of its governmental agencies or enterprises can safely conduct any transaction, including the payment of any outstanding contractual obligations without the immediate and real threat that their U.S. funds will be impounded in total disregard of the provisions the Foreign Sovereign Immunities Act. The sweeping relief obtained by the Plaintiff is unprecedented and cannot be legally justified and if condoned would serve notice on all other foreign states and their agencies and business that international transactions cannot be safely conducted in the United States without fear of the unrestrained reprisals and illegal attachments that the Defendants have been subjected to in this matter.

The Foreign Sovereign Immunities Act of 1976 provides for the exclusive method of service of process for suits against foreign states and their governmental agencies. At the time that the preliminary injunctions were entered, neither the Government of Iran, the SSO nor the Ministry, had been

served with process. Moreover, service in compliance with the Act had not even been attempted prior to the dates that the Defendants were enjoined. This was expressly recognized by the District Court with respect to the Government of Iran in its memorandum opinion. The legal significance of this, is that the District Court did not have personal jurisdiction over any of the Defendants at the time that the preliminary injunctions were entered.

In addition to service of process in compliance with the Foreign Sovereign Immunities Act of 1976, before a district court acquires "personal jurisdiction" over a foreign state or agency, the plaintiff's claim must be one that the foreign state or agency is not entitled to immunity from under the Act. Although Plaintiff asserts that its claim against the Defendants is within the "commercial activity" exception to the doctrine of sovereign immunity, the record is void of any evidence that the Government of Iran has engaged in the United States or anywhere else in any commercial activity with respect to the agreement in question, or the claim that is the basis of Plaintiffs suit. Moreover, it is clear from the evidence that during the time that the agreement in question was negotiated, executed, in effect or terminated, neither the SSO nor the Ministry, were engaged in any commercial activity in the United States or had substantial contact with the United States. Clearly, Plaintiff has failed to establish that its claim is within the "commercial activity" exception to the doctrine of sovereign immunity, and thus the District Court did not have personal jurisdiction over the Defendants with respect to that claim.

It is further submitted that the Defendants have not waived its sovereign immunity by reason of the Treaty of Amity between the United States and Iran, since that commercial treaty governs commercial activities that are

conducted in the United States by enterprises that are in direct competition with U. S. businesses and there is no evidence that any of the Defendants have engaged in commercial activity or in competition with any business in the United States.

The sole basis of Plaintiff's suit against the Government of Iran is that it interfered with its contractual rights arising from the agreement with the SSO and Ministry. The Foreign Sovereign Immunities Act grants absolute immunity from the jurisdiction of any U.S. court for any claim arising out of interference with contract rights. Thus the District Court did not have jurisdiction over the Government of Iran with respect to Plaintiff's claim of contractual interference.

Moreover the preliminary injunctions are violative of the Foreign Sovereign Immunity Act's ban on prejudgment attachments. The Foreign Sovereign Immunities Act mandates that property of a foreign state or agency is immune from prejudgment attachment unless that property is or was used for the commercial activity upon which the plaintiff's claim is based and there has been an explicit waiver of immunity. This ban of prejudgment attachments includes preliminary injunctions to prevent assets from being removed from a jurisdiction in order to frustrate satisfaction of a judgment. Thus the preliminary injunctions issued by the District Court are violative of the Act since there has been no evidence that the assets which the SSO and the Ministry have been enjoined from transferring or removing, or the funds in the Marine Midland Bank in New York were being used for any commercial activity, much less commercial activity in connection with the agreement that Plaintiff claims was breached by the SSO or the Ministry. Nor has there been an explicit waiver of sovereign immunity by any of the Defendants.

Assuming arguendo that the preliminary injunctions are not in effect prejudgment attachments, nevertheless those injunctions should be dissolved since they impound funds and assets which are not subject to execution under the Foreign Sovereign Immunities Act. Under the Act funds and assets not being used for commercial activity are not subject to execution. Since the purported purpose of the preliminary injunctions was to hold assets within the Court's jurisdiction in order that it may be used to satisfy any judgment that Plaintiff may ultimately obtain against any of the Defendants, it is submitted that those injunctions should be dissolved since the funds and assets impounded were not being used for commercial activity and thus are not subject to execution.

The funds in the Marine Midland Bank of New York which the Government of Iran has been enjoined from removing or transferring are not subject to execution under the Foreign Sovereign Immunities Act for additional reasons. Those funds are of a military character and are expressly exempt from execution under the Act. Moreover, the funds or assets of one governmental agency of a foreign state are not subject to execution to satisfy a judgment against another agency of the same foreign government. Thus funds which belong to the Iranian Ministry of Defense are not subject to execution to satisfy any judgment that might be rendered against the SSO and the Ministry. This would also be true, assuming arguendo if the funds belonged to the Government of Iran, since the SSO and Ministry have "separate juridical identities" apart from the Government of Iran, as recognized in Plaintiff's sworn complaint.

Finally, the preliminary injunctions have frozen in excess of $15 million. Nevertheless the District Court has only required security of Plaintiff in the amounts of $100,000 and $10,000 while requiring the Defendants to post bonds

of $20 million and $8 million in order to have the injunctions dissolved. The security required of the Plaintiff is nominal compared to the amounts involved in this matter and should be increased substantially if this Court does not order the District Court to dissolve the injunctions.

ARGUMENT

I. THE PRELIMINARY INJUNCTIONS ARE VOID DUE TO THE LACK OF PERSONAL JURISDICTION, SINCE THE DEFENDANTS HAVE NOT BEEN SERVED WITH PROCESS IN COMPLIANCE WITH THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act of 1976 for the first time in U.S. law provided "a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state." H.R. Rep. No. 94-1487, 94th Cong., 2d Session reprinted in 1976 U. S. Code Cong. & Ad. News, 6604 at 6606 (hereinafter cited "1976 U.S. Code Cong. & Ad News"). This procedure is the "exclusive" method of service on a foreign state or its agencies and instrumentalities. Id. at 6622. And it has been judicially recognized that a district court does not acquire in personam jurisdiction over a defendant unless service of process conforms to the literal and explicit requirements of those provisions. 40 D 6262 Realty Corporation v. United Arab Emirates Government, 447 F.Supp. 710 (S.D.N.Y. 1978); Gray v. Permanent Mission of the Peoples Republic of the Congo to the United Nations, 443 F.Supp. 816 (S.D.N.Y. 1978). Moreover, in the absence of strict compliance with the service of process provisions of the Act, all actions taken by the court including the entry of orders, injunctions or judgments are void. Gray, supra at 821-22.

Under §1608(a) of the Foreign Sovereign Immunities Act a foreign state can be served with process only by four exclusive methods:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivisions; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2) by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services - and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Under §1608(b) the exclusive method of service on an agency or instrumentality of a foreign state shall be made:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state -

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

The judicial decisions that have interpreted §1608 have recognized that this section provides for the exclusive method of service of process on a foreign state and its agencies and instrumentalities and that if service of process does not conform to the explicit requirements of those provisions then a district court does not acquire in personam jurisdiction over those defendants and any action taken by the court including the entry of orders, injunctions or judgments are void. 40 D 6262 Realty Corporation v. United Arab Emirates Government, 447 F.Supp. 710 (S.D.N.Y. 1978) Gray v. Permanent Mission of the Peoples Republic of the Congo to the United Nations, 443 F.Supp. 816 (S.D.N.Y. 1978).

In Gray v. Permanent Mission of the Peoples Republic of the Congo to the United Nations, supra, the court held that mere notification of the suit to the foreign state will not suffice for service of process on foreign states under the Foreign Sovereign Immunities Act of 1976. In this regard the Court held that service of process under the Act must conform explicitly to the letter of the Act. Otherwise service is insufficient and the Court does not obtain jurisdiction over the foreign state.

This strict approach to the literal and explicit requirements of service of process under the Foreign Sovereign Immunities Act was reiterated in 40 D 6262 Realty Corporation v. United Arab Emirates Government, supra. In that case the court stated that the statute mandated translations of the summons and complaint into the official language of the foreign state as well as notice of the suit to be transmitted in strict compliance with the Act. It was further stated that merely mailing the service of process to the embassy of the foreign state was not sufficient under the statute and until proper service was effected in accordance with the Foreign Sovereign Immunities Act, the Court had no jursidiction over the defendant.

With respect to the case now before this Court it is submitted that at the time the injunctions were issued in April and June of 1979, the Defendants enjoined had not been served, and the District Court did not have jurisdiction. The Plaintiffs had not followed the exclusive methods of service provided for in the Foreign Sovereign Immunities Act. Indeed, at the time that the Government of Iran was preliminarily enjoined on June 11, 1979, no service had even been attempted on the Government of Iran, and at the time the SSO and the Ministry were enjoined, purported service had been attempted under the wrong provisions of the Foreign Sovereign Immunities Act, and has yet to be perfected under any provision of the Act.

In the District Court's memorandum opinion of June 21, 1979, it expressly recognized that although suit had been filed against the Government of Iran on February 23, 1979 and a preliminary injunction was entered against the Government of Iran on June 11, 1979, no service had been effected on that Defendant:

> "EDSCI admits that it has yet received no evidence that service has been effected. Except obliquely, it makes no claim that it has attempted service upon the government." (R. Excerpts, p. 53)

Thus it is undisputed that the Government of Iran was not served at the time it was preliminarily enjoined.

With respect to service on the SSO and the Ministry, the District Court in its Memorandum Opinion of June 21, 1979 noted that service on the SSO and the Ministry was authorized by the Court on the date that suit was filed . . .

> ". . . by transmission of the various documents by any form of mail requiring a return receipt addressed and dispatched by the Clerk of this Court to the Secretary of State in Washington, D.C., and marked to the attention of the Director of Consular Services, with the Secretary of State to further transmit the documents through diplomatic channels in the manner set forth in §1608(a)(4)." (R. Excerpts pp. 50-51)

However, §1608(a)(4) applies only to service upon foreign states or their political subdivisions. The Ministry and the SSO are not political subdivisions, but are agencies or instrumentalities of a foreign state as conceded by the Plaintiff in its sworn Complaint. (R. Excerpts pp.1-2) Accordingly, both the SSO and the Ministry must be served under the "exclusive" methods for agencies and instrumentalities set forth in §1608(b). Thus, it is clear that the attempt to serve the SSO and the Ministry prior to the entry of the preliminary injunction through diplomatic channels was unauthorized as a matter of law.

Additionally on the same day that the SSO and the Ministry were preliminarily enjoined, the District Court authorized service on the SSO and the Ministry pursuant to §1608(b)(3)(B) by permitting the Plaintiff to mail the summons and complaint, receipt return requested, from France to Tehran, Iran. (R. Excerpts p. 51) The District Court in its Memorandum Opinion of June 21,

1979 noted that Plaintiff "has no proof of receipt as yet" of the summons and complaint by this method of service by these Defendants, even though authorized and attempted more than three months earlier. (R. Excerpts p. 51)

Additionally §1608(b)(3)(B), requires that the summons and complaint together with translations, "be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served." Clearly, the attempted service on the SSO and the Ministry did not comform to §1608(b)(3)(B) since the summons and complaint was purportedly transmitted by Plaintiff's own employees from Paris, France, after the SSO and the Ministry were preliminary enjoined by the District Court. In this regard there is nothing in the record to establish that the purported transmittal of the summons and complaint by Plaintiff's own employees was ever in fact received or refused by the SSO or the Ministry.

From the foregoing it is clear that the attempted service of process on the SSO, the Ministry and the Government of Iran did not comply with the requirements of §1608(a) and (b) and that service of process was not even attempted in accordance with the Foreign Sovereign Immunities Act, on any of the Defendants until after they were preliminary enjoined. The legal significance of this, is that the District Court did not have personal jurisdiction over any of the Defendants at the time that the preliminary injunctions were entered, and thus those injunctions are void, and should be reversed.

It has been well established that a federal court may issue a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. However, that rule is a procedural rule and confers no jurisdiction over the defendant and is subject to jurisdictional and other regulatory statutes and judicial principles. 7 Moore, Federal Practice ¶65.03 [3] (1978). Thus, a

court must have both personal and subject matter jurisdiction over a party prior to issuing a preliminary injunction against that party. It is for that reason that it has been well established that a court is without power to issue a preliminary injunction unless proper service of process has been made upon the defendant. Eighth Regional War Labor Bd. v. Humble Oil & Refining Co., 145 F.2d 462, 464 (5th Cir. 1944) cert. denied 325 U.S. 883 (1945); Fireman's Fund Insurance Co. v. Myers, 290 F.Supp. 405, 406 (E.D. Pa. 1968); Brooklyn Nat. League Baseball Club, Inc. v. Pasquel, 66 F.Supp. 117 (E.D. Mo. 1946). Moreover, an order granting a preliminary injunction against a defendant over whom the court does not have jurisdiction is erroneous as a matter of law and reviewable as such. Eighth Regional War Labor Bd. v. Humble Oil & Refining Co., supra; 7 Moore, Federal Practice, ¶65.03 [3] (1978). In this regard the issuance of a preliminary injunction without proper service of process or in personam jurisdiction is not a matter of discretion with the district court. In fact, service of process and in personam jurisidiction is a prerequisite before the court can exercise any discretion. Eighth Regional War Labor Bd. v. Humble Oil & Refining Co., supra at 464; Green v. Green, 218 F.2d 130 (7th Cir. 1954) cert. denied 354 U.S. 1401 (1957). Moreover, mere notice to a defendant under Rule 65 will not meet the requirement of personal jurisdiction over the defendant. 7 Moore, Federal Practice ¶65.04 [3] (1978). If the district court did not have personal jurisdiction over a defendant because of the lack of or insufficient service of process, then all actions taken by the court including the entry of orders, injunctions or judgments are void and must be reversed. Eighth Regional War Bd. v. Humble Oil & Refining Co., supra; Gray v. Permanent Mission of the Peoples Republic of the Congo to the United Nations, 443 F.Supp. 816

(S.D.N.Y. 1978); Brooklyn National League Baseball Club v. Pasquel, 66 F.Supp. 117, 120 (E.D. Mo. 1946); see also Hymen v. Kline 444 F.2d 65 (2nd Cir. 1971). Further, the district court's jurisdiction to enter a preliminary injunction cannot be made to depend upon facts to be ascertained after it has entered a preliminary injunction; rather the validity of every action by the court depends upon the jurisdiction of the court over the defendant at the time it is rendered, and it must appear affirmatively from the record that the court did have jurisdiction otherwise the actions of the court are void and mandate reversal. Pennoyer v. Neff, 95 U.S. 714, 728 (1877); Old Wayne Life Ass'n. v. McDonough, 204 U.S. 8 (1907).

The District Court in the instant case nevertheless concluded that it has personal jurisdiction over the Government of Iran for purposes of issuing the preliminary injunction. This determination is supported only by the District Court's reliance on Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969). (R. Excerpts p. 56) It is submitted that the District Court's reliance on the Plaquemines decision is misplaced since it is clear from that decision that the defendants in Plaquemines had in fact been personally served with process and the court thereby acquired personal jurisdiction of the defendants at the time that the preliminary injunction was issued.

It is thus submitted that since there has not been service of process on any of the Defendants in conformity with §1608 of the Foreign Sovereign Immunities Act, the District Court never acquired personal jurisdiction over any of the Defendants and the preliminary injunctions are void. Accordingly, the District Court's orders granting the preliminary injunctions should be reversed and the District Court ordered to dissolve those injunctions.

II. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER THE DEFENDANTS BY REASON OF THE DOCTRINE OF SOVEREIGN IMMUNITY AS CODIFIED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS IS NOT WITHIN THE "COMMERCIAL ACTIVITY" EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

The doctrine of sovereign immunity is a jurisdictional concept whereby a domestic court, under certain circumstances will refrain from assuming jurisdiction over a dispute involving a foreign state. The doctrine was first recognized in the The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812), and was subsequently invoked by the Courts at the suggestion of the State Department in disputes involving foreign states. Thus, in effect, it was the State Department, rather than the judiciary that actually determined whether a foreign state would be entitled to immunity in a legal dispute. Over the passage of time the State Department developed a policy of refusing to suggest sovereign immunity when the sovereign was acting in a commercial capacity as opposed to strictly sovereign activities. Jet Line Services, Inc. v. M/V Marsa El Hariga, 462 F.Supp. 1165, 1169 (D. Md. 1978).

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 et seq. was intended to codify the "restrictive" doctrine of sovereign immunity and to enumerate the only exceptions to sovereign immunity that shall be recognized by the courts, thereby transferring from the State Department to the judiciary the determination of whether a claim against a foreign state was subject to immunity. 1976 U. S. Code Cong. & Ad. News 6604, 6605-06. In this regard it is clear from the legislative history of the Foreign Sovereign Immunities Act of 1976 that in order for a U.S. court to acquire "personal jurisdiction" over a foreign government

or agency there must also be a claim against that foreign government or agency which is not entitled to immunity under the Act. 1976 U. S. Code Cong. & Ad. News at 6612.

Plaintiff asserts that its claim against the Defendants is within the "commercial activity" exception codified by §1605(a)(2) of the Foreign Sovereign Immunities Act. Under that section a foreign state or agency is not immune from the jurisdiction of a U.S. court if the action against the foreign state or agency is based:

> "(1) . . . upon a commercial activity carried on in the United States by the foreign state; or
>
> "(2) . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
>
> "(3) . . . 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." (28 U.S.C., §1605(a)(2)) (Emphasis added)

All three provisions of §1605(a)(2) require that the foreign state or agency be engaged in a commercial activity from which the Plaintiff's claim arises. Moreover, it is clear from the literal language of this section that the commercial activity must be performed or conducted by a foreign state or instrumentality or agency of a foreign state in the United States before this exception applies unless an act outside of the United States by a foreign government has a "direct effect" in the United States. See also, 1976 U.S. Code Cong. & Ad. News at 6617-18.

Further, "commercial activity" is defined as the regular course of commercial conduct in the United States or a particular commercial act by the foreign government. 28 U.S.C. §1603(d). And "commercial activity" carried on in the United States by a "foreign state" is defined as:

> "... commercial activity carried on by such state and having a substantial contact with the United States" [28 U.S.C. §1603(e)] [emphasis added]

There is no evidence, nor does the Plaintiff contend, that the Government of Iran has performed any "commercial activity" in the United States as that term is defined by the Foreign Sovereign Immunities Act. In fact, the District Court expressly found that:

> "As to the Government of Iran, the activities by this entity relating to the contract admittedly were confined to its own soil." [emphasis added] [R. Excerpts p. 49]

There is an allegation and some evidence that prior to executing the contract in dispute, officials from the SSO and the Ministry visited Plaintiff's facilities in Dallas and San Francisco. This casual conduct by the SSO and the Ministry which was not related to the performance of the agreement in dispute cannot be imputed as the conduct of the Government of Iran since Plaintiff does not dispute that these agencies have separate identities apart from the Government of Iran.[2] Thus, in order for the Government of Iran to be within the "commercial activity" exception, the record must affirmatively reflect that the alleged conduct of the Government of Iran, which was undisputedly "confined to its own soil" constituted commercial activity with respect to the contract in dispute and had a direct effect within the United States, under the provisions of clause 3 of 28 U.S.C. §1605(a)(2).

It is clear from the Act's legislative history that the commercial activity exceptions to sovereign immunity were not meant to encompass cases where the sole effect within the United States can be reduced to the fact that the plaintiffs asserting damages, are U.S. citizens or residents, even though the events giving rise to those damages occurred within the foreign state:

> "This definition, however, is intended to reflect a degree of contact beyond that occasion simply by U.S. citizenship or U.S. residence of the plaintiff." [1976 U.S. Code Cong. & Ad. News at 6616]

The reason for this limitation of jurisdiction is obvious since if, by the mere fact of United States citizenship or residence, a plaintiff can afford the necessary degree of contact for the exercise of jurisdiction, then there would be no meaningful limitations on jurisdiction over foreign sovereigns in actions brought by United States citizens or residents and the careful draftsmenship of the Act would be pointless.

This was the conclusion of Judge Richey in Upton v. The Empire of Iran, 459 F.Supp. 264 (D.D.C. 1978). In that case an action was brought against the Empire of Iran and Iran's Department of Civil Aviation for wrongful death, survival and personal injury as a result of the collapse of a roof at an airport terminal building in Iran. The Court in interpreting the direct effect provision of §1605(a)(2)(clause 3) rejected the contention of the plaintiffs that the court had both personal and subject matter jurisdiction over the defendants under that section:

> "The relatively simple statement of plaintiffs' position points up the correctness of this result. They contend that "[d]efendants' acts caused the deaths and injuries to Americans which caused direct effects in the United States." . . . Their own language attenuates the connection between the act and the effect. The common sense interpretation of a "direct effect" is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption. The unintended candor of plaintiffs' words demonstrates the indirect nature of the injuries which, though endured here, were caused in Tehran.
>
> In conclusion, as a matter of law, no direct effects were caused in the United States by the defendants' actions at Mehrabad Airport in Tehran, Iran, and therefore one of

> the two tests of 28 U.S.C. §1605(a)(2), clause 3, has not been satisfied." (Emphasis added)

Id. at 266. Accordingly where the immediate physical impact of the sovereign activity in question occurs outside of the United States, mere consequential damages which may be endured in the United States are "indirect effects" rather than "direct effects." Thus, a U.S. resident or corporation cannot circumvent sovereign immunity as the Plaintiff has attempted to do with respect to the Government of Iran, merely by asserting that it endures consequential damages in the United States resulting from any commercially-related activity wherever it occurs. If anything, where the defendant is a sovereign foreign state, and where the assertion of jursidiction should be weighed with considerations of comity, international law and foreign relations, even more immediate and substantial contacts with the forum should be required, under the "direct effect" provision of clause 3 of section 1605(a)(2), since the United States actually is setting the terms under which a foreign state may act within its own territory. 18 Harvard International Law Journal 429, 439, note 48; see also, the Restatement (Second) of Foreign Relations Law, §30(2)[3].

Moreover, the commercial activity exception is qualified by the fundamental requirements of minimal jurisdictional contacts. 1976 U. S. Code Cong. & Ad. News at 6612, 6616, and 6618. In this respect, it is quite clear that the Act was not intended to do away with the requirement for minimum contacts as a prerequisite to the establishment of in personam jurisdiction over a foreign entity under pre-Act law. On the contrary, the drafters went out of their way to emphasize that these requirements remain in force under the Act. As stated in the House Report:

> "Section 1630(b) provides in effect, a Federal long-arm statute over foreign states. . . . It is patterned after the long-arm statute Congress enacted for the District of Columbia. . . . The requirements of minimal jurisdictional contacts. . . . are embodied in the provision." Cf. International Shoe Company vs. Washington, 326 U.S. 310 (1945), and McGee vs. International Life Insurance Company, 355 U.S. 220, 223 (1957) . . . ." [1976 U. S. Code Cong. & Ad. News at 6612].

In this regard, the domestic long-arm statute cases applying the "minimum contact" doctrine, confirm that the mere locus of the plaintiff's consequential damages is too remote a basis on which to justify the forum court's jurisdiction. E.g. Leaks v. Ex-Lax, Inc., 424 F.Supp. 413 (D.D.C. 1976); Norair Engineering Associate, Inc. v. Noland, 365 F.Supp. 740 (D.D.C. 1973); Haynes v. James H. Carr, Inc., 307 F. Supp. 1228 (E.D. Va. 1969) aff'd 427 F.2d 700 (4th Cir. 1970) cert. denied 400 U.S. 942 (1970); Bradley v. Chelevitte, 65 F.R.D. 57 (D. Mass. 1974); Hoppenfeld v. Crook, 498 S.W.2d 52 (Tex. Civ. App. - Austin 1973 writ ref'd. n.r.e.); see also, Upton v. Empire of Iran, 459 F.Supp. 265 (D.D.C. 1978).

Accordingly, the record is void of any evidence that the Government of Iran has engaged in the State of Texas or anywhere else in the United States, in any commercial activity with respect to the contract in question. Moreover, the conduct of the Government of Iran which was alleged to have occurred within its own territory with respect to Plaintiff's contract with the SSO and Ministry, is not sufficient to establish the minimum jurisdictional contacts with the State of Texas or anywhere else in the United States. Even assuming arguendo that the Government of Iran has engaged in commercial activity within its own territorial limits, with respect to the contract in question, the only effect that that activity has had in the United States is the alleged consequential damages of the Plaintiff.

It is thus submitted that with respect to the Government of Iran, the plaintiff has failed to establish a claim within the narrow exception to sovereign immunity set out under §1605(a)(2).

With respect to the SSO and the Ministry, it is clear from the evidence that during the time that the agreement in question was negotiated, executed, in effect, or terminated, these agencies were not carrying on commercial activities in the United States as defined in §1605(a)(2). The sole function of these agencies is to carry out their governmental and proprietary activities within the country of Iran. They do not own and operate businesses, engage in shipping, or carry on any other activities of a commercial, revenue producing, nature. The only contact that these agencies had in the United States was the casual inspection of the Plaintiff's facilities in Dallas, prior to negotiating the agreement in question. This conduct which was not related to the performance of the agreement in question, could hardly be construed as "having a substantial contact with the United States" so as to fall within the definition of "commercial activity carried on in the United States." 28 U.S.C. §1603(e). Moreover, to urge that Plaintiff's unilateral conduct of transferring employees and shipping equipment from the United States to Iran is sufficient to establish the "commercial activity" exception of §1605(a)(2) ignores the expressed language of that section which requires that the activity in question be conducted by the foreign state or agency. In this regard, the effect, if any, in the United States, of the alleged conduct outside of the United States by the SSO and the Ministry is the purported consequential damages sustained by the Plaintiff. As discussed supra, this is not sufficient to establish a claim within the "direct effect" exception of §1605(a)(2)(clause 3) or the minimal jurisdictional contacts pursuant to the concept of long-arm jurisdic-

tion embodied in the Foreign Sovereign Immunities Act. It is thus submitted that Plaintiff has also failed to establish a claim within any of the three "commercial activity" exceptions to sovereign immunity codified by Congress in §1605(a)(2) as to the SSO and the Ministry.

B. DEFENDANTS HAVE NOT WAIVED THEIR SOVEREIGN IMMUNITY

Plaintiff also urges that the Defendants waived their sovereign immunity more than twenty years ago when the Government of Iran entered into a commercial treaty with the United States. The provision of the treaty which Plaintiff urges constitutes a waiver of immunity reads:

> "No enterprise of either High Contracting 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 High Contracting 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."

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 1955, 8 UST 901, TIAS 3853, Art. XI(4). The express language of this commercial treaty indicates that it applys to strictly commercial activity that is conducted in the United States by "enterprises" of the Government of Iran.

There is no suggestion from this commercial treaty, that the Government of Iran or any of its governmental agencies would in fact be "enterprises" if either merely sent representatives to the United States for the purpose of reviewing facilities of a business that is to perform services within the territorial limits of Iran which are in furtherance of strictly proprietary functions of a

government: a social security and national health insurance program. Rather what is suggested is that the term "enterprise" as used in this commercial treaty applies to only business entities created by the Government of Iran that are engaged in competition with U. S. businesses and are operated for a profit.

In this regard each time the term "enterprise" is used in the Treaty, it implies a business entity established for commercial purposes and for economic gain. See Article II (1); Article IV (1); Article IV (4); Article XI (1)(e); Article XI (r); Article XX (4).

Further, the waiver of immunity provision of the Treaty is within the context of an Article that attempts to ensure that no unfair competitive advantage would accrue to a state-controlled enterprise in competition with domestic enterprises. Paragraph 1 of Article XI requires that state-controlled enterprises execute their purchases and sales "solely in accordance with commercial considerations," and that other enterprises have "adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales." Paragraph 2 requires that "fair and equitable treatment" be accorded foreign nationals and companies with respect to government supply purchases, government contract awards, and sales of services by governments or monopolies. Paragraph 3 seeks "competitive equality" between publicly owned trading and manufacturing enterprises which are engaged in competition with private enterprise. To that end, Paragraph 3 extends to private enterprises special economic advantages which are accorded public enterprises. Finally in Paragraph 5, the competitive advantage which would otherwise be enjoyed by competing public enterprises to the extent such enterprise could claim sovereign immunity is eliminated.

In the context of both the Treaty and Article XI the waiver clause cannot be seen as removing sovereign immunity from all government agencies that have any contact with the territories of the other state, but only those government "enterprises" in competition with domestic enterprise and operated for a profit. Defendants are not such "enterprises".

This conclusion is supported by the fact that the legislative history of the Treaty of Amity evidences the conviction of both the State Department and the U. S. Senate that this Treaty was identical in scope and application to other commercial treaties that have been ratified by the United States. Commercial Treaties with Iran Nicaragua and the Netherlands: Hearing on Executive E, Executive G and Executive H, before the Senate Committee Relations, 84th Cong. 2d Sess., pp. 1-10 (1956); 33 Dep't of State Bull. 367, 368 (1955); 120 Cong. Rec. 12287, 13375 (1956). This is significant because it has been authoritatively recognized that the waiver of immunity provisions in commercial treaties govern only state controlled enterprises that are counterparts of, and are in competition with, private enterprises. Setser, The Immunity Waiver For State-Controlled Business Enterprises in United States Commercial Treaties, 1961 Proc. Amer. Soc. Int'l L. 89, 90-93, (1961); 50 Amer. J. Int'l 927, 929-30 (1956); Remarks of William Harvey Reeves, 1961 Proc. Amer. Soc. Int'l L. 130, 137 (1961).

As discussed by Vernon G. Setser, who was the Chief of the Commercial Treaties Branch, U. S. Department of State, when most of the present commercial treaties were negotiated:

> When the Department of State at the end of World War II embarked upon an extensive commercial treaty program, one of the most significant international facts of life to which it had to adjust its treaty projects was the almost universal growth of state activity in the economic field . . .

> A cursory reading of the immunity provision, when taken out of its context in the commercial treaty, may result in identification of it with the "restrictive theory," (of sovereign immunity), . . . defined as that under which "the immunity of the sovereign or public acts (jure imperii) of the state, but not with respect to private acts (jure gestionis)." The commercial treaty provision, however, is not at all concerned with the "private acts" of the sovereign generally, but only with establishing a rule to govern in the case of state entities that are counterparts of, and are in competition with, the enterprises to which treaty rights are accorded . . . (emphasis added)

Setser, The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties, 1961 Proc. Amer. Soc. Int'l L. 89, 92-93 (1961).

Further, it has never been considered to be within the province of any U. S. commercial treaty to provide the legal basis for establishing jurisdiction with respect to conduct of a foreign state or its agencies arising from proprietary functions, even though that conduct relates "to purchases and sales, to all types of contracts, and torts . . ." Id at 101. As was concluded by Setser:

> The immunity waiver in the commercial treaties, then, does not constitute any far-reaching fundamental United States policy innovation. It relates to a simple factual situation. If treaty assurances are to be given to foreign economic enterprises, then it is reasonable and appropriate to provide for equalization of the situation in the event that foreign state enterprises become competitors of American or the treaty-protected alien private enterprises . . . The commercial treaties merely extend the principle generally to foreign state enterprises established for business purposes. (emphasis added)

Id. at 104. This analysis of the scope and application of commercial treaties such as the Treaty of Amity is substantially confirmed in Wilson, A Decade of New Commercial Treaties, 50 Amer. J. Int'l L. 927, 929-30 (1956) and in the

remarks of William Harvey Reeves, 1961 Proc. Amer. Soc. Int'l L. 130, 137 (1961).

Further, it is noted by Setser that the deliberate use of the term "enterprise" in the sovereign immunity waiver provision of commercial treaties supports the conclusion that commercial treaties such as the Treaty of Amity do not apply to proprietary acts of a sovereign but govern only economic enterprises controlled by a foreign state that are in competition with private enterprises for economic profits:

> The "enterprise" is the basic unit in the organization of a capitalistic or "free enterprise" economy. Considering this meaning, the use of the term in the sovereign immunity waiver is significant. The restriction as to immunity contained in the provision can reasonably be construed to apply only to entities of the character of enterprises in a free-enterprise economic system. Logically, there could be included in that class private corporations of which government has acquired control by the acquisition of shares of stock, enterprises established under free enterprise that, through a nationalization program, have passed into government ownership, and entities created by government that are counterparts of the economic units of free enterprise.

Setser, supra at 97.

From the foregoing, it is submitted that the Treaty of Amity between Iran and the United States does not constitute a waiver of sovereign immunity either explicitly or implicitly by any of the Defendants. The Treaty does not apply to the Government of Iran but only to its "enterprises" that are engaged "in commercial, industrial, shipping or business activities within the territories of" the United States, and there was no evidence before the District Court to even suggest that either SSO or the Ministry were engaged in activities of that nature.

Even assuming arquendo that somehow either the SSO or the Ministry have engaged "in commercial, industrial, shipping or business activities" within the United States, neither of those Defendants were established for commercial purposes and have never engaged in competition with domestic enterprises. Rather all of the Defendants at all times have been performing proprietary functions with respect to the agreement in question: the administration of Iran's social security and national health insurance program in Iran. It is thus submitted that this commerical treaty, relied upon by the Plaintiff as a waiver of soveriegn immunities, like other commercial treaties ratified by the United States has no application with respect to those proprietary activities of the SSO and the Ministry and none of the Defendants have either explicitly or implicitly subjected themselves to the jurisdiction of the U. S. courts as a result of that commercial treaty.

III. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE GOVERNMENT OF IRAN SINCE THE FOREIGN SOVEREIGN IMMUNITIES ACT EXPRESSLY GRANTS TO FOREIGN STATES IMMUNITY FROM THE JURISDICTION OF UNITED STATES COURTS FOR ANY CLAIM ARISING OUT OF INTERFERENCE WITH CONTRACT RIGHTS

An even more compelling reason exists under the Foreign Sovereign Immunity Act for the dismissal of the Government of Iran due to lack of jurisdiction. The only basis of the Plaintiff's claim against the Government of Iran is that it interfered with the contract rights between Plaintiff and the SSO and the Ministry, thereby causing those agencies to breach that contract. (R. Excerpts p. 7) The plaintiff is not the first to attempt to expand its options under the Act by disingenuously naming a foreign state as an after-the-fact party defendant. In Carey v. National Oil Corp., 453 F.Supp. 1097 (S.D.N.Y. 1978), the court was faced with a plaintiff who named Libya as a co-defendant along with its

corporate enterprises. There, as here, the allegations were made that the government of Libya induced its corporate enterprises to breach a contract. The court ruled that Libya's conduct was not a commercial matter and further held that even if said conduct was commercial, the charge was at most a tortious interference with contract rights from which sovereign states enjoy absolute immunity. Id. at 1102. The specific provision that the court in the Carey decision was referring to was §1605(a)(5)(B) which provides immunity to a foreign state for:

> "Any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

As noted supra the district court under the Federal Sovereign Immunities Act has personal jurisdiction over a foreign state only if the claim is within the ambit of one of the codified exceptions. 1976 U.S. Code Cong. & Ad. News at 6612. And it is clear from §1605(a)(5)(B) that plaintiff's claim against the Government of Iran for interference with its contract rights is a claim from which the Government of Iran is expressly entitled to absolute immunity. Therefore, the Government of Iran should be dismissed and the preliminary injunction dissolved because the Plaintiffs failed to establish a claim within any of the exceptions to sovereign immunity as codified by the Foreign Sovereign Immunity Act.

IV. THE PRELIMINARY INJUNCTIONS VIOLATE THE FOREIGN SOVEREIGN IMMUNITIES ACT'S BAN ON PREJUDGMENT ATTACHMENTS

Of even more significance is the fact that the preliminary injunctions granted by the District Court are in direct violation of the Foreign Sovereign Immunities Act's ban on prejudgment attachments. The ban on attachments was codified, as follows:

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter."

28 U.S.C. §1609.

Section 1610(d) establishes the narrow grounds on which prejudgment attachment may be granted:

> "(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of the judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if -
>
> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
>
> (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." [Emphasis supplied]

Moreover it is clear from the legislative history of this section that the term "prejudgment attachment" is defined broadly to include any "provisional remedy ... to prevent assets from being disipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment" 1976 U.S. Code Cong. & Ad. News at 6629. Thus, before a district court is authorized to enjoin a foreign state or its agencies or instrumentalities from transferring or removing any assets, in order that those assets may be used to satisfy any judgment that may eventually be rendered, as the District Court has done in the instant case, there must be a showing that the assets or property were used for commercial

activity and there must be an explicit waiver of immunity by the foreign state or agency or instrumentality. Both of these requirements must be satisfied before a prejudgment attachment is authorized.

There has been no evidence submitted to the Court nor has there been any inquiry by the Court as to whether any of these assets or funds that the Defendants have been enjoined from transferring were in fact being used for a commercial activity. Moreover, the record affirmatively reflects that the funds in the Marine Midland Bank in New York, are not funds being used for commercial activity in the United States but in fact are of a military character and under the control of the military authority or defense agency and therefore immune from execution or attachment under §1611(b)(2). (R. Excerpts, pp. 29-34) Moreover, as discussed supra there has been no waiver of immunity by any of the Defendants, much less an "explicit" waiver as required by this section. It is thus submitted that the District Court's preliminary injunctions are in direct conflict with the expressed language of the Foreign Sovereign Immunities Act prohibiting prejudgment attachment and should thus be reversed.

V. THE ASSETS AND FUNDS THAT THE DEFENDANTS HAVE BEEN ENJOINED FROM TRANSFERRING OR REMOVING ARE EXEMPT FROM EXECUTION

Assuming arguendo that the preliminary injunctions are not in effect prejudgment attachments, nevertheless the assets which the SSO and the Ministry have been enjoined from transferring or removing, or the funds in the Marine Midland Bank are not subject to execution. Section 1610(a) provides that property of a foreign state or its agencies is not subject to execution unless the foreign state or agency has waived its immunity or the property is or was used for the

commercial activity upon which the claim is based. As discussed supra, none of the Defendants have waived their sovereign immunity. Further, it has been affirmatively shown from all the evidence that the funds in the Marine Midland Bank do not arise from any commercial activity. Nor are those funds related in any way to the agreement that Plaintiff claims was breached by the SSO and the Ministry. In fact the District Court found that the "funds in question are clearly unrelated to the contract forming the basis of this lawsuit". (R. Excerpts p. 59) And there has been no evidence to even suggest that any of the assets that the SSO and the Ministry have been enjoined from transferring are related to commercial activity. The purported legal justification for the preliminary injunctions was to prevent the removal of assets and funds from United States, in order that the Plaintiff might be able to satisfy any judgment that it may eventually obtain. It is submitted that there is no legal justification for the injunction since the funds and assets which the Defendants have been enjoined from removing or transferring are not subject to execution.

VI. THE FUNDS IN THE MARINE MIDLAND BANK IN NEW YORK ARE NOT SUBJECT TO ATTACHMENT OR EXECUTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT SINCE:

A. THE FUNDS ARE OF A MILITARY CHARACTER UNDER THE CONTROL OF THE IRANIAN MINISTRY OF DEFENSE

It is further urged that the funds in the Marine Midland Bank of New York, which the Government of Iran has been enjoined from removing or transferring are not subject to execution under the Foreign Sovereign Immunity Act even if the plaintiff is successful in obtaining a judgment against the SSO and the Ministry. As indicated by the deposition of James Bolan with Bank Sepah, that was introduced into evidence at the hearing on the preliminary injunction,

the funds transferred from that bank to the Marine Midland Bank were funds belonging to the Iranian Air Force and Navy, and were not transferred until verification and approval was given by the Iranian Ministry of Defense. (R. Excerpts p. 33) This clearly establishes that the funds are of a military character coming within the explicit provisions of §1611(b)(2). That section expressly negates the right of attachment and execution if:

> "(2) the properties intended to be used in connection with a military activity.
>
> "(a) Is of a military character, or
>
> "(b) is under the control of the military authority or defense agency."

Thus the funds in the Marine Midland Bank are not subject to execution or attachment since those funds are of military character and are under the control of the Iranian Ministry of Defense.

B. FUNDS BELONGING TO A FOREIGN GOVERNMENT OR ONE OF ITS AGENCIES ARE NOT SUBJECT TO ATTACHMENT OR EXECUTION TO SATISFY A JUDGMENT AGAINST ANOTHER AGENCY OF THAT SAME FOREIGN GOVERNMENT

Additionally, the legislative history of the Foreign Sovereign Immunity Act makes it clear that the property of one foreign agency or instrumentality is not subject to execution to satisfy a judgment against another agency or instrumentality of the same foreign government. As stated in the House Report:

> "There are compelling reasons for this. If U.S. Law did not respect the separate juridicial identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical division between different U.S. corporations or between a U.S. corporation and its independent subsidiaries."

1976 U. S. Code Cong. & Ad. News at 6628-29. Thus the funds belonging to the Iranian Ministry of Defense would not be subject to execution even if the Plaintiff were successful against the SSO and the Ministry. This would also be true, even if the funds, assuming arquendo belonged to the Government of Iran, since the SSO and the Ministry have "separate juridical identities" apart from the Government of Iran, as conceded by the Plaintiff in its sworn Complaint. (R. Excerpts pp. 1-2) To hold otherwise, would permit the circumvention of the Act's limitations and every suit against an agency or instrumentality would automatically be transformed into an action against the government proper, thereby placing all government funds, whatever their nature or source, subject to execution or attachment in direct contravention of both the intent and expressed language of the Act.

One could speculate about the practical impact on foreign relations and foreign governments if they cannot safely keep the funds here and face financial illiquidity and debt default every time an aggressive plaintiff brings a lawsuit and tries to maximize pressure to induce a settlement, by naming the foreign government as an after-the-fact conspirator to an alleged breach of a contract by an agency or instrumentality of that foreign government. The reprisals and strained relations which Congress sought to avoid in drafting the Act would surely become a reality!

VII. INADEQUACY OF PLAINTIFFS BONDS

Only in the event that this Court declines, to stay or dissolve the preliminary injunctions, or to order the dismissal of the Defendants for lack of personal and subject matter jurisdiction, it is requested that this Court at least

increase the security the Plaintiff must post for the payment of any damages that the Defendants or the Ministry of Defense of the Government of Iran may sustain as a result of having assets in excess of $15 million frozen pending the outcome of a trial on the merits. Although the District Court has indicated that it would dissolve the preliminary injunctions if the Social Security Organization and the Ministry of Health and Welfare posted a bond in the amount of $20 million and the Government of Iran posted a bond in the amount of $8 million, the Court has only required security of the Plaintiff in the amounts of $100,000 and $10,000. (R. Excerpts pp. 19, 43)

In light of the potential economic losses that the Defendants may sustain in being unable to meet the obligations that these funds were intended for, the security required by the District Court of the Plaintiff is nominal and constitutes an abuse of discretion. Austin v. Altman, 332 F.2d 273 (2d Cir. 1964). Moreover, it is clear from the testimony at the preliminary injunction hearing that plaintiff was created by EDS, its parent U.S. corporation for the sole purpose of performing the agreement in question in Iran and purports to be a separate corporate entity that is not actively engaged in any business activities. There is no evidence nor any inquiry by the District Court that Plaintiff has the financial ability to respond to any of the potentially enormous losses that would be incurred if the Defendants had been wrongfully enjoined. It is thus submitted that if this Court does not dissolve or stay the preliminary injunction or order the dismissal of the Defendants, then this Court should increase the bonds required of the Plaintiff to the same amounts that the Defendants would have to give in order to obtain a dissolution of the preliminary injunctions, i.e., $8 million and $20 million.

CONCLUSION

It is thus submitted that Plaintiff has openly and unquestionably violated the Foreign Sovereign Immunities Act of 1976 in every respect. Moreover, none of the Defendants were served with process nor was service even attempted, much less perfected, in compliance with that Act at the time that the preliminary injunctions were entered. Accordingly the District Court had no jurisdiction over the Defendants at that time, and for that reason alone the preliminary injunctions should be dissolved!

Additionally Plaintiff's claim against the Defendants is not within the "commercial activity" exception to the sovereign immunity doctrine nor have any of the Defendants waived their sovereign immunity. Under these circumstances the Defendants are immune from the jurisdiction of the District Court and the preliminary injunctions are void for lack of jurisdiction and should be dissolved.

Plaintiff's only claim against the Government of Iran is for interference with its contractual rights and the Foreign Sovereign Immunities Act expressly grants to a foreign state immunity from the jurisdiction of U.S. courts for any claim arising from interference of contractual rights. Accordingly, the District Courts jurisdiction to grant a preliminary injunction against the Government of Iran, cannot be legally justified, since the Government of Iran was immune from jurisdiction on that claim.

Moreover the Foreign Sovereign Immunities Act prohibits any prejudgment attachment, arrest or execution of the funds in the Marine Midland Bank or of the assets that the SSO and the Ministry have been enjoined from removing from the United States during the pendency of this litigation.

As a consequence of the foregoing violations of the Foreign Sovereign Immunities Act, millions of dollars have been illegally impounded and the Government of Iran and its governmental agencies are in effect prohibited from conducting any transaction in the United States including the payment of any outstanding contractual obligations. The sweeping relief afforded the Plaintiff without the Defendants ever being served with process, would have never been tolerated, much less considered, if the defendants had been someone other than the Government of Iran and its governmental agencies. There is nothing in the Foreign Sovereign Immunities Act or its legislative history to suggest that compliance with the provisions of the Foreign Sovereign Immunities Act should be relaxed or ignored merely because a foreign state endures the political and social changes which have been sensationalized by the American press in the last six months. In fact, one of the very purposes of the Act was to eliminate foreign policy implications from disputes involving foreign states. 1976 U.S. Code Cong. & Ad. News at 6606. Moreover, if the Plaintiff's conduct is not immediately condemned by the dismissal of the Defendants from this matter and/or the dissolution of the preliminary injunctions then all foreign states and their governmental agencies and enterprises, will be put on notice that they cannot conduct any transactions within its own territorial limits without the threat that its funds in the United States will be impounded by every over-aggressive plaintiff who elects to ignore and flaunt the Foreign Sovereign Immunities Act as the Plaintiff has done in this case.

WHEREFORE, PREMISES CONSIDERED, Defendant-Appellants pray that the preliminary injunctions be dissolved and the District Court be ordered to dismiss the Defendants for want of personal and subject matter jurisdiction. In

the alternative, Defendants pray that the District Court be directed to increase substantially the security required of Plaintiff for the preliminary injunctions.

Respectfully submitted,

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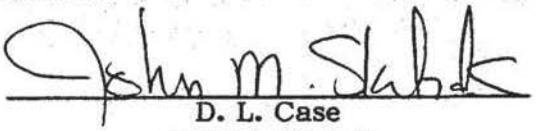
By: 
D. L. Case
John M. Skrhak

Attorneys for Defendants-Appellants

Certificate of Service

I hereby certify that a true copy of the above and foregoing instrument was served upon Plantiff's attorneys, HUGHES & HILL, 1000 Mercantile Bank Building, Dallas, Texas 75201, by certified mail, return receipt requested, this 15th day of August, 1979.

D. L. Case

Footnotes

[1]ITEL was nonsuited by the Plaintiff on March 30, 1979.

[2]Plaintiff's sworn complaint alleges that both the SSO and the Ministry are "agencies or instrumentalities of a foreign state" as those terms are defined in 28 U.S.C. §1603. An agency or instrumentality of a foreign state is defined, in §1603 as "a separate legal person which is an organ of or owned by a foreign state.

[3]"A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the grounds of the conduct effects one of its nationals." The Restatement (Second) of Foreign Relations Law §30(2).

FOURTH SESSION

Friday, April 28, 1961, at 2:00 p.m.

PANEL I: CURRENT DEVELOPMENTS IN THE LAW OF SOVEREIGN IMMUNITY

The session reconvened at 2:00 o'clock p.m. in the East Room of the Mayflower Hotel. Mr. Adrian Fisher, Chief Reporter, American Law Institute's Restatement on the Law of Foreign Relations, presided.

The CHAIRMAN, in introduction, stated that the current developments in the field of foreign sovereign immunity have a common point of departure in the so-called Tate letter sent out in 1952 by the Acting Legal Adviser of the Department of State to the Acting Attorney General of the United States. This letter announced *in vacuo* a change in the policy of the Department of State not to issue suggestions of immunity to courts in the United States in suits involving commercial activities by a foreign sovereign. Hitherto there had been no judicial recourse available, but redress was through diplomatic channels. The departure from the normal procedure in making such an announcement *in vacuo* was due to the diplomatic overtones which at the time posed serious problems with respect to certain countries.

THE IMMUNITY WAIVER FOR STATE-CONTROLLED BUSINESS ENTERPRISES IN UNITED STATES COMMERCIAL TREATIES

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In the 1948–1958 decade, the Department of State negotiated fourteen treaties containing a provision obligating each contracting party to waive sovereign immunity for state-controlled enterprises engaged in business activities within the territories of the other.[1] A typical such provision

* The views expressed here are personal—in no sense an official statement of the Department of State.

[1] The treaties follow, with the number of the article and paragraph containing the immunity waiver added after the citation. Italy, 1948 (63 Stat. (Pt. 2) 2225, Art. XXIV-6); Uruguay, 1949, not in force (S. Exec. D, 81st Cong., 2d Sess., Art. XVIII-5); Ireland, 1950 (1 U.S. Treaties 785, Art. XVIII-2); Colombia, 1951, not in force (S. Exec. M, 82nd Cong., 1st Sess., Art. XVIII-2); Greece, 1951 (5 U.S. Treaties 1829, Art. XIV-5); Israel, 1951 (5 U.S. Treaties (Pt. 1) 550, Art. XVIII-3); Denmark, 1951 (T.I.A.S., No. 4797; S. Exec. I, 82nd Cong., 2d Sess., Art. XVIII-3); Japan, 1953 (4 U.S. Treaties (Pt. 2) 2063, Art. XVIII-2); Federal Republic of Germany, 1954 (7 U.S. Treaties 1839, Art. XVIII-2); Haiti, 1955, not in force (S. Exec. H, 84th Cong., 1st Sess., Art. XVIII-2); Iran, 1955 (8 U.S. Treaties 899, Art. XI-4); Nicaragua, 1956 (9 U.S. Treaties 449, Art. XVIII-3); Netherlands, 1956 (8 U.S. Treaties 2043, Art. XVIII-2); Korea, 1956 (8 U.S. Treaties 2217, Art. XVIII-2).

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appears in Article XVIII (paragraph 3) of the Friendship, Commerce and Navigation Treaty with Israel,[2] signed August 23, 1951:

> 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, manufacturing, processing, 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.

Although note has been taken, usually in a favorable sense, in articles appearing in legal publications,[3] of these provisions, no extensive study or comment has been published to date on the question of how the provisions are to be understood and what they represent as concerns United States policy. It must be noted, of course, that the practice of including these provisions in the treaties was discontinued in 1958 for the reason that they were considered objectionable in certain quarters as endangering the ability of the Government to utilize the defense of sovereign immunity in suits in foreign courts against the United States. It is the purpose of the present paper to attempt to deal with the essential purport and policy implications of these provisions.

All of the provisions under consideration appear in the type of instrument generally known as the treaty of friendship, commerce and navigation. As regards the United States, this type of instrument, both in its traditional form and as recently revised and modernized, constitutes a body of assurances for the support of private enterprise. Such commercial treaties were extensively utilized by the United States in the 18th and 19th centuries for the protection of the private trader and his vessel when engaged in foreign trade,[4] generally against navigation laws and other types of interference by foreign nations with free competition on the high

[2] 5 U.S. Treaties (Pt. 1) 570; T.I.A.S., No. 2948.

[3] William W. Bishop, Jr., "New United States Policy Limiting Sovereign Immunity," 47 A.J.I.L. 96 (1953); Robert R. Wilson, "Postwar Commercial Treaties of the United States," 43 A.J.I.L. 272 (note) (1949); Robert R. Wilson, "A Decade of New Commercial Treaties," 50 A.J.I.L. 929 (1956); Herman Walker, Jr., "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 A. J. Comp. Law 238 (1956); Jean-Flavien Lalive, "L'immunité de juridiction des états et des organisations internationales," 84 Hague Academy Recueil des Cours 238, 254, 274 (note), 280–281 (1953, III). See also the author's article, "The Immunities of the State and Government Economic Activities," 24 (Part I) Law and Contemporary Problems 299, 312 (1959).

[4] The early period of U.S. commercial treaty policy is covered in Setser, The Commercial Reciprocity Policy of the United States, 1774–1829 (Philadelphia, 1937), but for the period since then, it is necessary to consult numerous individual monographs, or the treaties and diplomatic correspondence. See, however, S. F. Bemis, Diplomatic History of the U.S., Chs. 17, 38 (N.Y., 1950). The most comprehensive work on the international law aspects of commercial treaties is R. R. Wilson, United States Commercial Treaties and International Law (New Orleans, 1960).

seas and in the trading ports of the world. In more recent years, the State Department has developed the commercial treaty primarily as a means of establishing rights for the private enterprise to set itself up and carry on business on foreign territory.[5]

The manner by which the commercial treaty seeks to accomplish its object of supporting private enterprise is by interposing bars to the more usual ways in which governments interfere with free competition by alien-owned concerns under their jurisdiction. One of the simplest methods of discrimination against the foreign investor, and one of those most commonly practiced, is to bar the entry of foreign enterprises into certain fields. Most of the recent United States commercial treaties limit that device by assuring entry of aliens into definite broad fields of enterprise upon equal terms with domestic enterprises. Another mode of discrimination is to make the burdens normally imposed by government a little heavier upon the alien than upon the national in certain respects, for example, in the field of taxation. Many detailed provisions of the treaties have the purpose of preventing this practice. Perhaps the gravest of all dangers to private enterprise in international investment and trade lies in state occupation of certain fields of economic endeavor. The treaties seek to provide viable conditions for private enterprise by assuring just compensation for private property when the state nationalizes, and to establish reasonable standards to govern state enterprises when operating in competition with private enterprises. It is in relationship with the thrust against state trading and state economic enterprise in general that the subject of sovereign immunity enters into the purview of the commercial treaty.

When the Department of State at the end of World War II embarked upon an extensive commercial treaty program, one of the most significant international facts of life to which it had to adjust its treaty projects was the almost universal growth of state activity in the economic field. The countries of Eastern Europe that had passed into the Soviet orbit, though not yet fully communized, were socializing industry at a rapid pace.[6] Extensive programs of nationalization were also being pursued in Western

[5] Dept. of State Pub. 6565, entitled "Commercial Treaty Program of the United States," January, 1958; Walker, "Treaties for the Encouragement and Protection of Foreign Investment," *loc. cit.;* Setser, "Treaties to Aid American Business Abroad," 40 Foreign Commerce Weekly 3 ff. (U.S. Dept. of Commerce, Sept. 11, 1950). Although numerous official statements have been made emphasizing the "private enterprise" purpose of commercial treaties, the policy statement contained in the Mutual Security Act of 1954, as amended, which is followed by a clause that provides that the President shall "accelerate a program of negotiation treaties of commerce and trade . . . which shall include provisions to encourage and facilitate the flow of private investments . . ." is sufficiently illustrative. 22 U. S. C. 1933.

[6] Miriam E. Oatman, "The Nationalization Program in Czechoslovakia," 15 Dept. of State Bulletin 1027–1031 (1946); Leon Goldenberg and Laure Metzger, "The Polish Nationalization Law," 15 Dept. of State Bulletin 651–654 (1946); "Private Enterprises Nationalized in Yugoslavia" (Press Release), 15 Dept. of State Bulletin 1150 (1946).

Europe, particularly by Great Britain[7] and by France.[8] The pattern was not localized in Europe, but was in evidence rather generally throughout the world. The program for treaty-making was obviously intended to be extended to all countries that would consider treaties. In some cases, however, specific agreements were made to enter into negotiations. Such agreements were made, for example, with France and Czechoslovakia in 1946.[9] In formulating treaty provisions for such countries, the Department's specialists could hardly have avoided giving attention to the problem created by the nationalization programs. Under the governing principle of mutuality, treaty rights for American private enterprises in Czechoslovakia, for example, had to be balanced with reciprocal rights for Czechoslovak enterprises in the United States. In 1946–48, there were still private enterprises in Czechoslovakia that might establish branches or subsidiaries in this country under the treaty, but what would be the situation as nationalization progressed, and the central enterprises that had established branches and subsidiaries in the United States passed into state control? Provision for the denial of immunity to such enterprises seemed quite pertinent to the subject matter of the proposed treaties.

A cursory reading of the immunity provision, when taken out of its context in the commercial treaty, may result in identification of it with the "restrictive theory," adoption of which by the Department of State was announced in 1952 in the letter from the Department's Acting Legal Adviser, Tate, to Acting Attorney General Perlman.[10] The commercial treaty provision (in the Treaty of Friendship, Commerce and Navigation with Italy), however, antedated the Tate letter by four years, and the two documents were designed for different purposes. The letter declares the policy of the Department to follow the restrictive theory in its own dealing with requests from other governments for a grant of sovereign immunity, the restrictive theory being defined as that under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." The commercial treaty provision, on the other hand, is not at all concerned with the "private acts" of the sovereign generally, but only with establishing a rule to govern in the case of state entities that are counterparts of, and are in competition with, the enterprises to which treaty rights are accorded.

[7] William A. Robson, "The Public Corporation in Britain Today," 63 Harvard Law Rev. 1321–1348 (1950); William N. Loucks, Comparative Economic Systems 277–436 (N.Y., 1957).

[8] Henry P. De Vries and Berthold H. Hoeniger, "Post-Liberation Nationalizations in France," 50 Columbia Law Rev. 629 (1950).

[9] Byrnes-Blum agreement, May 28, 1946, 61 Stat. (4) 4175, 14 Dept. of State Bulletin 997 (1946); U.S.-Czechoslovak agreement relating to commercial policy, 61 Stat. (3) 2431, 15 Dept. of State Bulletin 1005 (1946). A treaty was not concluded with either country, however.

[10] The text of the Tate letter is in 26 Dept. of State Bulletin 984 (1952). See also W. W. Bishop, Jr., "New United States Policy Limiting Sovereign Immunity," 47 A.J.I.L. 96 (1953); Michael H. Cardozo, "Sovereign Immunity: the Plaintiff Deserves a Day in Court," 67 Harvard Law Rev. 608 (1954).

The treaty provision has a more limited and specific objective than the letter.

The typical United States commercial treaty of the group here under consideration has been developed as an integrated document, and the sovereign immunity provision may not properly be separated from the general context of the instrument.[11] The provisions having the most important relationship to the meaning of the immunity clause are those having to do with the admission by one party of the business enterprises of the other.[12] The article containing these may be considered the keystone of the treaty, with many of the succeeding articles related to it. Its clauses contain significant elements of definition of the principal terms used in the immunity provision. It sets forth that

> nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for profit (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.

The succeeding sentence clarifies what to engage in business activities within the territories of the other Party means:

> Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

The concept of "enterprise" is then introduced:

> Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

The intended applicability of the waiver is governed by three key terms, or expressions, within the waiver provision itself. These terms or expressions are "enterprise," "engages in . . . activities within the territories of," and "business activities." The usage of these and similar terms elsewhere in the treaty and the general context of the treaty affect the conno-

[11] There is no better established canon of treaty interpretation than that which requires that a treaty be considered as a whole. 1 Oppenheim, International Law 953 (8th ed., 1955, edited by H. Lauterpacht); McNair, The Law of Treaties 198 (1938); Crandall, Treaties, Their Making and Enforcement 317 ff. (1916); 5 Hackworth, Digest of International Law 222–224.

[12] Art. VII, treaty with Israel. The development of the terminology of the treaties has been a continuing process since 1946, and, moreover, negotiating problems in the cases of individual countries have necessitated some variation in language from treaty to treaty. Consequently, not all of the relationships of the various provisions discussed here with reference to the treaty with Israel can be shown as conclusively for every other treaty. The fundamental rationale does not vary, however.

tation of these terms and supply additional interpretative factors of value for the understanding of the provision. These terms are considered in some detail in the succeeding paragraphs.

The term "enterprise" and the concept it represents were taken for treaty use from the literature of economics.[13] The borrowing from this source was only natural, since the commercial treaty is primarily concerned with matters in the field of economics. The word is associated with the concept of the *entrepreneur* (enterpriser), whose function is regarded by perhaps the majority of economists as one of the four factors of production (along with capital, labor, and land). The "enterprise" is the undertaking in which the *entrepreneur* (enterpriser) invests capital, for which he hires labor, utilizes land, and exercises his managerial skill—all in the hope of making a profit, and at the risk of loss. In treatise after treatise of a professional character, this concept of enterprise is developed, with the meaning easily discernible from the context.[14] In a number of cases, elements of definition of the term are clearly in evidence. The text by Gemmill and Blodgett, for example, contains the following:

> Since some business concerns have hundreds or thousands of part-owners, there are many more enterprisers than enterprises. But there are also, in this country, a great many business *enterprises, in the sense of separate and distinct business units.*[15]

Buchanan delimits his usage of the term in the following passage:

> A characteristic thing about the organization of production in capitalistic economies through the price system is that while the price system is the primary regulator of production the process is typically undertaken by productive combinations or entities called "firms" or "enterprises." That is, when we examine the structural organization of production in capitalistic economies we observe at once that it is business enterprises that hire labor, that undertake the production of new commodities, that introduce technological changes, that invest funds in real capital goods, etc. *The way in which production is in fact organized is typically not on a human individualistic basis but rather in somewhat larger producing units, called firms,* within which economic resources are applied in the production of products for sale in more or less well-organized markets.[16]

With reference to the words "firms" and "enterprise" used in this passage, the author appends the following explanatory footnote:

> The latter terms do not here imply any particular legal form of business entity such as the corporation, the partnership, the single

[13] In the treaty with Israel, for example, the term "enterprise" is employed in the following provisions: Art. I; Art. VI, pars. 4, 5; Art. VII, pars. 1, 2, 3, 4; Art. VIII, par. 1; Art. IX, par. 3; Art. XVII, par. 1; Art. XVIII, pars. 1, 2, 3.

[14] Examples are: W. H. Kiekhofer, Economic Principles, Problems and Policies 32 (N.Y., 1951); P. F. Gemmill and R. H. Blodgett, Economic Principles and Problems, Vol. I, p. 79 (2 vols., N.Y., 1948); J. T. Wendzel, the Dynamics of Capitalism 29–31 (N.Y., 1956); Norman S. Buchanan, The Economics of Corporate Enterprise 13 (N.Y., 1940); S. H. Schlichter, Modern Economic Society 134, 144 (N.Y., 1935).

[15] *Op. cit.* 79, italics supplied.

[16] *Op. cit.* 13, italics supplied.

> proprietorship, etc., but merely refer to all such forms of business ownership organization. In the succeeding pages, we shall use the words "firm," "enterprise," "business enterprise" as synonyms.

It seems clear from the above, therefore, that the term "enterprise," when employed in a concrete sense in a context where there is reference to economic organization of a capitalistic order, as in the case in the treatises mentioned and in the typical United States commercial treaty, signifies the autonomous unit of economic organization in a free-enterprise economy.[17]

This concept of "enterprise" as developed by the economists has passed over into the vocabularies of writers who are members of the legal profession, a by no means surprising occurrence, since members of both professions must deal with the same phenomena. Lee Loevinger, in his *The Law of Free Enterprise,* utilizes a general summary of the nature and function of the "enterprise," under the heading "The Forms of Free Enterprise," as one of the bases for his exposition and analysis of the United States anti-trust legislation. His intended meaning in using the term is made clear in this paragraph:

> In a sense, each business enterprise is a combination of individuals. However, the term "business combination" commonly means a combination of separate enterprises. Numerous problems may arise in distinguishing between a single enterprise and a combination. *The general principle is that an individual legal or economic entity (proprietorship, partnership, association or corporation) constitutes a single enterprise, while business activities with separate formal organizations are separate enterprises.*[18]

In his learned article on "The Theory of Enterprise Entity," A. A. Berle develops in a more technical way the concept of "enterprise" as applicable to a more limited subject matter. The following quotation is illustrative:

> It is the thesis of this essay:
> That the entity commonly known as corporate entity takes its being from the reality of the underlying enterprise, formed or in formation;
> That the state's approval of the corporate form sets up a prima facie case that the assets, liabilities and operations of the corporation are those of the enterprise;

[17] The various senses of "enterprise" as used in economic writing are discussed by L. M. Fraser in his Economic Thought and Language (London, 1937), at page 318, as follows: "In ordinary language the word has two main meanings. In the first instance it refers to a thing projected or attempted—particularly if it be of a bold or hazardous nature. But it may also be used subjectively of the quality or qualities possessed by those who undertake such projects—that is to say, it may be in effect a synonym for 'boldness' or initiative. Both these meanings are to be found in economic writings, but in addition the word has come to be used in at least two rather more specialized ways. On the one hand it has become more concrete, standing for the result or objective realization of a project in the economic field—viz. a firm or business unit. And on the other hand it has become more abstract, being used of the *activities involved* in initiating or running such a project. . . ."

[18] Loevinger, The Law of Free Enterprise 86 (N.Y., 1949). The statement is in the nature of a definition italicized for purposes of the present paper.

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> But that where the corporate entity is defective, or otherwise challenged, its existence, extent and consequences may be determined by the actual existence and extent and operations of the underlying enterprise, which by these very qualities acquires an entity of its own, recognized by law.
>
> For brevity, this hypothesis is hereafter referred to as the theory of "enterprise entity."
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> * * *
>
> Whenever "corporate entity" is challenged, the court looks to the enterprise. Where the enterprise as such would be illegal or against public policy for individuals to conduct, that enterprise is equally illegal when carried on by a corporation, and the corporate form is not a protection. This is, in essence, not so much a "disregard of the corporate fiction" as it is a holding that the economic enterprise, whether corporate or non-corporate, is illegal, or criminal, or in violation of public policy, or fraudulent, or otherwise objectionable, as the case may be. The nature of the enterprise determines the result, negativing the corporate personality or any other form or organization of that enterprise.[19]

Again, Kronstein, in his essay on "The Nationality of International Enterprises,"[20] resorted to the term "enterprise" to designate the fundamental entity in the capitalistic business structure:

> For the purposes of determining the nationality of a corporation, it is significant that business enterprises often do not coincide with corporate units. Sometimes they exceed the boundaries of corporate units and make corporate units their instrumentalities; or one corporation, or an unincorporated individual or group, may own many business enterprises which may or may not be incorporated. Thus, it may be that a corporation has the nationality of A while the central enterprise with which it is affiliated is deeply entrenched in the economic order of B and some of the constituent permanent establishments are parts of the economic orders of C and D.

The employment of "enterprise" in this same general sense in treaties has not been limited solely to those of the commercial variety. It has long been in use in United States treaties for the avoidance of double taxation.[21] These treaties, being highly technical in character, and perhaps because they may have the effect of directly amending the national revenue laws, carry an extensive list of definitions, among them definitions of "enterprise." A typical definition is that of "United States enterprise" found in the Convention for the Avoidance of Double Taxation between the

[19] A. A. Berle, "The Theory of Enterprise Entity," 47 Columbia Law Rev. 344, 354 (1947).

[20] 52 Columbia Law Rev. 985. Other passages in the article contribute to an understanding of the "enterprise" concept. The fact that Kronstein prefers to employ the term to refer to the major central business units does not affect the bearing of his discussion upon the treaty terminology.

[21] A more universal acceptance of the term is indicated by its use in the same sense in the model income tax convention adopted in 1943 at Mexico City at a conference held under the auspices of the League of Nations Fiscal Committee. League of Nations Fiscal Committee, Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion, *passim*, but especially pp. 16, 19 (Geneva, 1943).

United States and the Federal Republic of Germany,[22] signed July 22, 1954:

> The term "United States enterprise" means an industrial or commercial enterprise or undertaking carried on in the United States by a resident (including an individual in his individual capacity or as a member of a partnership) or by a United States corporation or other entity. . . .

It would appear from the writings of authorities in the fields of economics and law, of which the above are examples, and from the precedent of the tax treaties, that there is a settled and consistent usage of the term "enterprise," with a meaning, in connection with economic matters, and especially in relation to the organization of economic activities, which is clear and unequivocal. The "enterprise" is the basic unit in the organization of a capitalistic or "free enterprise" economy. Considering this meaning, the use of the term in the sovereign immunity waiver is significant. The restriction as to immunity contained in the provision can reasonably be construed to apply only to entities of the character of enterprises in a free-enterprise economic system. Logically, there could be included in that class private corporations of which government has acquired control by the acquisition of shares of stock, enterprises established under free enterprise that, through a nationalization program, have passed into government ownership, and entities created by government that are counterparts of the economic units of free enterprise.

The phrase immediately following "enterprise" in the waiver provision, "including corporations, associations, and government agencies or instrumentalities," was apparently made a part of the paragraph as an afterthought. It does not appear in the treaties with Italy, Uruguay, Ireland, or Greece, which are among the earliest in which the immunity provision appears. It makes no substantial contribution to the meaning of the paragraph. It is evident, however, that it had its origin in the desire to assure coverage of the government-controlled enterprise, however disguised. As Lalive points out,[23] the forms of state economic enterprise are myriad.

> But the matter [i.e., with reference to the denial of immunity in the case of a state enterprise having an independent juridical personality] is not always so simple, for state activity in the economic sphere can borrow some very diverse forms. The state can take part itself through the agency of its ministries or departments. It can convert to the public service a designated sector of economic activity (direct administration: railways, the national bank, etc.), allowing it administrative and budget autonomy. It can create special public law juridical persons—public establishments, state enterprises in the narrow sense of the term. It can also establish mixed enterprises having a private law personality.

In any case, the "including" clause merely means that the waiver extends to state enterprises *in the form of* government agencies and instrumentalities, as well as to those in the form of corporations.

[22] 5 U.S. Treaties 2768.

[23] *Loc. cit.* 245.

The second key expression in the provision is the phrase "if it engages in . . . activities within the territories of the other party." This is the language employed in the treaty to refer to entry and establishment. Again, for interpretation, reference must be made to the establishment provisions in Article VII.[24] The first sentence of that article states that

> nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types . . . of . . . activity for profit . . . within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.

The concluding phrase, "whether directly or by agent or through the medium of any form of lawful juridical entity," makes clear beyond any possibility of doubt that actual *presence* of the alien enterprise "within the territories" is what is contemplated. The second sentence develops further what is comprehended by "engaging in . . . activity" of the specified class. It states that, pursuant to the general rule of the preceding sentence, the alien nationals and companies shall be allowed to set up and maintain "branches, agencies, offices, factories and other establishments appropriate to the conduct of their business," to form or acquire control of domestic corporations, and "to control and manage enterprises which they have established or acquired."

Similar language is utilized in the treaty's tax provisions:

> . . . nationals and companies of either Party *engaged in* trade or other gainful pursuit . . . within the territories of the other Party, shall not be subject to the payment of taxes . . . more burdensome than those borne by nationals and companies of such other Party.[25]

The phrase "engaged in trade or other gainful pursuit within the territories of the other Party" in this context appears to be equivalent to "engaged in trade or business in such other state through a permanent establishment situated therein" as used in the tax treaties,[26] since both provisions rest upon the same United States tax theory and basic provisions of tax law. The United States obligation to admit alien corporate enterprises is intended to be commensurate with the requirements of the various States respecting the licensing of out-of-State corporations.[27] Within the context of the treaty, then, a state-controlled enterprise of one party is

[24] This entry and establishment provision has been properly described as "the heart of the treaty as an investment instrument." Walker, "Treaties for the Encouragement and Protection of Foreign Investment," 5 A. J. Comp. Law 236. It is often the most difficult part of a treaty to negotiate, since its acceptance is fully recognized as establishing a permanent policy of permitting the establishment of the alien enterprise without discrimination.

[25] Art. XI of the treaty with Israel.

[26] See Art. III, U.S.-Germany Convention for the Avoidance of Double Taxation, T.I.A.S., No. 3133.

[27] See Walker, "Provisions on Companies in United States Commercial Treaties," 50 A.J.I.L. 373 (1956). For the interpretation of national treatment as the treatment accorded to out-of-State corporations, see Art. XXII, par. 4, Israel treaty.

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subject to denial of its claim to sovereign immunity only if it is *present* by reason of its having an establishment within the other party's territories.[28]

The third expression of major significance for the interpretation of the provision is the term "business activities." It is to be noted that "business activities" is made synonymous with "activity for profit" in Article VII of the treaty with Israel, and with "activity for gain" in a number of other treaties.[29] Its specific meaning as a treaty term is also influenced by the fact that a purpose of its use is to distinguish normal economic activities in the fields of production and distribution from what may be described as eleemosynary or other non-profit activities. The latter types of activities are dealt with separately in most of the commercial treaties.[30] These factors have a proper bearing when it comes to consideration of whether the immunity waiver has any applicability to the normal and traditional activities of government.

The treaty provision goes somewhat further than the recommendations of many of the advocates of a liberal modification of the doctrine of sovereign immunity in that it provides that the state-controlled enterprise shall not claim or enjoy immunity not only from suit, but also from "taxation . . . execution of judgment or other liability to which privately owned and controlled enterprises are subject. . . ." [31] The intent here is obviously to equate the economic unit when it comes within the control of the state completely with the private enterprise as concerns liabilities and burdens imposed by law. As far as taxation is concerned, however, at least in the United States, it may be assumed that the immunity provision is not self-executing to the extent of imposing taxes upon a government enterprise in the absence of a specific provision of law providing for the assessment of such taxes.[32] The certain effect of the clause is to provide a complete defense against claims to immunity in case the tax authorities should find themselves able to assess taxes against such an enterprise under the tax

[28] The coverage of the treaty provision is much narrower than that proposed by the experts of the Harvard Research in International Law in Art. II of the Draft Convention on the Competence of Courts in Regard to Foreign States. The latter would not only deny immunity to a state when "it engages in an industrial, commercial, financial or other business enterprise" in another state, but also if "it does an act there in connection with such an enterprise wherever conducted." The latter coverage, of course, is not provided in the commercial treaty. 26 A.J.I.L. Supp. 451, 597 (1932).

[29] Those with Korea, Netherlands and Nicaragua. "Activity for profit" was again used in the treaty with Haiti.

[30] See Art. IX, par. 3 of the treaty with Israel.

[31] Lalive, *loc. cit.* 272-281; B. Fensterwald, "Sovereign Immunity and Soviet State Trading," 63 Harvard Law Rev. 624 (1950); Note, "Execution of Judgments Against the Property of Foreign States," 44 *ibid.* 963 (1931).

[32] There are a number of decisions and opinions that support the view that the language used would not override, for example, Sec. 892 of the Internal Revenue Code, which exempts foreign governments from taxation of income from any source within the U.S. 5 Hackworth 179, 185; 2 Hyde, International Law 1457; Crandall, Treaties 183-199. The principles concerning the taxation of a foreign state are discussed in Charles Fairman and Archibald King, "Taxation of Friendly Foreign Armed Forces," 38 A.J.I.L. 258 (1944).

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laws. The waiver of immunity with respect to execution of judgment would leave the courts free to use their discretion in the enforcement of their decisions against the property of state enterprises. By the terms of the provision, the waiver extends only to the property of the individual enterprise concerned, and does not subject government property generally to execution.

What is to be expected as to the effect of this provision in its actual application? It is evident, of course, that the development anticipated and feared in 1947–48—the nationalization of foreign firms having establishments in the United States, and the increased entry of state-controlled enterprises—did not transpire. The number of claims to immunity by foreign enterprises in this country does not appear to have substantially increased since World War II. The reason that the situation envisaged by the treaty planners did not materialize is not far to seek. Economic relations with the countries within the Communist orbit have been held down by the Cold War. The conservative reaction in Western Europe checked the nationalization movement before it had penetrated very far into the economic sectors from which branch establishments in the United States are likely to issue.[33] State-controlled aviation and shipping companies are, of course, operating to and within the United States. In the case of the former, waiver of immunity from suit is required by the Civil Aeronautics Board in connection with its issuance of permits to foreign air carriers.[34] In the case of the latter, established precedents seem to be sufficient to make recourse to the commercial treaties unnecessary.[35] No United States court case involving the application of the sovereign immunity waiver has been reported.

What of the application of the immunity waiver to activities of the United States Government in countries with which treaties are in force? Obviously the waiver provision considered as a rule of law can be construed with finality only in connection with the facts of a specific case.[36]

[33] The establishment of foreign state-controlled insurance entities in this country was checked by State action. An attempt in 1955 by the Caisse Centrale de Reassurance, a reinsurance company controlled by the French Government, to obtain a license to engage in business in Florida, resulted in the enactment of a law (F.S.A. 631.16) forbidding the licensing in that State of an insurer "owned, controlled, or operated by a foreign government or any agency thereof." Similar action has since been taken by many other States. Such legislation, promoted by the organized private insurance interests, was further stimulated by efforts of a company controlled by an agency of the Province of Saskatchewan, Canada, to expand into some of the Northwestern States.

[34] This is done under authority of 49 U.S.C. 482. See also the special agreement between the U.S. and The Netherlands providing for waiver of immunity of air carriers, June 19, 1953. 4 U.S. Treaties 1610. State-owned air carriers seem to be subjected by Art. 2 of the Warsaw Convention (1929) to liability for the death or injury of passengers and for loss or damage to goods or baggage during transportation, but the U.S. entered a reservation to that article. 4 Treaties (Trenwith) 5250.

[35] 2 Hackworth 436–442; 46 U.S.C. 747.

[36] In addition to its strictly legal character, however, a treaty of the type here considered is essentially a political and diplomatic instrument. By far the greater number of questions of treaty obligation and interpretation are disposed of in the foreign offices and never reach the courts.

But the author of a treaty provision is obliged to guide himself by more general considerations, by broader facts and tendencies. A careful general survey of the manifold operations in which the United States Government is involved in treaty countries has revealed no case of an existing activity coming within the purview of the waiver provision reasonably interpreted, and the evidence is clear that the intent was to exclude such activities. Reconstruction of an entity such as the United States Merchant Fleet Corporation of the 1920's,[37] or an undertaking by the Tennessee Valley Authority to build and operate an electric power utility within a treaty country would, of course, activate the treaty provision with respect to such enterprises. But no such ventures on the part of the United States can now be foreseen. It appears that no question regarding the treaty waiver has ever been raised in any foreign court, nor has any diplomatic approach on the subject been made to the United States.

The commercial treaties do not concern themselves in any very significant way with the regulation of the normal functions of government in its proprietary capacity.[38] The only clause dealing with the matter of government contracts, for example, is the very general rule [39] that government agencies shall make their purchases and sales involving imports and exports in accordance with commercial considerations, and that each treaty party shall accord the nationals and companies of the other "fair and equitable" treatment with respect to purchases and sales and the awarding of contracts. There are weighty arguments indeed that, in furtherance of the rule of law, all "private acts" of governments, including those relating to purchases and sales, to all types of contracts, and torts, should be subject to adjudication in the same way as similar acts of private persons and entities, and without regard to whether the act was performed by a business enterprise within the adjudicating jurisdiction. But it has not been considered the province of the United States commercial treaty to provide the legal basis for establishing jurisdiction over such acts.

Much United States Government activity abroad has to do with the establishment and maintenance of military bases and the supply of military forces stationed abroad. Obviously these activities involve much buying and selling, and numerous acts affecting the rights of private persons. But there is no parallelism between the governmental organizations carrying on these activities and the economic enterprises carrying on business activities for gain which are the subject matter of the commercial treaty. This is the case even when the government agency assesses charges to cover the cost of goods or services furnished in connection with the supply, subsistence, and maintenance of the well-being of military and attached civilian

[37] U.S. policy with respect to immunity in the case of this corporation is illustrated by the cases in 4 Hackworth 439–442.

[38] It is a well-settled axiom of treaty interpretation in the United States that treaty rules do not bind a government as to its proprietary activities except to the extent that they specifically stipulate that such activities are covered. Heim *v.* McCall, 239 U.S. 175 (1915), and the line of cases applying and elaborating the doctrine of that case.

[39] Art. XVIII, pars. 1 and 2, Israel treaty.

personnel.[40] The situation is the same with respect to diplomatic and consular establishments abroad.

Other principal United States Government activities that are concerned with foreign countries are those connected with foreign lending, disposal of surplus commodities, the stockpiling of strategic materials, and the distribution of foreign aid. A significant thing to note in the legislative policy statements regarding most of these activities is the clear intent to avoid replacing or competing with private enterprise. Generally speaking, the governmental establishments are intended to support or reinforce private efforts in the same general field. The law establishing the Export-Import Bank of Washington, which does most of the foreign lending either directly or as fiscal agent for the International Cooperation Administration, states that "it is the policy of the Congress that the Bank in the exercise of its functions should supplement and encourage and not compete with private capital."[41] Public Law 480, in providing for the disposal of surplus agricultural commodities for foreign currencies, requires the President "to take appropriate steps to assure that private trade channels are used to the maximum extent practicable both with respect to sales from privately owned stocks and from stocks owned by the Commodity Credit Corporation."[42] The Strategic and Critical Materials Stock Piling Act merely provides for purchase, storage, processing, and disposal of materials, but the policy of avoiding state competition with private industry is indicated in the provision that the refining or processing of materials is to be handled through "normal commercial channels."[43] Furthermore, barter arrangements under Public Law 480 for strategic or other materials needed by the Government are to be made through private trade channels.[44] Great emphasis is placed by the Mutual Security legislation upon the rôle of free enterprise, not only as concerns utilizing the Mutual Security programs to promote its growth in participating countries, but also with respect to the utilization of private enterprises to the maximum extent for the carrying out of the programs.[45] The provisions of law establishing the Development Loan Fund reiterate these purposes.[46]

The Government instrumentalities concerned with the activities here under discussion do not maintain establishments within the territories of foreign countries for the purpose of carrying on business activities there. The Export-Import Bank makes its loan contracts in the United States. The credits it extends are used to pay for purchases of United States products, and are usually extended to American private firms, although extensive credits are made available to foreign governments and sometimes

[40] For an interpretation of the status of military post exchanges, see Standard Oil Co. *v.* Johnson, 316 U.S. 481. "From all this," said the Court, "we conclude that the post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and Federal statutes."

[41] 12 U.S.C. 635.

[42] 7 U.S.C. 1701.

[43] 50 U.S.C. 986.

[44] 7 U.S.C. 1692.

[45] 22 U.S.C. 1933.

[46] Public Law 85-141, 85th Cong.

to foreign private firms. Members of its staff make frequent visits to foreign countries to obtain information pertinent to loan applications, but the Bank establishes no branches or field offices abroad.[47]

In the operations necessary for the disposal of agricultural surpluses, the agricultural attachés on the staff of United States diplomatic missions abroad play an important rôle. They engage in many activities to encourage the marketing of American products, but they do not participate in any sales transactions.[48] These transactions are the function of private business concerns. The best-known surplus disposal operations are carried out under the Agricultural Trade Development and Assistance Act of 1954 (P.L. 480). Under this Act, surplus commodities are sold to foreign countries for local currencies at prices generally much below the cost of the products to the Commodity Credit Corporation, distributed abroad for famine relief and other charitable purposes, exchanged for strategic materials and equipment needed in foreign military programs, or in connection with economic aid. Agreements with foreign governments regarding sales are concluded through diplomatic channels, but actual sales take place between the foreign importer and the private American exporter, who obtains his commodities in most cases from the Commodity Credit Corporation. The latter entity does not maintain any establishment within the countries where sales are made.[49]

The widest incidence of United States Government influence in economic matters upon foreign countries occurs in connection with the administration of the Mutual Security policies. Although several agencies participate in this administration, the controlling instrumentality[50] at the present time is the International Cooperation Administration (a semi-autonomous organization within the Department of State). Activities with which this agency is concerned have to do with the distribution of aid funds provided by United States taxpayers to the governments and peoples of foreign countries, either in the form of free grants of money, liberal-term loans, or special services. Although there are many classes of activities involved, including military aid of various sorts, economic development assistance, and technical aid, there is nothing in the organization of I.C.A. or in the methods by which it carries out its responsibilities that suggests in any way

[47] Export-Import Bank of Washington, Report to the Congress for the Twelve Months Ending June 30, 1957 (Pts. I and II); Olin S. Pugh, The Export-Import Bank of Washington (Charleston, S.C., 1957); Commission on Organization of the Executive Branch of the Government, Task Force Report on Overseas Economic Operations 373–382 (June, 1955). The legislation establishing the Bank can hardly be considered hostile to the idea of its being subjected in a proper case to foreign jurisdiction, however. It is specifically authorized to "sue and be sued, to complain and to defend in any court of competent jurisdiction." 12 U.S.C. 635.

[48] Dept. of State, The American Agricultural Attaché (1957).

[49] Commission on Organization of the Executive Branch of the Government, Task Force Report on Overseas Economic Operations 317–341; Sixth Semiannual Report on Activities Under Public Law 480 . . . Jan 1 through June 30, 1957.

[50] Designated at different times in the past as Economic Cooperation Administration (to 1952), Mutual Security Administration (1952–1953), and Foreign Operations Administration (1954–1955).

the private enterprise for gain that is the subject matter of the commercial treaties.

The International Cooperation Administration is essentially a financial institution, which makes the financial arrangements required by the legislation, authorizes the allocation of funds, and carries out inspections to assure that funds are expended in accordance with the established policies. It maintains missions (now more or less integrated with the staffs of the United States embassies) in all countries where aid is being accorded. The personnel of these missions help prepare the documentation for aid projects, assist in the end-use inspections, perform administrative work needed in the carrying out of the United States Government's function in the operation, and participate in some of the technical assistance work. Aid is accorded, as a rule, pursuant to agreements negotiated through diplomatic channels. For the most part, orders equipment, materials, or commodities originate with the foreign government or a private firm authorized by it, and are placed with a private firm, usually in the United States. Much of the technical assistance is furnished through private firms or universities whose services are contracted for.[51] The Mutual Security Act of 1957 established a new instrumentality in the field of foreign aid, the Development Loan Fund.[52] In carrying out Mutual Security policies, the Fund may make loans to governments, private corporations, and other entities, and is authorized to take measures to assure repayment. The establishment of the Fund grew out of the desire of Congress to substitute loans on liberal terms for much of the grant aid. There is nothing essentially new in the policy, however, or in the methods projected for carrying it out. Loans made by the Fund are to be administered by the Export-Import Bank in accordance with the general provisions of law governing that agency and those governing its function as fiscal agent for the International Cooperation Administration.[53]

The immunity waiver in the commercial treaties, then, does not constitute any far-reaching fundamental United States policy innovation. It relates to a simple factual situation. If treaty assurances are to be given to foreign economic enterprises, then it is reasonable and appropriate to provide for equalization of the situation in the event that foreign state enterprises become competitors of American or the treaty-protected alien private enterprises. The principle had previously been implemented in part by the Civil Aeronautics Board in requiring a waiver from alien air carriers, and

[51] Commission on Organization of the Executive Branch of the Government, Overseas Economic Operations, A Report to the Congress (June, 1955), and Task Force Report on Overseas Economic Operations (June, 1955); Report to Congress on the Mutual Security Program for the Six Months Ended June 30, 1957; Department of State, The Mutual Security Program, Fiscal Year 1958; Jerome Jacobson Associates, The Use of Private Contractors in Foreign Aid Programs (March, 1957), a study prepared at the request of the Special Committee to Study the Foreign Aid Program, U.S. Senate, 85th Cong., 1st Sess.

[52] Public Law 85-141, 85th Cong.; International Cooperation Administration, Development Loan Fund (Dec., 1957).

[53] 22 U.S.C. 1757; Sec. 205, Public Law 85-141, 85th Cong.

by the Congress and the Executive in accepting foreign jurisdiction over United States Merchant Fleet Corporation vessels. The commercial treaties merely extend the principle generally to foreign state enterprises established for business purposes. Until the United States abandons its free enterprise philosophy and begins to replace private enterprise in foreign countries with Government-owned enterprises, there would appear to be no basis in reason or in experience for fear that such treaty provisions will result in subjection of United States Government activities to foreign jurisdictional liabilities.

EXECUTION AGAINST THE FOREIGN SOVEREIGN'S PROPERTY: THE CURRENT SCENE

By *William L. Griffin* *

Office of the Legal Adviser, Department of State

I. The Concept of "Execution"

The term "execution" is used here, not in any technical sense, but as generally descriptive of any process of attaching, taking, apprehending or seizing property of a foreign state, or depriving such state of its control over its property, pursuant to a judicial order or ruling for the purpose of, or to aid in, or to induce, carrying into effect a judicial order or ruling on the merits against the sovereign.

The question what is execution is self-evident in the ordinary case in which the plaintiff has obtained a money judgment against a sovereign of which the court has obtained *in personam* jurisdiction. In such case execution is a clearly demarcated step, following entry of a judgment and an order of execution. But when jurisdiction is *in rem,* or when plaintiff seeks specific relief, for example, concerning his claim to a title interest, or injunction against various kinds of torts, enforcement of various kinds of liens, *et cetera,* the question of what is execution may not be initially quite as clear.

With regard to disputed title claims the question of execution does not arise. If the court holds in favor of the sovereign, that is the end of the matter. If the court finds in favor of the adverse party, then the sovereign has no ownership interest to be executed upon. With regard to granting other types of specific relief involving the sovereign's property, the suit may simply terminate with an order on the merits against the sovereign, the carrying out of which would be execution as described above.

Under the foregoing description, execution includes the process variously known as "garnishment," "trustee process" or "attachment execution," when used to describe a post-judgment-on-the-merits process directed against a judgment debtor's property in the hands of a third party. Such

* The views expressed herein are the author's in his personal capacity.

Annex 229

80-1641

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNIT A

80-1641

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,
Plaintiff-Appellee,

VS.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN, and THE GOVERNMENT OF IRAN,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Defendants-Appellants

On Appeal From the United States District Court for the Northern District of Texas

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Defendants-Appellants.

CERTIFICATE REQUIRED BY
LOCAL RULE 13.6.1

The undersigned, counsel of record for Defendants-Appellants, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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The Social Security Organization of the Government of Iran

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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vs.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN,

Defendants-Appellants

REQUEST FOR ORAL ARGUMENT

Counsel for defendants-appellants requests oral argument in the above captioned appeal. Argument is necessary to fully explore the issues presented particularly with respect to the immunity of foreign states in the courts of this country. This appeal is important in the development of the law in this area and may have a significant impact on the foreign relations of the United States and its role in international commerce. There has been relatively little judicial interpretation of the Foreign Sovereign Immunities Act and oral argument is necessary in this landmark case.

Judith Levin

JUDITH LEVIN, Esq.

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STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIM AND IN PERSONAM JURISDICTION OVER DEFENDANTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT?

II. DID THE DISTRICT COURT ERR IN HOLDING THE GOVERNMENT OF IRAN AND THE MINISTRY OF HEALTH AND SOCIAL WELFARE OF IRAN LIABLE ON A CONTRACT ENTERED INTO ONLY BY THE SOCIAL SECURITY ORGANIZATION, A SEPARATE JURIDICAL ENTITY?

III. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A CONTINUANCE?

IV. DID ENTRY OF JUDGMENT BELOW VIOLATE TREASURY REGULATIONS BLOCKING IRANIAN ASSETS IN THE UNITED STATES?

STATEMENT OF THE CASE

I. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Plaintiff filed this action for breach of contract February 23, 1979 against the Social Security Organization of the Government of Iran (hereinafter SSO), the Ministry of Health and Welfare of the Government of Iran (hereinafter Ministry), the Government of Iran and Itel Corporation (R. Excerpts, No. 79-2641, 1).[1/] The court, on March 12, 1979, issued an ex parte preliminary injunction restraining SSO and the Ministry from removing assets from the United States (R. Excerpts, No. 79-2641, 17). On April 2, 1979, the court issued an ex parte temporary restraining order against the Government of Iran, prohibiting it from transferring assets (R. Excerpts, No. 79-2641, 36).[2/] Thereafter, defendants appeared and filed motions to dismiss on April 12, 1979 (R. Excerpts, No. 79-2641, 39-40).

1/ Plaintiff voluntarily dismissed the claim against Itel on March 30, 1979 (R. 107-108).

2/ On the same day, plaintiff commenced an identical action in the District Court for the Southern District of New York for the purpose of attaching Iranian government funds located there. The New York court issued the same temporary restraining order and later entered an order of attachment. Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran, et al., No. 79 Civ. 1711 (CLB) (May 23, 1979), remanded, 610 F.2d 84 (2d Cir. 1979).

On June 11, 1979, the court preliminarily enjoined the Government of Iran from removing any funds from the Marine Midland Bank in New York (R. Excerpts, No. 79-2641, 42-43). On June 21, 1979, the court denied the motions to dismiss of SSO and the Ministry and reserved decision on the Government's motion pending further efforts to serve it (R. Excerpts, No. 79-2641, 44-63).[3/] Defendants appealed the June order to this court, which has carried that appeal with the instant one.

In its June order, the lower court also granted plaintiff's request for an expedited trial, setting it for August 20, 1979 (R. Excerpts, No. 79-2641, 63). Thereafter, at defendants' request, the court continued the trial until November (R. Excerpts, No. 79-2641, 71). In November, defendants requested a further continuance, which was denied (R. 698-701, 781). Because of its own calendar, the court later postponed the trial until January, 1980 (R. 833). Defendants renewed their motion for continuance to complete discovery, investigation and preparation for trial (R. 4U).

3/ Service of process in this case is a saga in itself. The Government of Iran was served through diplomatic channels and that is not an issue in this appeal. Service on SSO, however, is an issue and the relevant facts are set forth in the argument. See pp. 37-39, infra.

On January 9, 1980, the court reserved decision on the motion after denying it (R. Excerpts 89). On January 14, 1980 the court again denied the motion in open court and by written order (R. Excerpts 94-95).

Trial commenced January 14, 1980 and continued through January 28th. The court issued findings of fact and conclusions of law on May 2, 1980, finding that it had subject matter jurisdiction over plaintiff's claim, personal jurisdiction over all defendants and that the defendants were liable for breach of the contract between plaintiff and SSO (R. Excerpts 68-82).

The final judgment was entered May 9, 1980 against all defendants, jointly and severally (R. Excerpts 83-84). The court awarded plaintiff $15,177,404 in damages, $2,812,251 in pre-judgment interest, $1,079,875 in attorneys' fees, post-judgment interest and costs (R. Excerpts 83-84).

II. STATEMENT OF FACTS

The subject matter of this action is a contract which, by its terms, was "made and entered into in Tehran," between SSO and the plaintiff (D. Ex. 36, p. 1).[4/] The

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4/ Defendants' Exhibit 36 and plaintiff's Exhibit 40 are both copies of the contract in issue. However, plaintiff, at the hearing on the preliminary injunction, introduced a different version of the contract; the differences between the two versions are noted in D. Ex. 36.

purpose of the "output-oriented, performance contract" was the establishment and operation of a national health insurance and social welfare data processing system.

When Electronic Data Systems Corporation began to explore international business opportunities in the "lucrative" markets of developing nations, it focused on Iran (T. 24-25). Representatives of EDS went to Iran in 1975 to explore the possibility of government contracts (T. 47-48). EDS presented the first draft of a contract with SSO in Tehran on Christmas Day, 1975 (T. 64). Negotiations proceeded in Iran, principally with representatives from SSO (T. 69-70). The contract was signed in Iran on September 25, 1976, dated November 2, 1976, to be effective on November 22, 1976 (T. 108).

During this time, EDS "had occasion to have representatives of the Ministry visit . . . EDS facilities in the United States" (T. 413). In the fall of 1975, several Iranians came to look at EDS facilities in Texas and to go over the detailed study that EDS was preparing for Iranian contracts (T. 414-415). Later, there were other visitors, including Mr. Neghabat, Director of SSO (T. 415-416). Mr. Neghabat returned to the United States in the spring of 1978. On his second visit, he reportedly discussed the possibility

of extending the contract after 1979 (T. 417-418). The only Iranian who testified about those visits came to the United States at plaintiff's request (T. 1136-1137).

The contract provided for performance in Iran and payment there in rials, the Iranian currency (D. Ex. 36, p. 47). Plaintiff submitted monthly invoices to SSO and was paid by the controller of SSO (Tr. 147-149). Plaintiff was last paid in July, 1978 for the months of April and May, 1978 (T. 144). At that time the political situation in Iran was volatile and the people with whom plaintiff had dealt were removed from office (T. 145). Their replacements in turn resigned (T. 146). Plaintiff, unpaid, ultimately terminated the contract December 16, 1978, effective January 16, 1979 (T. 158-159, Ex. 114).

SUMMARY OF ARGUMENT

The lower court did not have subject matter or personal jurisdiction to enter judgment in this case. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, et seq. (FSIA), governs judicial determinations of jurisdiction over foreign states. The Act provides a general grant of immunity to foreign states subject to certain enumerated exceptions, none of which apply in this case. Only two of the exceptions are even relevant: waiver and commercial activity.

The 1955 Treaty of Amity between Iran and the United States specifically does not waive the immunity of the Government of Iran or its non-commercial agencies and instrumentalities. Only government-owned business enterprises are affected by the Treaty's waiver provision. Defendantshere are not enterprises within the meaning of the Treaty.

The FSIA's commercial activity exception also does not apply to plaintiff's claim, which is based on defendant SSO's failure to pay on a contract, wholly executed and performed in Iran, which provided for payment in Iran.

The claim does not come within the Act's exception because it is not based on any defendant's commercial activity carried on in the United States, act within the United States based on commercial activity elsewhere or act elsewhere based on commercial activity elsewhere which has a direct effect in the United States. Since no defendant has the requisite jurisdictional contacts with the United States, required by the Act, the lower court had no jurisdiction.

Moreover, the Ministry and SSO were not properly served with process, since plaintiff and the lower court failed to comply with the exclusive methods of service set forth in 28 U.S.C. § 1608(b).

The district court erred in finding the Government of Iran and the Ministry liable on plaintiff's contract with SSO. The court completely ignored the FSIA and law of Iran, which exclusively controls disputes under this contract, and mistakenly relied on inapposite cases involving common law questions of agency and alter ego.

The district court abused its discretion in denying defendants' motion for a continuance and deprived them of an adequate opportunity to prepare for trial.

Finally, the judgment entered by the district court violates the Iranian Assets Control Regulations which prohibit judgments affecting Iranian assets located in this country.

ARGUMENT

POINT I.

THE LOWER COURT HAD NO JURISDICTION TO ENTER JUDGMENT BECAUSE DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602, et seq., governs determinations of sovereign immunity in the United States.

Historically, foreign sovereigns were entitled to absolute immunity in United States courts. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). In the usual case, a foreign state claiming immunity would seek a "suggestion of immunity" from the State Department, whose determination was considered binding upon the judiciary. Ex parte Peru, 318 U.S. 578 (1943); Rich v. Naviera Vacuba, 197 F.Supp. 710 (E.D. Va. 1960), aff'd., 295 F.2d 24 (4th Cir. 1971).

As states became increasingly involved in international trade and commerce in the 20th century, however, the doctrine of absolute immunity gradually gave way to the modern doctrine of restrictive immunity, pursuant to which a sovereign may claim immunity for its governmental acts (juri imperii) but not for its purely commercial acts (juri gestiones). In 1952, the State Department issued the "Tate

letter" which announced the Department's adoption of the restrictive immunity doctrine. 26 Dept. of State Bull. 984 (1952). The State Department practice of determining claims of immunity by issuing or denying binding suggestions continued until the enactment of the FSIA.

The FSIA, drafted by the Departments of State and Justice, generally codifies State Department practice under the restrictive immunity doctrine. See H.R. Rep. No. 1487, Jurisdiction of United States Courts In Suits Against Foreign States, 94th Cong., 2d Sess.p.9 reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6608 [hereinafter cited as House Report]. The major change effected by the Act was to remove the State Department from actual determination of individual immunity claims and to vest jurisdiction for determination of such claims with the federal courts, "thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that ensure due process. Id. at 7, reprinted at 6606.

Under the Act, "foreign states" are entitled to immunity from suit in the courts of the United States in all cases which do not come within specific statutory

exceptions.[5] All defendants fall within the Act's definition of "foreign state," which includes a state's agencies and instrumentalities, 28 U.S.C. § 1603(a), (b). House Report at 15, reprinted at 6613-14. Thus, defendants can be subject to the jurisdiction of a United States court only if and to the extent that the particular claim against them falls within the exceptions enumerated in §§ 1605-1607. 28 U.S.C. § 1604.[6] House Report at 13-14, reprinted at 6612.

The only exceptions arguably relevant here involve cases:

5/ The Act grants district courts subject matter jurisdiction of actions against a foreign state "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a). Section 1330(b) provides for jurisdiction in personam over a foreign state as to those claims over which the courts have subject matter jurisdiction, provided service pursuant to § 1608 has been made. See infra, pp. 37-39.

6/ 28 U.S.C. § 1604 is also explicitly "subject to existing international agreements to which the United States is a party." The 1955 Treaty of Amity between Iran and the United States is such an agreement, mistakenly relied upon by the lower court for its finding that defendants have waived immunity (R. Excerpts, No. 79-2641, 49). See discussion, infra, pp. 25-36.

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . .

28 U.S.C. § 1605(a).[7/] Careful application of the law to

7/ Subsection (3) of § 1605(a) refers to rights in property taken in violation of international law; subsection (4) deals with property in the United States; subsection (5) affects losses in the United States as a result of a foreign state's tortious act or omission. Although plaintiff initially pressed a claim against the government for tortious inducement to breach the contract in question, it appears to have abandoned that claim after trial and, in any event, § 1605(a)(5)(B) specifically excludes claims for interference with contract rights from this exception to immunity. (See Br. of Appellee in No. 79-2641, at pp. 35-38).

Subsection 1605(b) refers to suits in admiralty; § 1606 governs extent of liability only; and § 1607 provides jurisdiction over counterclaims where the foreign state is a plaintiff or intervenor. Accordingly, none are relevant to the question of jurisdiction in this case.

the facts reveals that neither exception deprives any defendant of immunity from suit in this case.

A. Defendants Did Not Have A Nexus With The United States Sufficient To Divest Them Of Immunity.

The "commercial activity" exception to the general grant of immunity applies only if one of three distinct factual predicates exist. § 1605(a)(2). A claim under this exception must be based upon: (1) a foreign state's "commercial activity carried on in the United States;" (2) its "act performed in the United States in connection with commercial activity . . . elsewhere;" or (3) an act performed elsewhere in connection with commercial activity elsewhere which "causes a direct effect in the United States." Id.

The district court failed to address these three criteria individually or to develop any coherent analysis of § 1605(a)(2) (R. Excerpts, No. 79-2641, 46-49). Since plaintiff's claim is based on an act in Iran in connection with activity in Iran, having, at best, an indirect effect in the United States, it does not come within any aspect of the exception.

1. Defendants Did Not Carry On Commercial Activity In The United States.

The Act defines "commercial activity carried on in the United States by a foreign state," as having substantial contact with the United States." 28 U.S.C. § 1603(e) (emphasis added).

At the very least, the sovereign's actions must have "a degree of contact beyond that occasioned simply by United States citizenship or United States residence of the plaintiff." House Report at 17, reprinted at 6616.

In evaluating the nexus between defendants' activity and the United States, the lower court erroneously applied "the notion of minimum contacts" (R. Excerpts, No. 79-2641, 49). Although the legislative history reveals a congressional intent to pattern the Act after the District of Columbia long-arm statute and to embody within it the constitutional requirement of minimum jurisdictional contacts, House Report at 13, reprinted at 6612, these concerns serve only as:

> . . . a guide to interpreting the Act, not a binding directive. Instead, as to foreign states, Congress provided a much narrower basis for jurisdiction. . . . [T]he crucial question is whether [defendant's conduct] involves 'substantial contact with the United States within the meaning of the Act.

Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284, 1295-96 (S.D.N.Y. 1980) (Weinfeld,J.); Harris v. V.A.O. Intourist, Moscow, 481 F.Supp. 1056, 1059 (E.D.N.Y. 1979). In Verlinden , the court refused to find that the Central Bank of Nigeria, which established in Nigeria a letter of credit advised and payable through a New York bank, had contacts with the United States sufficiently substantial to deprive it of immunity. Another court has held that negotiations in the forum alone are insufficient to meet the Act's "substantial" contact requirement. East Europe Domestic International Sales Corp. v. Terra, 467 F.Supp. 383, 390 (S.D.N.Y. 1979). Even an inspection visit to the United States by the foreign state's representatives, heavily relied on by the lower court here, is not "jurisdictionally significant," Waukesha Engine Division v. Banco Nacional de Fomento, 485 F.Supp. 490, 493 (E.D. Wisc. 1980). Defendants' occasional visits to the United States, at plaintiff's behest, cannot, as a matter of law or logic, meet the Act's "substantial contact" test.

Indeed, defendants do not even meet the Constitution's minimal contact standard. The due process clause allows exercise of jurisdiction in personam only where the defendant has initiated "systematic and continuous" contacts with the forum. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). Neither "irregular nor casual" conduct will satisfy the minimal contacts requirement. Id. In order for jurisdiction to be constitutionally permissible, it is

> . . . essential in each case that . . . defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The leading Supreme Court cases upholding personal jurisdiction as constitutional involve defendant sellers who have initiated contacts in the forum for the purpose of making a profit. In International Shoe v. Washington, the foreign corporation regularly sent shoe salesmen into the forum. McGee v. International Life Insurance Co., 355 U.S. 220 (1957), involved a Texas insurance company which sought out an insured in California and offered to assume a life insurance policy, delivered the contract there, and accepted premiums mailed from California. Courts cannot exercise personal jurisdiction, even under the District of Columbia long-

arm statute, which has been construed to be co-extensive with the constitutional standard and was a model for the Act, where a defendant did not solicit business in the forum and his isolated contacts there -- including negotiations and even an agreement -- were "a direct result of plaintiff's initiative." Textile Museum v. Eberstadt & Co., Inc., 440 F.Supp. 30, 33 (D.D.C. 1977). Cf., Margoles v. Johns, 483 F.2d 1212, 1218 (D.C. Cir. 1973).

Here, plaintiff went to Iran to sell data processing to SSO. Contract negotiations took place in Iran. The parties signed the contract in Iran. Plaintiffs purportedly performed it in Iran. It provided that the law of Iran apply to any disputes arising under it. Plaintiff's cause of action is based not upon defendants' commercial activity carried on in the United States, but upon plaintiff's commercial activity carried on in Iran. Defendants' only contacts with this country were truly negligible and possessed none of the earmarks of traditional jurisdictional contacts. Defendants neither purposely sought profit from

the United States nor invoked the protection of its laws.[8/] Their actions do not even amount to "minimal contact" with the United States. A fortiori they do not satisfy the Act's "substantial contact" test for jurisdiction based on commercial activity carried on in the United States.

2. Plaintiff's Claim Is Not Based Upon Any Defendant's Act Within The United States In Connection With Commercial Activity Elsewhere.

The statutory language and the legislative history make crystal clear that, to justify jurisdiction in the United States under the second criterion, acts must not only be performed in the United States, but also "in and of themselves . . . [be] sufficient to form the basis of a cause of action." 28 U.S.C. § 1605(a)(7); House Report at 19; reprinted at 6617-18.

8/ The lower court erred in attributing plaintiff's activity in the United States to the defendant for jurisdictional purposes (R. Excerpts, No. 79-2641, 47, 49). A plaintiff's activity can never satisfy the requirement that defendant have the contact with the forum, even where the defendant can reasonably foresee plaintiff's involvement in the forum, consents to it, and himself has had negligible contact in the forum. Kulko v. Calif. Superior Court, 436 U.S. 84 (1978), Cf., World Wide Vokswagen v. Woodson, ___ U.S. ___, 100 S.Ct. 559 (1980). Waukesha Engine Division v. Banco Nacional de Fomento held that the fact that a defendant foreign state knew plaintiff would perform on the contract in the United States did not affect sovereign immunity. 485 F.Supp. at 493.

The act -- actually, the omission -- upon which plaintiff bases its claim is the failure of SSO to pay in Iran plaintiff's invoices submitted in Iran. Plaintiff has never complained about any defendant's act in the United States; indeed, things apparently were going very well when plaintiff brought its Iranian visitors here. Accordingly, since plaintiff's claim does not arise out of any act performed in the United States, this exception cannot defeat defendants' claim of sovereign immunity.

3. Defendants' Acts In Iran Did Not Have A Direct Effect In The United States.

The district court erred in concluding that plaintiff's activity in this country during the life of the contract and after its termination constituted a direct effect of defendants' acts (R. Excerpts, No. 79-2641, 47, 49); see n. 8 , supra. The court's hopeless confusion is nowhere more clearly revealed than in the bizarre conclusion that the "direct effect" was "the utilization of numerous workers of E.D.S.C.I. to carry out duties under the contract." Id. at 47. The Act, however, requires that "the direct effect in the United States" flow from an act outside this country which is the basis of the claim. The act outside the United States of which plaintiff complains was SSO's failure to

pay, not, as the lower court apparently thought, its signing the contract. Plaintiff's acts in the United States pursuant to the signing of the contract cannot possibly be the direct effect of SSO's failure to pay.

The legislative history of the "direct effect" exception to sovereign immunity incorporates "the principles set forth in § 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." House Report at 19, reprinted at 6618. The Restatement requires that, where, as here, the conduct at issue is not criminal or tortious, any "effect" warranting jurisdiction must be substantial and a direct and foreseeable result of the conduct. Restatement (Second) Foreign Relations Law of the United States § 18(b), Comment f. at 50 (1965) [hereinafter cited as Restatement §].[9/]

9/ The Restatement permits jurisdiction to prescribe a rule of law attaching consequences to conduct outside the territory which has an effect inside the territory if that "conduct and its effect are generally recognized as constituent elements of a crime or tort . . ." Restatement § 18 (a). The Act, by contrast, explicitly requires that the effect always be direct. § 1605(a)(2).

Moreover, the Restatement makes clear that, even with respect to patently criminal conduct, the effect must be direct. For example, although it permits jurisdiction to apply the law of a state in the United States when X, an alien, shoots across the border from outside the United States and the bullet kills Y inside the United States, it denies jurisdiction when X shoots Y outside the United States and dies as a result. Restatement § 18, Comment c, Illustrations 2 and 3 at 48-49. These illustrations are instructive here. Plaintiff's claim is based on defendants' failure to pay it under the contract which called for payment in rials, in Iran. Thus, the injury of which plaintiff complains was entirely within Iran. The fact that plaintiff is a United States corporation cannot divest defendants of immunity in this country.

The case law further clarifies that the direct effect exception

> can only be invoked when a "substantial" effect within the territory 'occurs as a direct and foreseeable result of the conduct outside the territory.

Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. at 1298, quoting the Restatement, § 18(b). In Harris v. V.A.O. Intourist, Moscow, Judge Weinstein reached the same conclusion as Judge Weinfeld: that § 18(b) of the Restatement is the appropriate guide to the Act's direct effect exception. 481 F.Supp. at 1062-63.

Verlinden held that the actual "locus of the injury is dispositive of jurisdiction." 488 F.Supp. at 1298. The injury in this case was in Iran where plaintiff was not paid, and it is irrelevant that plaintiff, a Texas corporation, may later have suffered in the United States. Even when United States citizens have been injured or killed by allegedly tortious conduct by foreign states abroad, their subsequent suffering or their relatives' grieving in the United States has repeatedly been held not to provide a basis for jurisdiction in the United States. Harris v. V.A.O. Intourist, Moscow, 481 F.Supp. at 1062-63; Upton v. Empire of Iran, 459 F.Supp. 264, 266 (D.D.C. 1978), aff'd., 607 F.2d 494 (D.C. Cir. 1979).

The result is equally compelled in the commercial context where a foreign state cannot be subjected to personal jurisdiction in the United States for injuring the plaintiff abroad even though the plaintiff suffers a resultant financial loss in this country because it happens to be here. East Europe Domestic International Sales Corp. v. Terra, 467 F.Supp. at 390. Similarly, courts construing the District of Columbia long-arm statute have required "more than injurious consequences" in the forum "of an act committed elsewhere . . . [to] vest jurisdiction" in personam.

Margoles v. Johns, 483 F.2d 1212, 1217-18 (D.C. Cir. 1973). A resident plaintiff's pecuniary loss in the District of Columbia as a result of being injured elsewhere does not meet the test for jurisdiction. Leaks v. Ex Lax, Inc., 424 F.Supp. 413 (D.D.C. 1976); Norair Engineering Assoc., Inc. v. Noland, 365 F.Supp. 740 (D.D.C. 1973).

Carey v. National Oil Corp., 592 F.2d 673, irrelevantly distinguished on the facts by the district court, (R. Excerpts, No. 79-2641, 48), applied "a minimum contact" test to the direct effect exception and found that an effect in the United States could not warrant withdrawal of immunity from a foreign state on whose part there had been "no real entering of the marketplace in the United States." Id. at 676-77 (emphasis added). See: Thos. P. Gonzales Corp. v. Consejo Nacional de Producion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980); Waukesha Engine Division v. Banco Nacional de Fomento, 485 F.Supp. 490 (E.D. Wisc. 1980). That the facts of Carey are not identical to those at bar does not make its clear holding on direct effect any less applicable.

Carey also holds that a defendant's awareness of and even intent to cause harmful consequences in the United States "cannot reach the level of 'direct' effect" described in the statute. Id. at 677. The Supreme Court has recently observed that "'Foreseeability' alone has never been a sufficient benchmark for personal jurisdicition." World-Wide

Volkswagen v. Woodsen, ___ U.S. ___, 100 S.Ct. 559, 566 (1980).

Since defendants' isolated and irregular visits to the United States cannot satisfy the constitutional "minimal contact" standard, see pp.16-18, supra, the indirect effect on plaintiff in the United States of SSO's failure to pay on the contract in Iran does not deprive defendants of immunity under the "direct effect" aspect of the commercial activities exception.

In World-Wide Volkswagen Corp. v. Woodsen, decided last term the Court held that, despite the recent trend toward extending personal jurisdiction, state lines are not "irrelevant" and, federalism notwithstanding, "States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." 100 S.Ct. at 565. If sister states within the United States cannot tread upon each other's sovereign right to appropriate jurisdiction, surely a federal district court cannot assume jurisdiction over a suit properly within the courts of a foreign sovereign, let alone drag the sovereign into court.

B. Defendants Have Not Waived Their Sovereign Immunity In The Treaty Of Amity.

Article VI, paragraph 4, of the 1955 Treaty of Amity, Economic Relations & Consular Rights between the United States and Iran, 8 U.S.T. 899, 909 T.I.A.S. 3853, provides as follows:

> No enterprise of either High Contracting 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 High Contracting 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.

Ten other treaties of friendship, commerce and navigation (hereinafter FCN treaties), negotiated between 1948 and 1958, contain substantially similar immunity provisions.[10/]

10/ In addition to the 1955 treaty with Iran, such provisions are presently contained in FCN treaties with Nicaragua, Art. XVIII, Para. 3, 9 U.S.T. 449, T.I.A.S. 4024 (1956); Korea, Art. XVIII, Para. 2, 8 U.S.T. 2217, T.I.A.S. 3947 (1956); Netherlands, Art. XVIII, Para 2, 8 U.S.T. 2043, T.I.A.S. 3942 (1956); Federal Republic of Germany, Art. XVIII, Para. 2, 7 U.S.T. 1839, T.I.A.S. 3593 (1954); Japan, Art. XVIII, Para. 2, 4 U.S.T. 2063, T.I.A.S. 2863 (1953); Denmark, Art. XVIII, Para. 3, 12 U.S.T. 908, T.I.A.S. 4797 (1951); Greece, Art. XIV, Para. 5, 5 U.S.T. 1829, T.I.A.S. 3057 (1951); Israel, Art. XVIII, Para. 3, 5 U.S.T. 550, T.I.A.S. 2948 (1951); Ireland, Art. XV, Para. 3, 1 U.S.T. 785, T.I.A.S. 2155 (1950); Italy, Art. XXIV, Para. 6, 63 Stat. 2255, T.I.A.S. 1965 (1948).

Both the United States and Iran construe the treaty to waive immunity only for government-owned, profit-making commercial enterprises which are in economic competition with similar privately-owned businesses. None of the defendants here are such enterprises. The United States government, in this very case, has urged this narrow construction of the treaty, which would exclude all defendants from the waiver provisions. Brief for the United States Amicus Curiae, Electronic Data Systems Corporation, Iran, v. Social Security Organization of the Government of Iran. 610 F.2d 84 (2d Cir. 1980) (A copy of the brief is filed herewith as Addendum No. 1)[11/] [Hereinafter cited as Brief of United States to the pages in the Addendum]. See n.2, supra.

11/ The United States, by letter to the court, reaffirmed its position after the hostage crisis began. (Addendum No. 2). The New York litigation involves the propriety of pre-judgment attachment of Iranian government assets in New York, pending trial of the instant case in Texas. Although only an explicit waiver can divest a foreign state from immunity from attachment of its assets prior to judgment under § 1610(d), while § 1605(a)(1) withdraws immunity from liability whether the waiver be implicit or explicit, that distinction is irrelevant here. There can be no implicit waiver where the Treaty specifically does not waive immunity. The only questions here are: 1) are any defendants enterprises within the Treaty and 2) if they are, did they engage in commercial activity in the United States.

Moreover, the treaty does not waive even an enterprise's immunity unless "it engages in commercial. . . or other business activities within the territory of the High contracting Party. . ." Even assuming, arguendo, that any defendant here is an enterprise under the Treaty provision, the Treaty does not waive its immunity since no defendant is engaged in commercial activity in the United States. See Point IA, supra.

The lower court jumped to a conclusion of waiver by virtue of the Treaty of Amity without any analysis at all of either its explicit terms or its history (R. Excerpts No. 79-2641, 49). Concededly, it did not have the benefit of the careful and cogent analysis of the United States at the time that opinion was handed down. However, the brief of the United States had been submitted to the Second Circuit when the district court issued its post-trial findings of fact and conclusions of law which are strangely silent on the Treaty of Amity and waiver.

1. The Plain Meaning Of The Treaty of Amity Expressly Excludes Defendants from the Waiver Provision which is limited to "Enterprises."

The Treaty explicitly restricts the waiver of immunity to publicly owned or controlled enterprises of either High Contracting Party. "Enterprise" must represent

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an express limitation on the waiver provision or the word would have no meaning at all. An enterprise is, simply, a business undertaking and, "when employed in. . . the typical United States commercial treaty, signifies the autonomous unit of economic organization in a free enterprise economy." Setser, The Immunity Waiver for State Controlled Business Enterprises in United States Commercial Treaties, Proc. Am. Soc. Int. L. 89, 95 (1961). Setser, the chief of the Commercial Treaties Branch of the Department of State during the period these treaties were negotiated, concludes:

> It would appear from the writings of authorities in the fields of economics and law...that there is a settled and consistent usage of the term "enterprise" ...which is clear and uniquivocal. The "enterprise" is the basic unit in the organization of a capitalistic or "free enterprise" economy. Considering the meaning, the use of the term in the sovereign immunity waiver is significant. The restriction as to immunity...can... apply only to entities of the character of enterprises in a free enterprise economic system.

Id. at 97.[12/] Government-owned commercial airlines, state trading corporations and state tourist agencies are examples of enterprises. The term, however, does not include the

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12/ Another principal state department negotiator of the FCN treaties, adopts the same view. Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 238-239 (1956). See, Brief of United States A23 - A26.

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Social Security Organization, much less the Ministry of Health and Social Welfare. Their function is exclusively governmental and they have no counterpart in the private sector.

The courts have recognized that similar FCN treaty provisions do not waive the immunity of the sovereign or its non-commercial instrumentalities. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964); Bank Voor Handel in Scheepraort, N.V. et al. v. Robert Kennedy, 288 F.2d 375, 376 (D.C. Cir.) cert. denied, 366 U.S. 962 (1961) (FCN Treaty with the Netherlands).

The United States, in its brief, observes that "[a] straightforward reading of . . . the Treaty . . . does not reveal an intent to waive immunity of the contracting states as such and of their non-commercial agencies and instrumentalities. Brief of United States, A 11. Had the contracting states intended to waive their own immunity or that of their non-commercial agencies, the provision might, as the United States points out, more sensibly have begun: "Neither High Contracting Party nor its publicly owned" etc. Id. at A13 - A14. The Treaty neither expresses nor implies such an all-encompassing waiver.

The district court's broad interpretation of

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enterprise completely ignores the express limitation of the Treaty. See Id. at 9.

2. The Purpose of the Treaty of Amity Was to Waive Immunity Only for State-Owned Businesses in Competition With Private Enterprise.

The United States entered into the FCN treaties, including the Treaty of Amity with Iran, during the decade following World War II. Recognizing the extensive nationalization of previously private enterprises, the contracting states, through the immunity waiver provisions, sought to put state enterprises on an equal footing with private enterprises. Setser, supra, at 104-105. Thus the FCN treaties serve different purposes and express different policies than the Foreign Sovereign Immunities Act. The treaties are concerned with the nature of the entity involved, and waive immunity only for state-owned businesses. They do not waive the immunity of the contracting states and their non-commercial agencies and instrumentalities, even for commercial activity. The Act, on the other hand, is addressed to the nature of the activity involved and, accordingly, withdraws immunity for commercial activity regardless of which governmental agency engages in it or its purpose. House Report, at 16, reprinted at 6615. See: Brief of United States, A26 - A29. Both, of course, confer jurisdiction only in situations having the requisite contacts with the United States. See pp. 13-24, supra.

The negotiating history of this and other FCN treaties as well as the legislative history of their ratification make clear that the waiver of immunity was not intended to apply to the contracting states or their non-commercial agencies and instrumentalities.

The limited scope of the waiver provision was first commented on by Herman Walker, Jr., the principal negotiator of modern FCN treaties, in an informal annotation of the draft treaty with Portugal:

> (9) This word [enterprise] hardly covers a traditional arm of pure sovereignty, such as the Ministry of War, or the Foreign Service, as such. It does, nevertheless, cover entities having forms other than that of government corporation.
>
> * * *
>
> (11) The Waiver of immunity is only for "business enterprises." The situation of other types of government entities, agents and activities is left open, without prejudice. Beds for the government's tourist hotel are covered, but those for the Army are not.

See Brief of United States, A47-48 (emphasis in original).

This view was reaffirmed by subsequent treaty negotiations. During the 1953 negotiation with the Netherlands, the Dutch requested clarification of the status of sovereign immunity as a result of the proposed FCN treaty. The State Department's response was contained in its instruction to the American Embassy, dated August 4, 1953.

The State Department defined the two conditions which must be met before the waiver of immunity would attach:

> It will be noted that the provision sets forth two conditions that must be met. First, there must be an entity properly described as an "enterprise" which is publicly "owned or controlled." This wording is calculated to exclude from the provision the State as such and the component elements of the Government in its "sovereign" capacity (e.g., the Ministry of Justice or the Foreign Service) Id., A41-43 (emphasis added).

The Senate hearings on the ratification of the treaties also demonstrate that the treaties were not designed to waive immunity for state agencies in general but only for commercial enterprises. The first treaty to be ratified was that with Italy. Willard Thorp., Assistant Secretary of State for Economic Affairs, testified before the Senate:

> Then there is a new approach to the problem of what happens when a government goes into business and then the necessity, if there remain private enterprises in competition, for a fair opportunity being given to those competing private enterprises, and there is in this treaty a provision creating obligations for fair treatment of private enterprises when they are in a position of competition with public enterprises.

Hearing On Proposed Treaty Of Friendship, Commerce, And Navigation Between The United States And The Italian Republic; Before a Subcommittee Of The Committee On Foreign Relations, United States Senate, 82nd Cong., 2nd Sess., 9 (April 30, 1948) (emphasis added).

Later at the hearings, Thorp pointed out the rationale for the treaty:

> In addition to the danger of being expropriated, a serious danger faced by American private enterprise abroad is that of being subjected to unfair competition from state owned or controlled enterprises. In this treaty, an effort is made to deal with this problem by providing that, with certain exceptions, special favors granted by one country to its publicly controlled business enterprises shall be extended also to the private enterprises of the other in situations in which the public enterprises operate in fact in competition with private enterprises. Somewhat related to this provision is another which provides that no publicly owned or controlled enterprises of one country, if it engages in business activities within the territories of the other, shall claim for itself or its property immunity from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned or controlled enterprise is subject therein.

Id., at 26 (emphasis added).

These statements make clear that the term "enterprise" is used to mean publicly controlled business enterprises in competition with private enterprises.

The Report of the Senate Committee on Foreign Relations described the immunity waiver in the Treaty of Uruguay:

> The treaty with Uruguay as well as the treaty with Italy took into account the trend in certain parts of the world

> toward government ownership of enterprises that are normally conducted by private capital. Provision is made in the treaty so that such enterprises shall not claim in the territory of the other party immunity from taxation or suit (Art. XVIII, par. 5)...
>
> This type of provision is of distinct advantage to the United States since it places private American business in a position of equality in dealing with government-owned commercial enterprises of other states. (Emphasis added).

S. Exec. Rpt. No. 5, 81st Cong., 2nd Sess. 6 (1950).

Several years later the Committee, in its Report on the FCN treaty with Israel, summarized Articles XVII and XVIII of that treaty as dealing

> with the situation arising in a number of countries where governments are taking over activities which in the United States would normally be carried on by private business.

S. Exec. Rpt. No. 5, 81st Cong., 2nd Sess. 6 (1950). See also: Brief of the United States, A20-A23.

Further, the State Department has consistently maintained that the purpose of the waiver provision was to deal with State trading conducted by publicly owned commercial enterprises. In a 1957 memorandum to the Department of Justice, the Legal Adviser of the Department of State, commented on the treaty waiver provision as follows:

> [T]he term "enterprise"...is calculated to exclude from the provision the State as such and the component elements of the government in its

> "sovereign capacity"... [T]he entity must be one which engages in "business activities."

Brief of United States, A34-38.

As a result of this interpretation, the State Department did not consider the waiver provision in the FCN Treaty with the Netherlands applicable to the Traffic Bureau of the Netherlands Ministry of Defense which:

> is the shipping agency of the Netherlands Government in the United States in charge of the organization of all sea and air transport to the Netherlands...of materials and commodities acquired by the Netherlands Ministry of Defense in the United States for the use of the Netherlands Armed Forces.

Sovereign Immunity Decisions of the Department of State, May, 1952 to January 1977, Digest of United States Practice in International Law, 1039 (Case No. 23) (1977).

3. This Court Should Adopt the United States' Interpretation of the Treaty.

The Supreme Court gives great weight to the interpretation of treaties by those charged with their negotiation and enforcement. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 294-295 (1933). One commentator considers a common interpretation by both parties to a bilateral treaty binding. O'Connell, International Law, 261 (2d Ed. 1970). The Restatement provides that United States courts construing international agreements respect the executive branch's interpretation of them. Restatement, §152.

The Restatement recognizes that judicial interpretation of international agreements can impact on the conduct of foreign relations and cautions courts "to make sure they have as complete a realization as possible of the implications of their decisions." Id., at Comment b. It specifically notes "no instance [in which the Supreme Court has adopted the executive's interpretation] has resulted in serious difficulties...for the executive branch in its conduct of...foreign relations." Id., Comment a.

The interpretation of the Treaty of Amity's waiver provision here "is a matter of considerable importance to the United States in the conduct of its foreign relations." Brief of United States, A7. Were this Court to affirm the lower court's reading of the treaty, it "would harm important United States foreign relations interests." Id. at A29-A31. Such an interpretation would affect relations not only with Iran but with all countries which are signatories to FCN treaties containing similar waiver provisions. Id at A29-A30; See n.10, supra.

The plain meaning of the treaty, its negotiating and legislative history, and the foreign relations implications of the district court's unreasonably broad construction of the waiver provision warrant reversal of the finding that it provides a basis for jurisdiction of plaintiff's claim.

C. Proper Service of Process Was Not Made On The Social Security Organization Or The Ministry Of Health And Welfare.

The Act provides the exclusive procedures for service of process on foreign states, their agencies and instrumentalities, 28 U.S.C. § 1608. House Report at 23, reprinted at 6622. Subsection (a) sets forth the procedures for service on a foreign government and its political subdivisions, while subsection (b) addresses service on agencies and instrumentalities. Service of process must strictly comply with the letter of the law before a court in the United States may exercise jurisdiction in personam over a foreign state, its agencies or subdivisions. 40 D 6262 Realty Corporation v. United Arab Emirates Government, 447 F.Supp. 710 (S.D.N.Y. 1978); Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations, 443 F.Supp. 816 (S.D.N.Y. 1978).

The two preferred methods of service of process on agencies and instrumentalities -- by special arrangement or upon a duly authorized representative in the United States -- were unavailable here. 28 U.S.C. § 1608(b)(1)(b). In such a situation, § 1608(b)(3) authorizes, in relevant part, alternate service either by mail requiring a signed receipt or "as directed by order of the court consistent with the law of the place where service is to be made." 28 U.S.C.

court's finding that this method is consistent with the law of Iran is without any basis whatsoever in the record or in the law of Iran.[14/]

Moreover, §1608(a)(4) requires a 30-day waiting period after attempting service by mail before serving a government through diplomatic channels. Assuming, arguendo, that diplomatic channels are appropriate alternate service under §1608(b)(3)(C), plaintiff must at least comply with the letter of §1608(a)(4). Neither plaintiff nor the lower court saw fit to wait ten minutes, let alone 30-days, before attempting service through diplomatic channels on SSO and the Ministry.[15/] Neither did, or could, give any reasons for failure to comply with this requirement.

14/ The Civil Procedure Code of Iran, Article 101, provides that:

> Service on all the Government departments and organizations affiliated to the Government, Social Service Institutions, those institutions whose capital is owned wholly or partly by the Government and likewise on the municipalities shall be made in the manner that the Chief Clerk shall write a letter to the institution concerned for service of the suit and shall enclose the documents concerning the suit and shall send it through a bailiff. The bailiff shall submit the enclosures to the officer-in-charge of the department of the addressee or his deputy and shall obtain his signature on the duplicate copy of the servicesheet. In case the said officer or his deputy refuses to accept, the bailiff shall record his refusal in accordance with Article 93 and shall return it to the office of the court. In the above case, the refusal of the said officer or his deputy from accepting the documents concerning the suit and refusal to issue receipt shall be regarded as non-compliance of duty.

15/ Service by mail on these defendants was not even attempted until after diplomatic channels were employed.

POINT II

THE MINISTRY AND THE GOVERNMENT CANNOT BE HELD LIABLE ON THE CONTRACT WITH THE SSO WHICH IS A SEPARATE JURIDICAL ENTITY.

Although the contract at issue was between plaintiff and the SSO alone, the district court hastened to hold the Government and Ministry liable on the common law theories of agency and alter ego. R. Excerpts 76-77. In doing so, the court completely ignored the Foreign Sovereign Immunities Act and the law of Iran which alone determine whether the Government and/or the Ministry can be liable on plaintiff's contract with SSO.[16/]

The law of Iran governs disputes under this contract in accordance with the express intention of the parties and traditional choice of law rules. Austin Building Co. v. National Union Fire Insurance Co., 432 S.W.2d 697 (Tex. 1968). Applicable Iranian law clearly provides that neither the Government nor the Ministry can be liable for the SSO contract. (T. 1161-1163). Under the Social Security law of Iran, SSO is a separate juridical entity; it is subject to its own

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16/ The lower court pays lip service to the general applicability of the law of Iran to plaintiff's claim on the SSO contract. R. Excerpts 78. However, it resolutely refuses to apply it except insofar as it benefits plaintiff. For example, it cheerfully awards pre-judgment interest under Iranian law, which provides twice that permitted by Texas law. R. Excerpts, 80; Tex. Rev. Civ. Stat. Ann., art. 5069-1.03 (Vernon Supp. 1979).

specific regulations concerning its financial transactions (T. 1148-1150, 1252). SSO can sue and be sued in the court of Iran (T. 1155). The Government contributes only three percent of its revenue; the rest is derived from employer and worker contributions (T. 1153). Although the Government does have input into SSO policy, by law, it has no liability for its debts. (T. 1158-63).

The District Court mistakenly relies on wholly inapposite agency cases to support its erroneous conclusion that the Ministry and the Government are liable on the SSO contract. R. Excerpts 76. Those cases arise under express statutory waivers of sovereign immunity and present questions not of the liability of the United States for its instrumentalities but of whether an individual government employee was acting within the scope of his employment, as required by statute. See 28 U.S.C. § 1346.[17/] Not one of the cases cited by the district court raises the issue presented here. Indeed, in cases involving the liability of the United States

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17/ In Pierson v. United States, 527 F.2d 459 (9th Cir. 1975) the issue was, simply, whether an Army Officer consenting to a particular use of military aircraft, which crashed, had authority to do so. Oman v. United States, 179 F.2d 738 (10th Cir. 1949) concerned the scope of authority of certain government employees who allegedly injured plaintiff by wrongfully encouraging improper use of government land by others. Murser Builders, Inc. v. Roddy Realty, Inc., 459 F.Supp. 1317 (N.D. Pa. 1978), involved the authority of an attorney for the Small Business Administration.

on claims against its separate juridical entities, agency is never an issue. The Supreme Court and this circuit have consistently recognized that, absent an express waiver, the federal government cannot be liable. Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484-85 (1942) (Army Post Exchange); Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971) (Army Post Exchange); Sloan Shipyards Corp. v. United States Shipping Board, 258 U.S. 549 (1922) (Emergency Fleet Corp.); United States v. Strang, 254 U.S. 491 (1921) (Emergency Fleet Corp.); see also, United States v. Algoma Lumber, 305 U.S. 415 (1939). This Court must likewise respect the law of Iran which expressly insulates the Government and the Ministry from liability on the SSO contract.

The lower court's alter ego/instrumentality theory is equally flawed and inappropriate. Even if the law were applicable, it would not provide a basis for the liability of or jurisdiction over the Ministry or the Government of Iran.

Courts may not "lightly disregard" the legal separateness of a corporation. Krivo v. National Distillers and Chemical Corp., 483 F.2d 1098, 1102 (5th Cir. 1973). Two essential elements are necessary to hold a parent corporation liable for its independent subsidiary. First, the parent must control the subsidiary and, secondly, its misuse

of that control must be the proximate cause of the plaintiff's injury. Id. at 1103. A "controlling influence" is not sufficient to pierce the corporate veil; actual and total control is necessary. Id. at 1106. Moreover, in every case where corporate separateness is disregarded, the facts reveal that the subsidiary had no independent corporate purpose whatsoever. Id. Fitz-Patrick v. Commonwealth Oil Co., 285 F.2d 726 (5th Cir. 1968), cited by the district court, involved a subsidiary which was a mere conduit, incorporated in Haiti for the sole purpose of carrying out the parent's contract in compliance with Haitian law. This is plainly not the case with the Ministry and SSO which have distinctly independent purposes. Not surprisingly, the record reveals a relationship between SSO and the Ministry, but, however plaintiff or the lower court may characterize it, the Ministry did not exercise absolute control over SSO, nor do the two have but one purpose.

Even when courts might disregard the "fiction" of corporate separateness on the question of liability, formal corporate separation will defeat personal jurisdiction over a foreign defendant, even when the separation is "merely formal", so long as it is not "pure fiction". Cannon Mfg. Co. v. Cudahy Co., 267 U.S. 333, 336-37 (1925); McPheron v. Penn Central, 390 F.Supp. 943, 953 (D. Conn. 1975). SSO's corporate separation is a matter of statutory law in Iran

and plainly precludes jurisdiction over the Ministry and the government.

The district court improperly chose to disregard the supposed "fiction" of separateness to avoid an unspecified "manifest injustice." R. Excerpts 77. In doing so, the court also disregarded the applicable precedent.

The Foreign Sovereign Immunities Act limits the liability of foreign states and their agencies and instrumentalities to judgments arising from their own actions, not the actions of other entities.[18] Congress specified that:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another unrelated agency or instrumentality.[19]

18/ The legislative history makes clear that foreign law governs the determination of which entities come within the definition of "agencies and instrumentalities" of a state:

> The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name. (Emphasis added).

House Report at 15, reprinted at .

19/ The Act further differentiates between "agencies or instrumentalities" and the State. It Subjects all property of a "separate legal person" to execution upon a judgment of the entity, whether or not the property is commercial in nature or had any connection to the cause of action. In contrast, the Act subjects the property of the State itself to execution only if the property "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. §1610(a)(2)(b).

The United States, in its brief filed in this case in New York, observed that the Act, consistent with international law principles:

> provide[s] for the immunity of foreign governmental-owned property not related to the commercial activity on which a claim is based; the immunity of property of one government agency or instrumentality from seizure to satisfy claims against another agency or instrumentality; and the immunity of central bank property and military property.

A30.

The House Report explains:

> If United States 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 United States corporations or between a United States corporation and its independent subsidiary.

House Report at 29-30, reprinted at 6628-29.

The commentators have similarly emphasized that the Act maintains the distinction between an agency with a separate juridical personality under the laws of its creation, and the State.[20/]

20/ See Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Columbia Journal of Transnational Law, 33, 55 (1978); Note, The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States, 6 Van. J. of Trans. L. 549, 578 (1973) (commenting on the 1973 bill identical in all material respects to the 1976 bill finally passed); Sklaver, Sovereign Immunity in the United States: An Analysis of S. 566, 8 Int'l Lawyer 408, 422 (1974); Weber, The Foreign Sovereign Immunities Act of 1976: Its Origins, Meaning and Effect, 3 Yale Studies in World Public Order 122 (1976); Note, The Foreign Sovereign Immunities Act of 1976; Giving the Plaintiff His Day in Court, 46 Fordham L. Rev. 543, 568 (1977).

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The United States argues that government property not used for the commercial activity on which a claim is based should not be exposed to execution lest the "United States...be charged with failure to honor its international obligations...". The government argues that exposure of a foreign state's property to judgments against its agencies and instrumentalities could jeopardize the United States and private United States corporations abroad. Moreover, it might erode confidence in the United States as a place in which foreign governmental funds and property will enjoy the protection they are due." Brief of the United States, A30.

The district court, in an effort to hold the Government and the Ministry liable on plaintiff's contract with SSO, not only erroneously applied the law of agency and "alter ego", but also, and more importantly, wholly ignored the truly applicable law -- the FSIA and the law of Iran -- both of which preclude the result reached.

POINT III

THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION FOR A CONTINUANCE WAS AN ABUSE OF DISCRETION

The district court's cavalier denial of defendants' motion for continuance of the trial wholly deprived defendants of the opportunity to prepare to meet plaintiff's claims and to prove their affirmative defenses.

The trial began nine months after defendants first appeared. During that time, over one thousand pages of pleadings were filed, countless motions were made and defended, discovery hurtled along and two interlocutory appeals were taken to this court. Moreover, in November, United States diplomatic personnel were taken hostage in Iran, diplomatic relations were severed, and defendants had no opportunity to consult with their clients and properly prepare this case.

The court denied defendants' first application for a continuance two days after it was made in November (R. 698, 781). Defendants renewed their motion on January 9th, 1980 (R. 902 U). Defendants submitted affidavits concerning their inability to prepare as well as a "suggestion of Interest of the U.S." filed in New York requesting a stay of all proceedings involving the Government of Iran, because the United States was "in the midst of an unprecedented international crisis created by the unlawful detention of American citizens of the Embassy in Tehran, Iran" and that "any action taken in

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cases involving the Iranian government could have serious repercussions for the conduct of foreign policy, and could complicate the effort to resolve the crisis in Iran." R. 904U, Ex. 3,6. The court at a hearing held the same day the motion was filed, commented:

> I'm very frank to say I'm not concerned about what the State Department says. They have demonstrated to me, the State Department, the entire Executive, for the 67 days, that they don't have the slightest idea of what to do in the Mid East period, much less -- I mean, broader than Iran . . .

R. Excerpts 88. Thereupon the court indicated its intention to "put the case to trial" and, in the same breath, reserved decision. R. Excerpts 89. Although purportedly still considering the motion, the court proceeds to swear plaintiff's witnesses and announce that, after reviewing some discovery matters, "we'll be ready to go". R. Excerpts 91, 92. At no time did either the district court or the plaintiffs indicate plaintiff would be prejudiced by a continuance. R. Excerpts 87-92. Not surprisingly, the court again denied the motion and, although defendants answered not ready, forced them to proceed to trial unprepared. R. Excerpts 93-95.

The arbitrary denial of defendants' application wholly deprived them of the opportunity to prepare their defenses of non-performance, illegality in the procurement of the contract, and act of state. Defendants have the burden of proof as to these issues and the unnecessary rush to trial made it impossible for them to meet it.

Rulings on motions for continuances, although addressed to the discretion of the trial court, must be made in the interests of justice and are subject to reversal on appeal for abuse of discretion. Gaspar v. Kassim, 493 F.2d 964 (3d Cir. 1974); Latham v. Crofters, Inc., 492 F.2d 913 (4th Cir. 1974); Smith-Weik Machinery Corp. v. Murdock Machinery & Engineering Co., 423 F.2d 842 (5th Cir. 1970); Davis v. Operation Amigo, Inc., 378 F.2d 101 (10th 67); Cornwell v. Cornwell, 118 F.2d 396, 398 (D.C. Cir. 1941).

The Supreme Court has observed that:

> [t]he term discretion denotes the absence of a hard & fast rule. . . When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge as a just result.

Lagnes v. Green, 282 U.S. 531, 541 (1931). A court may not, consistent with sound discretion, let zeal for proceeding to trial overcome its duty to do justice to the litigants. Cornwell v. Cornwell, 118 F.2d at 398.

This court did not hesitate to order a new trial where, as here, a district court's denial of a continuance severely prejudiced the defendant. In Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., the defendant moved for a continuance because his principal counsel became

ill, his local counsel was relatively unprepared, and the case involved complicated legal questions. His motion was denied. This court held that forcing the defendant to trial under these conditions "tipped the scales so heavily in favor of the plaintiff as to effectually deprive the defendant of its rightful day in court." 423 F.2d at 844.

Defendants' counsel, although they were able at the eleventh hour to bring two witnesses from Iran, barely had time to prepare them. More importantly, because of the district court's arbitrary denial of the motion, defendants and their counsel were unable even to ascertain who their witnesses should be, let alone assure their availability and prepare them. They were foreclosed by the trial court's haste from a meaningful opportunity to prove their case and suffered the same prejudice as litigants forced to trial when a party or key witness was unavailable. In such cases, appellate courts have consistently reversed for abuse of discretion. Gaspar v. Kassim; Latham v. Croftors, Inc.; Davis v. Operation Amigo, Inc. Moreover, denying a defendant adequate time to prepare has been held reversible error warranting a new trial. Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950).

The district court's error, in the face of defendants' pressing need, is aggravated by the fact there was no showing whatsoever of any possible harm to plaintiff had the

motion been granted. Cf Landis v. North American Co., 299 U.S. 248, 255 (1936). Plaintiff is a Texas corporation, headquartered in Dallas, with its evidence handy. Given the fact that all defendants' assets in the United States were blocked pursuant to Executive Order 12170 and Treasury Department regulations prohibited judgment in any event, it is hard to imagine what plaintiff had to lose. 31 C.F.R. 535.203(e). The district court gave no reason at all for denying defendant's motion, unless its open contempt of the state department could be so construed. The only argument plaintiff advanced was its immediate entitlement to its rightful day in court. (R. 909). It was not, however, plaintiff's rightful day in court that was at stake; it was defendant's. The district court denied defendants what the constitution guarantees -- the fundamental due process right to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Menzo, 380 U.S. 545, 552 (1965); Mathews v. Eldridge, 424 U.S. 319, 333 (1975).

The district court's denial of defendants' motion for a continuance is reversible error and a new trial is required.

brief for Iran

POINT IV

THE JUDGMENT ENTERED BY THE DISTRICT COURT VIOLATED TREASURY DEPARTMENT REGULATIONS.

On November 15, 1979 the President of the United States, pursuant to his authority under the International Economic Powers Act, 50 U.S.C. § 1801 et. seq., issued Executive Order 12170 freezing all Iranian assets in the United States. The Secretary of the Treasury promulgated regulations pursuant to the Executive Order which prohitit, inter alia, entry of any judgment affecting the blocked assets. 31 C.F.R. 535.201. 535.310.

The lower court's final judgment is in clear violation of the regulations and must be vacated.

CONCLUSION

For the reasons stated above, this court should reverse the judgment of the district court and dismiss the complaint.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1641

ELECTRONIC DATA SYSTEMS CORPORATION IRAN,

Plaintiff-Appellee

vs.

CERTIFICATE OF SERVICE

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, THE MINISTRY OF HEALTH AND WELFARE OF THE GOVERNMENT OF IRAN AND THE GOVERNMENT OF IRAN,

Defendants-Appellants.

The undersigned certifies that a copy of the within Brief for Appellants and the Record Excerpts was served this 26th day of September, 1980, on counsel for plaintiff-appellee, Thomas W. Luce, III, Esq., Hughes & Hill, 1000 Mercantile Dallas Building, Dallas, Texas 75201, by Federal Express.

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JUDITH LEVIN, Esq.

LILLICH

79-7696

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELECTRONIC DATA SYSTEMS CORPORATION, IRAN,

Plaintiff-Appellee,

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, et al.,

Defendants-Appellants,

and

MARINE MIDLAND BANK,

Intervening Defendant.

ON APPEAL UNDER 28 U.S.C. 1292(b) FROM AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-7696

ELECTRONIC DATA SYSTEMS CORPORATION, IRAN,

Plaintiff-Appellee,

v.

THE SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN, et al.,

Defendants-Appellants,

and

MARINE MIDLAND BANK,

Intervening Defendant.

ON APPEAL UNDER 28 U.S.C. 1292(b) FROM AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

Plaintiff-appellee ("Electronic Data") has pending in the court below a suit against the Social Security Organization of the Government of Iran ("SSO"), the Ministry of Health and Welfare of the Government of Iran ("Ministry") and the Government of Iran ("Iran"). The suit was instituted on April 2, 1979

under the provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602-1611, and seeks damages for breach of contract by SSO and the Ministry for the installation and operation of a data processing system in Iran. Iran was charged with conspiring with SSO and the Ministry to breach the contract and with tortious interference with Electronic Data's contractual rights.

Simultaneously with the filing of the suit, Electronic Data sought a pre-judgment attachment order seizing certain funds on deposit in the Marine Midland Bank in New York. Finding that the funds belonged to Iran, the court below ordered that the United States Marshal --

> . . . levy within his jurisdiction at any time before final judgment herein upon, and take into his actual custody, such funds of defendants, or any of them, as are on deposit with, or held by Marine Midland Bank, including the funds on deposit in Account Number 000-79-791-0, in the name of "Mohammed Suri, in Trust for the Islamic Revolutionary Council of Iran," in an amount equal to but not exceeding $20 million; . . . [Joint App. A 251]

Pursuant to that order, an amount of some $17 million was seized by the Marshal in the Marine Midland Bank.

Thereafter, SSO, the Ministry and Iran moved the court below for a certification order under 28 U.S.C. 1292(b), and the district court entered such an order on July 3, 1979 certifying for interlocutory appeal to this Court four questions.1/ This Court, on October 9, 1979, permitted the

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1/ 1. Whether the defendants have explicitly waived their immunity from attachment prior to entry (Continued on next page)

interlocutory appeal to be taken.

QUESTION PRESENTED

The United States will address only the first of the four questions which have been certified to this Court, viz.:

> Whether the defendants have explicitly waived their immunity from attachment prior to entry of judgment, within the meaning of 28 U.S.C. § 1610 (d)(1).

INTEREST OF THE UNITED STATES

In issuing the pre-judgment attachment order, the district court construed Article XI, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran as constituting an explicit waiver of immunity from pre-judgment attachment by Iran, SSO and the Ministry within the meaning of Sec. 1610(d)(1) of the Foreign Sovereign Immunities Act of 1976.

The United States is a party to numerous other treaties of friendship, commerce and navigation ("FCN treaties")

1/ (Continued from preceding page)

of judgment, within the meaning of 28 U.S.C. § 1610(d)(1);

2. Whether the purpose of the attachment was impermissibly to obtain jurisdiction over the defendants, pursuant to 28 U.S.C. § 1610(d)(2);

3. Whether the Court has personal jurisdiction over the defendants, pursuant to 28 U.S.C. § 1330(b); and/or

4. Whether the Court has subject matter jurisdiction over the action, pursuant to 28 U.S.C. § 1330(a).

containing substantially the same clause, and the correct construction of that treaty clause is a matter of considerable importance to the United States in the conduct of its foreign relations. It is the view of the United States that the treaty waiver 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.

TREATY AND STATUTORY PROVISIONS INVOLVED

1. Article XI, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, 8 U.S.T. 899, 909, T.I.A.S. 3853, provides as follows:

> No enterprise of either High Contracting 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 High Contracting 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.

2. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1300, 1601-1611, provides in pertinent part as follows:

> § 1609. Immunity from attachment and execution of property of a foreign state
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based,* * * .

* * * * *

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or,

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

* * * * *

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of

judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

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

ARGUMENT

I

THE WAIVER PROVISION OF ARTICLE XI OF THE 1955 TREATY OF AMITY WITH IRAN APPLIES ONLY TO THE PROPERTY OF PUBLICLY-OWNED OR CONTROLLED COMMERCIAL OR BUSINESS ENTERPRISES OF THE CONTRACTING STATES.

A straightforward reading of Article XI, paragraph 4, of the Treaty of Amity with Iran does not reveal an intent to waive the immunity of the Contracting States as such and of their non-commercial agencies and instrumentalities.

The immunity waiver provision as typified in Article XI of this treaty was used, with minor vairations, in fourteen FCN treaties negotiated between 1948 and 1958, eleven of which are currently in force. 2/ The records of the Department of State which bear upon the negotiating history of the waiver

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2/ In addition to the 1955 treaty with Iran, such provisions are presently contained in FCN treaties with Nicaragua, Art. XVIII, Para. 3, 9 U.S.T. 449, T.I.A.S. 4024 (1956); Korea, Art. XVIII, Para. 2, 8 U.S.T. 2217, T.I.A.S. 3947 (1956); Netherlands, Art. XVIII, Para. 2, 8 U.S.T. 2043, T.I.A.S. 3942 (1956); Federal Republic of Germany, Art. XVIII, Para. 2, 7 U.S.T. 1839, T.I.A.S. 3593 (1954); Japan, Art. XVIII, Para. 2, 4 U.S.T. 2063, T.I.A.S. (Continued on next page)

provision in these treaties confirm that the waiver was not intended to be applicable to the Contracting States as such and their non-commercial agencies or instrumentalities. Rather, it was intended to refer to publicly-owned or controlled commercial or business enterprises of the Contracting States. Contemporaneous public documents clearly reflect this understanding of the immunity waiver provision on the part of the Department of State and the Senate Committee on Foreign Relations. As we show below, this interpretation also finds support in writings of former officials of the Department of State who played significant roles in the negotiation of the FCN treaties.

A. The Text of Article XI, Paragraph 4, does not Indicate an Intent to Waive the Immunity of the Contracting States or their Non-commercial Agencies or Instrumentalities.

The language of the treaty provision, read in accordance with generally accepted rules of treaty interpretation, 3/

2/ (Continued from preceding page)

2863 (1953); Denmark, Art. XVIII, Para. 3, 12 U.S.T. 908, T.I.A.S. 4797 (1951); Greece, Art. XIV, Para. 5, 5 U.S.T. 1829, T.I.A.S. 3057 (1951); Israel, Art. XVIII, Para. 3, 5 U.S.T. 550, T.I.A.S. 2948 (1951); Ireland, Art. XV, Para. 3, 1 U.S.T. 785, T.I.A.S. 2155 (1950); Italy, Art. XXIV, Para. 6, 63 Stat. 2255, T.I.A.S. 1965 (1948).

3/ International law as well as our domestic law recognizes certain established principles of treaty construction. Thus, the former Permanent Court of International Justice stated in its advisory opinion on Polish Postal Service in Danzig:

> It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something
(Continued on next page)

manifestly does not reveal an intent on the part of the contracting parties to deal with the sovereign immunity of the Contracting State as such. The provision states in pertinent part:

> No enterprise of either High Contracting 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 High Contracting Party, claim or enjoy, either for itself or for its property, immunity . . . . [Emphasis added]

Had the contracting parties intended to deal with the immunity of the Contracting States as such they undoubtedly would have expressed that intent simply and directly. For example, the subject of the sentence might have read "Neither High Contracting Party, nor its publicly owned or controlled corporation,

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3/ (Continued from preceding page)

> unreasonable or absurd. [1 Hudson, World Court Reports 440, 466 (1934)]

And the Supreme Court has followed a similar rule since its earliest days:

> The intention of the framers of the treaty must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation, and in these three cases, we must collect the meaning from the words, or from probable or rational conjectures, or from both. [Ware v. Hylton, 3 Dall. 198, 239 (1796)]

See also Geofroy v. Riggs, 133 U.S. 258, 271 (1890); Tucker v. Alexandroff, 183 U.S. 424, 437 (1902); Nielsen v. Johnson, 279 U.S. 47, 52 (1929); (Continued on next page)

associations, agencies and instrumentalities . . . ." 4/ The language actually used is not a functional equivalent of this example. To interpret the treaty clause as including the Contracting States themselves totally ignores the express limitation imposed by the framers of the treaty through the use of the terms "enterprise of" and "publicly owned or controlled."

The district court's construction of the treaty stipulation would expose all property of a Contracting State to pre-judgment attachment and execution if such state, or any of its agencies, engaged in a single commercial act in the United States. Such a result clearly goes beyond any reasonable interpretation of the treaty clause here involved.

In the decades between the issuance of the "Tate Letter" (26 Dep't State Bull. 984 (1952)) and the enactment of the

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3/ (Continued from preceding page)

Maximov v. United States, 373 U.S. 49, 54 (1963).

Art. 31(1) of the Vienna Convention on the Law of Treaties, Exec. L, 91st Cong., 1st Sess., reprinted in 63 Am. J. Int'l L. 875, 885 (1969), prepared by the International Law Commission, sets forth the basic rule of treaty interpretation as follows:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.

4/ Cf. Article XV, paragraph 1 of the treaty which is quite direct in providing that "The government of either High Contracting Party may. . . acquire, own, lease [certain real property]."

Foreign Sovereign Immunities Act in 1976, the Department of State consistently took the position that the treaty waivers in these post-World War II commercial treaties did not waive the immunity of the Contracting States themselves or of their sovereign components.

For example, in a 1957 memorandum to the Department of Justice (Appendix "A", infra), the Legal Adviser of the Department of State commented on the treaty waiver provision as follows:

> It will be noted that two conditions must be met to satisfy the rule laid down in this provision. First, there must be an entity properly described as an "enterprise" which is "publicly owned or controlled". There are other provisions within the treaty which provide a context important for the interpretation of the term "enterprise" and other terms used in the paragraph. This wording is calculated to exclude from the provision the State as such and the component elements of the government in its "sovereign capacity". Second, the entity must be one which engages in "business activities". A government-owned corporation which runs a general import-export business (e.g. the AMTORG), or manfactures automobiles for general sale (e.g. the French Renault enterprise) or engages in general marine insurance underwriting, would be obvious examples. Clearly, this provision does not attempt to curtail the sovereign immunity of the State itself when it acts in its sovereign capacity. The rule is stated interms of "enterprises" in order to emphasize this point. The waiver of sovereign immunity therefore pertains to commercial activities of the State when operating through entities created and dominated by it, but not to all State functions.
>
> The term "corporations, associations, and government agencies and instrumentalities," is deemed to be illustrative. Its addition was considered necessary to assure that governments would not seek to evade the rule by designating government agencies rather than public corporations to carry on the State's business activities. The United States

> usually chooses the form of a corporation, but this practice varies. The precise juridical form of the governmental enterprise engaging in business activities is irrelevant.
>
> It must be emphasized that the clause, "No enterprise . . . shall . . . claim or enjoy, either for itself or for its property, immunity . . . from taxation, suit, execution of judgment or other liability . . . " means that the treaty will allow the property of a relevant publicly-owned or controlled enterprise to be subjected to taxation, suit, execution of judgment, etc. in the situation and to the extent described. This, of course, would not lay government property generally open to such liability. Thus, property not owned by the enterprise itself would continue in the same status with respect to immunity as exists apart from the treaty. [Appendix A, infra, at A-1 - A-2]

In supporting sovereign immunity requests for the Government of Israel and The Netherlands Ministry of Traffic, the Department of State did not consider the treaty waiver provision - contained in the FCN treaties with Israel and The Netherlands - to apply. See, Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, Digest of United States Practice in International Law 1034, (Case No. 15) and 1039 (Case No. 23) (1977). In case No. 15, suit was brought against the Government of Israel by a machinist injured while working aboard an Israeli military vessel in Brooklyn. The plaintiff was the employee of a company that had contracted with Israel to make repairs and improvements to the vessel. In recognizing Israel's immunity from suit, the Department of State "agree[d] with the contention of the Ambassador of Israel that the Treaty of Friendship, Commerce and Navigation between the Government of the United States and the Government of Israel has no applicability to this case." Digest, supra, at 1035.

In case No. 23, immunity was upheld for an agency of The Netherlands Government described as follows:

> The Traffic Bureau of the Netherlands Ministry of Defense is the shipping agency of the Netherlands Government in the United States in charge of the organization of all sea and air transport to the Netherlands . . . of materials and commodities acquired by the Netherlands Ministry of Defense in the United States for the use of the Netherlands Armed Forces. [Digest, supra, at 1039]

The Department of State recently confirmed this interpretation as a matter of public record. (See Letter from the Department of State to the County of Santa Clara, San Jose, California, of July 24, 1979; Appendix "B", infra, A-6 - A-7).

In sum, the treaty waiver on its face does not apply to the Contracting States or their property, and it has been consistently so interpreted and applied by the United States. 4a/

4a/ Some fifteen years ago, this Court, in one of its landmark decisions on sovereign immunity (Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (1964), gave recognition to the limited nature of the waiver contained in these treaties. The Court stated:

> After World War II the United States began to restrict immunity by negotiating treaties obligating each contracting party to waive its sovereign immunity for state-controlled enterprises engaged in business activities within the territory of the other party. Fourteen such treaties were negotiated by our State Department in the decade 1948 to 1958. [336 F.2d at 357; emphasis added]

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B. The Negotiating History of these Waiver Provisions Makes it Clear that the Contracting States as such and their Non-commercial Agencies and Instrumentalities were not Included in the Provisions.

A Department of State Instruction to the American Embassy at The Hague, dated August 4, 1953 (Appendix "C", infra) commented upon the waiver provision in the FCN treaty with the Netherlands in the following terms:

> It will be noted that the provision sets forth two conditions that must be met. First, there must be an entity properly described as an "enterprise" which is publicly "owned or controlled." This wording is calculated to exclude from the provision the State as such and the component elements of the Government in its "sovereign" capacity (e.g. the Ministry of Justice or the Foreign Service). Second, the entity must be one which engages in "business activities." A Government-owned corporation which runs a general import-export business (e.g. Amtorg), or manufactures automobiles for general sale (e.g., the French Renault enterprise), or engages in general marine insurance underwriting, would be the obvious example. [Appendix "C", infra, at A-9, emphasis added]

The cable went on to discuss the particular situation of the Netherlands Bank:

> There can be said to be a presumption, however, that a State's "central bank" which acts as an arm of the Government in executing the Government's monetary control and fiscal policy represents the Government in its sovereign capacity, and is not a commercial (or business) enterprise within the purview of the provision. This presumption is, of course, rebuttable if the evidence in the instance of a given central bank does not bear it out.
>
> The MSA, cited by the Dutch, affords an obvious illustration of an entity outside the purview of the provision. It is analogous, for purposes of the present discussion, to the Foreign Service and the State Department. It is not analogous to a business corporation engaged in commerce or activity for pecuniary gain. Its

function is a high foreign policy function of a public Governmental character; the furnishing of grants and assistance to friendly countries (at a loss to the Treasury) for the humanitarian purpose of relieving impoverishment and the politico-military purpose of restoring economic viability, promoting political stability, and building the underpinnings of military strength. [Appendix "C", infra, at A-9 - A-10; emphasis added]

A draft FCN treaty with Portugal, informally annotated by Herman Walker, Jr. (excerpt at Appendix "D", infra), makes the same points. This document is of significance since Mr. Walker was a principal negotiator of the modern FCN treaties. The pertinent annotations with respect to the term "enterprise" used in the treaty are as follows:

> (9) This word [enterprise] hardly covers a traditional arm of pure sovereignty, such as the Ministry of War, or the Foreign Service, as such. It does, nevertheless, cover entities having forms other than that of government corporation.
>
> * * * * *
>
> (11) The waiver of immunity is only for "business enterprises." The situation of other types of government entities, agents and activities is left open, without prejudice. Beds for the government's tourist hotel are covered, but those for the Army are not.
>
> * * * * *
>
> (2) This paragraph [immunity waiver provision], together with paragraph 1 of protocol, paragraphs 1 and 2 of Article XVII, and paragraph 4 of Article VI constitute treaty's effort to adjust its traditionally private-enterprise predilections to State-enterprise tendencies. [Appendix "D", infra, at A-14 - A-15; emphasis in original] 5/

5/ Mr. Walker's use of the quoted phrase "business enterprises" rather than "enterprises" reflects the normal meaning of the term enterprise and not any difference between the draft Portugal text and the Iran text.

Foreign Service Despatch No. 2181 from the High Commissioner for Germany to the Department of State, dated February 9, 1954 (Appendix "E", infra) reinforces this interpretation with respect to the FCN treaty with the Federal Republic of Germany:

> The U.S. team said that this paragraph [immunity waiver provision] had been included in generally all our FCN treaties since 1947, and that it reflected a gradual change in international concept which was aimed at eliminating the sometimes scandalous abuses of sovereign immunity claims, special mention being made of AMTORG [the Soviet state trading corporation]. [Appendix "E", infra, at A-20 - A-21]

A Department of State Instruction to the American Embassy in Montevideo, dated August 2, 1960 (Appendix "F", infra), discussed the waiver provision in a proposed FCN treaty with Uruguay and emphasized that the sovereign immunity waiver provisions were designed to deal with state economic entities:

> The waiver of sovereign immunity was added to the Department's treaty proposals shortly after the end of the Second World War, at a time when treaties were under consideration with a number of European countries that had recently nationalized extensive segments of private industry. It was feared that branches of the nationalized industries established in the United States might seek to avoid legal liabilities through claims to sovereign immunity. [Appendix "F", infra, at A-25]

C. Contemporaneous Public Documents with Respect to the Several FCN Treaties Reflect the Understanding that the Waiver Provisions did not Include the Contracting States as such and their Non-commercial Agencies and Instrumentalities.

A summary of the FCN treaty with Uruguay, prepared by the Department of State and included in the Report of the Senate Committee on Foreign Relations, described the immunity

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waiver provision of the treaty as providing "that no state-owned or state-controlled commercial enterprise of either country shall enjoy in the other immunity. . . ." S. Exec. Rpt. No. 5, 81st Cong., 2d Sess. 5 (1950) (emphasis added). Two years later Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs, testified at a hearing before a subcommittee of the Senate Committee on Foreign Relations with regard to FCN treaties with Colombia, Israel, Ethiopia, Italy, Denmark and Greece. Mr. Linder discussed the problems arising out of state ownership of economic enterprises in the following terms:

> Another significant feature of the postwar treaties of interest to the prospective investor is the body of provisions which deals with problems arising from the state ownership of economic enterprise. There is a growing tendency abroad for the real competitor of private business to be the government itself. The Department of State has, accordingly, endeavored to work out treaty provisions designed to reduce the hazards of unfair competition from state-controlled businesses.... There are...newly developed provisions, found first in the 1948 treaty with Italy, to assure . . .that state-owned commercial enterprises of the one country engaged in business in the other country will not be immune from taxation, suit, or other normal liabilities by reason of their public character. [Hearing before a Subcommittee of the Committee on Foreign Relations, United States Senate, on Executives M and R, 82d Cong., 1st Sess., and Executives F, H, I and J, 82d Cong., 2d Sess. 5 (1952); emphasis added].6/

6/ In a subcommittee hearing with respect to the FCN treaty with Italy, Winthrop G. Brown, Acting Deputy Director of the Office of International Trade Policy at the Department of State, responded to a question whether there were examples of state trading in the United States in the following terms:

> Oh, yes. The Government does a good deal of procurement. The Treasury Department buys; the Agriculture Department (continued on next page)

The reports of the Senate Committee on Foreign Relations demonstrate that the Committee understood the waiver provision in similar terms. With respect to the FCN treaty with Uruguay, the Committee stated in its Report the following:

6/ (Continued from preceding page)
buys grain; the Metals Reserve Corporation used to buy for stock piling; the Rubber Reserve Corporation bought rubber; so that we have had in this country a certain amount of State trading, and that would be a kind of State trading enterprise. [A Proposed Treaty of Friendship, Commerce, and Navigation Between the United States and the Italian Republic, Hearing Before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 2d Sess. 10 (April 30, 1948)]

To the extent this isolated reference to the Treasury Department might be read to suggest that the United States considered the treaty waiver to cover procurement by non-commercial government departments for their normal public functions, it would be clearly erroneous and at variance with the treaty text and other evidence of the intent of the framers of the treaty. Remarks by other State Department spokesmen made it clear that the treaty provisions were designed to deal with the situation in which the State enters the business arena through enterprises of the kind normally employed by private business. Thus, for example, Willard Thorp, Assistant Secretary of State for Economic Affairs, referred to the treaty during the hearing as incorporating "a new approach to the problem of what happens when a government goes into business and then the necessity, if there remain private enterprises in competition, for a fair opportunity being given to those competing private enterprises . . . ." Hearing, supra, at 9 (emphasis added). Moreover, while the Brown testimony may suggest that a government agency engaging in commodities procurement for the general economy could, arguably, fall within the scope of the waiver provision, it does not, in context and in light of the overall record, sustain a conclusion that the provision was intended to reach foreign governments to the extent that they engaged in any purchasing abroad for their customary activities, e.g., equipment and supplies for their offices or beds for the army. See also Setser, The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties, Proc. Am. Soc. Int'l L. 89, 101-104 (1961).

> The treaty with Uruguay as well as the treaty with Italy took into account the trend in certain parts of the world toward government ownership of enterprises that are normally conducted by private capital. Provision is made in the treaty so that such enterprises shall not claim in the territory of the other party immunity from taxation or suit (Art. XVIII, par. 5). . . .
>
> This type of provision is of distinct advantage to the United States since it places private American business in a position of equality in dealing with government-owned commercial enterprises of other states. [S. Exec. Rpt. No. 5, 81st Cong., 2d Sess. 6 (1950); emphasis added].

Several years later the Committee, in its Report on the FCN treaty with Israel, summarized Articles XVII and XVIII of that treaty as dealing "with the situation arising in a number of countries where governments are taking over activities which in the United States would normally be carried on by private business." S. Exec. Rpt. No. 5, 83d Cong., 1st Sess. 5 (1953).7/

D. The Writings of Negotiators of the Various FCN Treaties Confirm that the Term "Enterprise" does not Include the Contracting States as such and their Non-commercial Agencies and Instrumentalities.

Herman Walker, Jr.--who, as noted, was a principal State Department negotiator of the modern FCN treaties--described the introduction of the article dealing with publicly owned

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7/ The House Report on the Foreign Sovereign Immunities Act of 1976 states that "a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation . . . ." H. Rept. No. 94-1487, 94th Cong., 2d Sess., 18 (1976). This language, however, appears in a section of the report dealing with jurisdictional immunity under Sec. 1605 (a)(1) and, in that context, the rather loose language would not, in any event, have implied a waiver broader than or even as
(Continued on next page)

enterprises into the post-World War II FCN treaties as follows:

> Another new area to which attention is given is the phenomenon of the state-in-business. In this connection, a provision is included for the waiver of claims to sovereign immunity on the part of state-owned commercial enterprises that have occasion to do business abroad. Conversely, a provision has been developed to assure that if a state-owned enterprise engages in a commercial activity, within its own country, in competition with an established private enterprise of the other Party, it shall not avail itself of any subventions or other special privileges that would give it an unfair competitive advantage. [Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229, 238-239 (1956); footnotes omitted; emphasis added]

Vernon G. Setser, Chief of the Commercial Treaties Branch of the Department of State at the time that many of the post-

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7/ (Continued from preceding page)
broad as the exceptions to jurisdictional immunity provided regardless of waiver by Sec. 1605 (a)(2)-(5).

Much more precise language was used by the report when dealing with the waiver of immunity of foreign state property from attachment and execution under Sec. 1610. The report makes clear that Sec. 1610 was, in part, intended to limit the absolute immunity of property of foreign states from execution. In discussing Sec. 1610, the report stated:

> A number of treaties of friendship, commerce, and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). [H. Rept. No. 94-1487, at 27; emphasis added]

The provision in the FCN treaty with Japan cited in the report is identical to the provision in the Treaty of Amity with Iran here involved. Congress clearly understood that such treaty provisions did not waive the immunity of property owned by the Contracting States themselves.

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war FCN treaties were negotiated and, in fact, a State Department witness at the hearing before the Senate Committee on Foreign Relations with respect to the FCN treaties with Iran, Nicaragua and the Netherlands, later discussed the immunity waiver in the 1961 Proceedings of the American Society of International Law:

> The treaties seek . . . to establish reasonable standards to govern state enterprises when operating in competition with private enterprises. It is in relationship with the thrust against state trading and state economic enterprise in general that the subject of sovereign immunity enters into the purview of the commercial treaty.
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> * * * * *
>
> It would appear from the writings of authorities in the fields of economics and law . . . and from the precedent of the tax treaties, that there is a settled and consistent usage of the term "enterprise," with a meaning, in connection with economic matters, and especially in relation to the organization of economic activities, which is clear and unequivocal. The "enterprise" is the basic unit in the organization of a capitalistic or "free enterprise" economy. Considering this meaning, the use of the term in the sovereign immunity waiver is significant. The restriction as to immunity contained in the provision can reasonably be construed to apply only to entities of the character of enterprises in a free-enterprise economic system.
>
> * * * * *
>
> If treaty assurances are to be given to foreign economic enterprises, then it is reasonable and appropriate to provide for equalization of the situation in the event that foreign state enterprises become competitors of American or the treaty-protected alien private enterprises. The principle had previously been implemented in part by the Civil Aeronautics Board in requiring a waiver from alien air carriers, and by the Congress and the Executive in accepting foreign jurisdiction over United States Merchant Fleet Corporation vessels. The commercial treaties merely extend the principle generally to foreign state enterprises established for business purposes. [Setser, The Immunity Waiver for State-

Controlled Business Enterprises in United States Commercial Treaties, Proc. Am. Soc. Int'l L. 89, 91, 97, 104-105 (1961); emphasis added]

E. The Treaty Waiver Provision does not Correspond to the Entire Restrictive Theory of Sovereign Immunity or Waive Immunities which the Modern Theory Accords to State Property not Belonging to a Commercial Enterprise.

The historical documents referred to earlier contain references which, taken out of context, might be interpreted as equating the treaty waiver provision with the restrictive theory of sovereign immunity. Thus, Foreign Service Despatch No. 2181 from the High Commissioner for Germany (Appendix "E", at A-20) notes that the United States negotiators explained that the United States had for some time been breaking away from the classical theory and that the immunity provision was an endeavor "to crystallize the present U.S. practices, which were believed to reflect generally majority international practice in this connection." See also Department of State Instruction to the American Embassy at The Hague, August 4, 1953 (Appendix "C", p. 2). However, when such references are viewed in the light of the entire body of interpretive material referred to above, and examined with regard to the actual purpose and context of the treaties in which the provision appears, it is clear that the treaty waiver provision was not intended to incorporate the entire jure imperii/jure gestionis distinction of the restrictive theory, but only the restrictive theory's treatment of state-owned commercial or business enterprises. In other words, the Contracting States, through these treaty provisions, did not waive immunity

for all of their commercial or private acts, but dealt only with acts of their commercial or business enterprises. For example, the waiver would apply to a purchase of goods by a state-owned tourist hotel, but not by the army. Setser states as follows:

> A cursory reading of the immunity provision, when taken out of its context in the commercial treaty, may result in identification of it with the "restrictive theory," adoption of which by the Department of State was announced in 1952 in the letter from the Department's Acting Legal Adviser, Tate, to Acting Attorney General Perlman . . . .[T]he two documents were designed for different purposes . . . . The commercial treaty provision . . . is not at all concerned with the "private acts" of the sovereign generally, but only with establishing a rule to govern in the case of state entities that are counterparts of, and are in competition with, the enterprises to which treaty rights are accorded. The treaty provision has a more limited and specific objective than the letter.
>
> * * * * *
>
> The commercial treaties do not concern themselves in any very significant way with the regulation of the normal functions of government in its proprietary capacity . . . . <u>There are weighty arguments indeed that, in furtherance of the rule of law, all "private acts" of governments, including those relating to purchases and sales, to all types of contracts, and torts, should be subject to adjudication</u> in the same way as similar acts of private persons and entities, and <u>without regard to whether the act was performed by a business enterprise within the adjudicating jurisdiction. But it has not been considered the province of the United States commercial treaty to provide the legal basis for establishing jurisdiction over such acts</u>. [Setser, <u>supra</u>, at 92-93, 101; footnotes omitted; emphasis added].<u>8/</u>

<u>8/</u> In any event, at the time these treaties were negotiated, it was not the settled interpretation of the <u>jure imperii/ jure gestionis</u> distinction that immunity shall not be recognized with respect to acts which are by (continued on next page)

The inclusion of the phrase "including corporations, associations, and government agencies and instrumentalities" does not expand the application of the waiver provision to entities that are not "enterprises." The phrase was included for the purpose of clarification. The U.S. team negotiating the FCN treaty with the Federal Republic of Germany noted specifically that the enumeration was illustrative and that the listing "was to indicate that the precise juridical form of the government entity was irrelevant." Foreign Service Despatch No. 2181 ("Appendix "E", at A-20). Setser has observed that the phrase was apparently added as an afterthought and makes no substantial contribution to the meaning of the paragraph. He further comments:

> It is evident, however, that it had its origin in the desire to assure coverage of the government-controlled enterprise, however disguised. As Lalive points out, the forms of state economic enterprise are myriad . . . . In any case, the "including" clause merely means that the waiver extends to state enterprises in the form of

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8/ (Continued from preceding page)
their nature commercial, without regard to their purpose. See e.g., Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, Digest of United States Practice in International Law 1017, 1020 (1977). This concept "crystallized" somewhat later and is now embodied in the Foreign Sovereign Immunities Act of 1976. Moreover, until the adoption of the Act, the United States interpretation of the restrictive immunity theory included absolute immunity of state property from execution. H. Rept. No. 94-1487, at 27. Even were the waiver provision deemed to be an expression of the restrictive theory, it would be unwarranted to assume that it was intended to reflect the current restrictive theory and to go beyond even this theory, which protects property of the State which neither belongs to the particular agency or instrumentality which engaged in the commercial activity in this country, nor was used for the commercial activity on which the claim is based.

> government agencies and instrumentalities, as well as to those in the form of corporations. [Setser, supra, at 97; footnote omitted; emphasis in original].

The foregoing, we submit, demonstrates that the FCN waiver provision applies to the property of publicly-owned or controlled commercial or business enterprises, but not to the property of a Contracting State or its non-commercial agencies or instrumentalities. The mere fact that a Contracting State or one of its agencies purchases goods or services to enable it to carry out its governmental functions does not trigger the waiver provision in the treaty.

II.

AN OVERBROAD INTERPRETATION OF THE WAIVER PROVISION IN OUR FCN TREATIES WOULD HARM IMPORTANT UNITED STATES INTERESTS.

An interpretation of the treaty waiver provision which ignores the intent of the contracting parties and the policy underlying that intent would harm important United States foreign relations interests.

As noted (supra, p. 6), almost identical waiver provisions are included in numerous commercial treaties, including those with important allies and trading partners such as Japan and Germany. The district court's construction of the waiver provision, if permitted to stand, could subject the property of these states and their agencies or instrumentalities to pre-judgment attachment or execution in this country from which they would otherwise be immune. This problem would be

particularly acute if such an interpretation were to result in exposing to attachment or execution property of the Contracting States themselves which was not used for the commercial activity upon which the claim was based or property of one agency or instrumentality of a Contracting State in an action against another agency or instrumentality of such State. The United States could be charged with failing to honor its international obligations with respect to the immunity of state-owned property. Moreover, such an interpretation might erode confidence in the United States as a place in which foreign governmental funds and property will enjoy the protection they are due.

While the United States Government does not claim immunity from suit abroad involving its commercial activities, the Government does not waive the immunity from attachment and execution to which its property abroad is entitled under the restrictive theory of sovereign immunity, as that theory is now generally recognized and applied under customary international law. Sections 1609-1611 of the Foreign Sovereign Immunities Act of 1976 codify as a matter of domestic United States law these international law principles, and provide in general for the immunity of foreign government-owned property not related to the commercial activity on which a claim is based; the immunity of property of one government agency or instrumentality from seizure to satisfy claims against another agency or instrumentality; and the immunity of central bank property and military property.

While foreign states and their agencies and instrumentalities are now clearly subject to suit in the courts of the United States "insofar as their commercial activities are concerned, and their commercial property . . .may be levied upon for satisfaction of judgments rendered against them in connection with their commercial activities," 28 U.S.C. 1602, Congress has also spelled out with particularity in 28 U.S.C. 1610(d), that pre-judgment attachment of foreign state-owned property can be had only where the foreign state has waived its immunity "explicitly", and where the property is attached to secure satisfaction of judgments.

This Court should not permit the statutory scheme to be circumvented by finding in treaties waivers beyond those intended by the Contracting States.

° ° °

CONCLUSION

Article XI, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran should be contrued as waiving sovereign immunity only for the property of publicly owned or controlled commercial or business enterprises of the Contracting States and not for the property of the Contracting States as such or their non-commercial agencies and instrumentalities. To the extent that the order entered by the court below rests on a contrary construction of the treaty, it should be set aside.

Respectfully submitted,

ALICE DANIEL,
Acting Assistant Attorney General.

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United States Attorney.

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OCTOBER 1979.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 1979, I served copies of the foregoing brief for the United States as amicus curiae on counsel for the parties, by mailing copies thereof, first class mail, special delivery, to:

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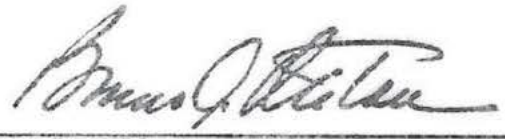

BRUNO A. RISTAU,
Attorney for the United States.

APPENDICES

APPENDIX "A"

DEPARTMENT OF STATE

THE LEGAL ADVISER

August 13, 1957

To: Mr. Leonard, First Assistant,
Civil Division,
Department of Justice.

From: Mr. Becker, Legal Adviser,
Department of State.

Subject: Sovereign Immunity Clauses in FCN Treaties

In view of your concern regarding the provisions on sovereign immunity in the post-war treaties of friendship, commerce and navigation of the United States, I desire to set forth the Department's views on the subject and to make some general observations in respect thereto.

1. A typical provision reads as follows:

> "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." (U.S.-Japanese FCN Treaty, TIAS 2863, Article VIII, paragraph 2).

It will be noted that two conditions must be met to satisfy the rule laid down in this provision. First, there must be an entity properly described as an "enterprise" which is "publicly owned or controlled". There are other provisions within the treaty which provide a context important for the interpretation of the term "enterprise" and other terms used in the paragraph. This wording is calculated to exclude from the provision the State as such and the component elements of the government in its "sovereign capacity". Second, the entity must be one which engages in "business activities". A government-owned corporation which runs a general import-export business (e.g. the AMTORG), or manufactures automobiles for general sale (e.g. the French Renault enterprise) or engages in general marine insurance underwriting, would be obvious examples. Clearly, this provision does not attempt

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to curtail the sovereign immunity of the State itself when it acts in its sovereign capacity. The rule is stated in terms of "enterprises" in order to emphasize this point. The waiver of sovereign immunity therefore pertains to commercial activities of the State when operating through entities created and dominated by it, but not to all State functions.

The term "corporations, associations, and government agencies and instrumentalities," is deemed to be illustrative. Its addition was considered necessary to assure that governments would not seek to evade the rule by designating government agencies rather than public corporations to carry on the State's business activities. The United States usually chooses the form of a corporation, but this practice varies. The precise juridical form of the governmental enterprise engaging in business activities is irrelevant.

It must be emphasized that the clause, "No enterprise . . . shall . . . claim or enjoy, either for itself or for its property, immunity . . . from taxation, suit, execution of judgment or other liability . . . " means that the treaty will allow the property of a relevant publicly-owned or controlled enterprise to be subjected to taxation, suit, execution of judgment, etc. in the situation and to the extent described. This, of course, would not lay government property generally open to such liability. Thus, property not owned by the enterprise itself would continue in the same status with respect to immunity as exists apart from the treaty.

2. A very important reason for including sovereign immunity provisions in our treaties was the fact that foreign governments are going increasingly into business, in competition with private business. For example, as noted above, the Renault Works is owned by the French Government. The treaty rule is designed to provide equality of treatment for private American business abroad. If the United States negotiates treaties with countries that have or may have publicly-owned business entities, it was considered only fair, and desirable by the American business community, to seek a treaty assertion that if such essentially business entities engaged in business activities in the United States that they could not hide behind the facade of a sovereign immunity claim and thus avoid the obligations which fall upon private budness in like circumstances. As the Senate Foreign Relations Committee stated: "This type of provision is of distinct advantage to the United States since it places private American business in a position of equality in dealing with government-owned commercial enterprises of other States" (Sen. Ex. Rpt. No. 5, 81st Cong., 2d Sess., p. 6).

3. In

3. In the course of negotiations with foreign governments questions have been asked, which are pertinent to your inquiry, as to the precise scope and meaning of the sovereign immunity clause proposed by the United States for inclusion in the FCN treaties. The Dutch, for example, were quite emphatic that their government would not be prepared to undertake any general commitment regarding the suability of the State itself. The United States negotiators, in reply, declared forcibly that the proposed rule was stated in terms of "enterprises of the State" and not in terms of the State itself.

During the same negotiations, the Dutch asked, for example, whether the Mutual Security Agency came within the purview of the treaty rule. The Department explained that the Agency was analogous to the Foreign Service and the State Department and that it was not analogous to a business corporation engaged in commercial or activity for pecuniary gain. The Department explained that the function of the Mutual Security Agency was a high foreign policy function of public governmental character; the furnishing of grants and assistance to friendly countries (at a loss to the Treasury) for the humanitarian purposes of relieving impoverishment and the politico-military purpose of restoring economic viability, promoting political stability and building the underpinnings of military strength.

The Dutch also requested views regarding an entity such as a central bank. They feared that the Netherlands Bank might be subject to the provisions of this clause in the treaty. The United States explained that there can be said to be a presumption that a "Central Bank", which acts as an arm of the government in executing governmental monetary controls and fiscal policies, represents the government in its sovereign capacity, and is not a commercial or business enterprise within the purview of the provision. This presumption is of course rebuttable if the evidence in the instance of a given Central Bank does not bear it out.

In another instance, in the course of negotiations with the Philippines in 1947 (which did not result in the conclusion of a treaty), the Philippine negotiators took the position that it should

be

be made absolutely clear that the waiver of sovereign immunity did not extend to such agencies as the Philippine Purchasing Agency in New York. In attempting to clarify the intent of the United States proposal, State Department representatives stated that whereas their proposal would not disturb such immunities as might otherwise be enjoyed by the quartermaster-general in buying shoes for the army, a government bottling works that manufactured beverages for sale on the market would, on the other hand, be without immunity. It was stated specifically that "it is not proposed to use the treaty of friendship, commerce and navigation as a vehicle for giving the courts directives on the larger issues of sovereign immunity beyond the area delimited" in the proposed provision.

In attempting to meet the Philippine insistence upon some additional language of assurance, various means of distinguishing between the functions of the sovereign for which immunity might be properly claimed, and those activities to be covered by the waiver, were considered. One formula, in the form of a sentence to be added to the waiver provision was as follows:

> It is understood that the provisions of the preceding sentence shall not be construed so as to prejudice the enjoyment by government instrumentalities of immunities that may appertain to them with respect to purchasing supplies for use by the government in the discharge of public functions not entailing the furnishing of goods and services for which specific charges are made.

It was developed in the discussions, however, that the phrase "not entailing the furnishing of goods and services for which specific charges are made" would not be satisfactory, since government hospitals, educational institutions, and the Post Office - all proper public functions for which immunity should be accorded - imposed charges for services, and under the proposed rule might lose their immunity when making purchases abroad. Eventually it was agreed that the term "business" constituted the best definition of activities to which the waiver should apply. The Philippine negotiators then agreed to the sovereign immunity provision, with the addition of the following interpretative sentence:

> It is understood that the provisions of the preceding sentence shall not be construed so as to prejudice the enjoyment by government instrumentalities of immunities that may appertain to them with respect to purchasing supplies for use by the government in the discharge of public functions of a non-business character.

As

As stated, the treaty was never concluded. The above interpretative sentence indicates, however, the scope of the provision as the Department's negotiators saw it.

I trust the foregoing sets forth adequately for your purposes the Department's views on the sovereign immunity provision of the Friendship, Commerce and Navigation treaties of the United States. If any specific cases arise in which the Department of Justice desires further elucidation of our views, we shall be glad to consider the matter further.

APPENDIX "B"

DEPARTMENT OF STATE

Washington, D.C. 20520

L/NEA

July 24, 1979

Mr. Ralph F. Long
Deputy County Counsel
County of Santa Clara
County Government Center, East Wing
70 West Hedding St.
San Jose, California 95110

Dear Mr. Long:

Thank you for your inquiry of March 12.

It remains the view of the United States that personal property owned by a foreign state for a public use is immune from local and state property taxation as a matter of customary international law. See e.g., State Department Note of September 2, 1965 quoted in Republic of Argentina v. City of New York, 25 N.Y. 2d 252, 250 N.E. 2d 698, 303 N.Y.S. 2d 644 (1969) (New York Court of Appeals upholds the Argentine Consulate's immunity from city real property taxes, based on the Department of State's note asserting such immunity for real and personal property); State Department Note of January 13, 1942 quoted in Bishop, Immunity from Taxation of Foreign State-Owned Property, 46 Am. J. Int'l Law 239 (1952); State Department Note of June 16, 1925 quoted in 2 G. Hackworth, Digest of International Law 469 (1941).

The military property owned by the Imperial Iranian Air Force does not fall within the limited waiver of immunity provisions of Article XI, Section 4 of the Treaty of Amity, Economic Relations and Consular

Rights, of August 15, 1955, 8 UST 899, TIAS 3853, because a state's armed forces are not "enterprise[s]" as that term was understood by the United States Government. The negotiating history of both identical and related provisions in similar treaties indicates that the term encompassed only those entities transacting business for an economic purpose. See, e.g., Note from American Embassy, Bonn to Department of State, February 9, 1954; State Department Note to American Embassy, The Hague, August 4, 1953. See also State Department Note to American Embassy, Montevideo, August 2, 1960; State Department Note to American Embassy, The Hague, July 1, 1953.

Since customary international law is a part of U.S. law, we would assume that an immunity based on such law would exempt the equipment from taxation under Article XIII, Section 1 of the California Constitution and Sections 201 and 202 of the California Revenue and Taxation Code.

I hope that this letter will help you resolve this matter and clear your tax rolls.

Sincerely,

David H. Small
Assistant Legal Adviser
for Near Eastern and
South Asian Affairs

APPENDIX "C"

DEPARTMENT OF STATE INSTRUCTION

137

RESTRICTED

NO.: A-52 August 4, 1953

SUBJECT: FCN treaty. Embassy despatch 89 of July 21, with enclosure.

DEPARTMENT OF STATE
G/T.
AUG 7 - 1953
TREATY BRANCH
OFFICE OF THE LEGAL ADVISER

TO: The American Embassy, THE HAGUE

Department comments follow:

Article XIX, para. 2. Department's reply to Embdes 1522, being transmitted separately, states this Government's attitude toward the Netherlands suggestion for broadening the coverage of this Article.

Article XVIII, para. 1. The Netherlands feeling of reserve about this provision is noted, and the Department is of course prepared fully to explore in a mutually sympathetic manner Dutch views concerning the proposed provision. Such an exploration in the case of other countries has so far resulted in agreement on the provision, with minor clarifications of language in a couple of instances. Although obviously not indispensable to an FCN treaty or the achievement of the major objectives of such a treaty, the provision is felt by the Department to be helpful to world trade and international economic development; and the failure of the ITO Charter hardly diminishes the desirability of obtaining recognition in some other instrument of the fundamental principle regarding restrictive business practices which the many countries participating in the formulation of that document agreed on as desirable. The provision of the FCN treaty is not regarded as incompatible with or interfering with the discussions underway in ECOSOC.

Article XVIII, para. 2. The reasons for the non-appearance of this provision in the treaty with Japan lie in development of the negotiation, which is of course a matter of diplomatic confidence. (For the Embassy's information, the Japanese Government did not resist the provision in general principle, but felt reserve about it on two scores: (a) As the provision goes beyond the terms of national treatment, the Government felt it might be open to criticism for undertaking potentially special rights for aliens, a rather sensitive matter at present in Japan, as the Embassy can appreciate. (b) There might be exceptional cases, due to Japanese economic circumstances, in which the treaty rule might hamper a Governmental effort to correct

deficiencies

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DECONTROLLED by Susan Haggerty, EB/OT/STA, 9/14/79

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deficiencies occuring in the private sector of the economy. In view of the many concessions the Japanese Government had made to U.S. views during the negotiation, the Department in the end withdrew the provision in the interest of expediting signature of the treaty on a note of full harmony).

The Japanese treaty would appear to be a less persuasive precedent for the Netherlands than treaties with European countries, all of which include the provision: Italy (Protocol, para. 2); Ireland (Article XV, para. 2); Denmark (Article XVIII, para. 2); and Greece (Article XIV, para. 2); also Israel (Article XVIII, para. 2). The provision represents a duly cautious effort to find a way to deal with the disturbing phenomenon of "creeping confiscation" represented by unfair subsidized State competition against private enterprise. Through such a device, of course, a Government can effectively achieve nationalization of industry without having to pay the just compensation required by international law in cases of outright expropriation. It is not presumed that the Netherlands would have less interest than the U.S. in furthering the international acceptance of the principle embodied in the provision.

Article XVIII, para. 3. The final interpretation of this provision, in its application to specific cases, would properly be a judicial function. The Department, in formulating the provision, has endeavored to employ concepts and terms that have become familiar in both continental and Anglo-Saxon jurisprudence in connection with the development of principles concerning the proper applicability of the doctrine of sovereign immunity under modern circumstances. It is not believed that the provision establishes any radical new departure in the law generally prevailing in the U.S. or Western Europe, but rather endeavors to crystallize and give formal international recognition to a principle that has come to enjoy fairly wide approbation.

It will be noted that the provision sets forth two conditions that must be met. First, there must be an entity properly described as an "enterprise" which is publicly "owned or controlled". This wording is calculated to exclude from the provision the State as such and the component elements of the Government in its "sovereign" capacity (e.g. the Ministry of Justice or the Foreign Service). Second, the entity must be one which engages in "business activities". A Government-owned corporation which runs a general import-export business (e.g. Amtorg), or manufactures automobiles for general sale (e.g., the French Renault enterprise), or engages in general marine insurance underwriting, would be the obvious example.

Without an adequate description of the Netherlands Bank, and the activities in which it engages, the Department cannot venture an opinion as to its probable status under the provision. There can be said to be a presumption, however, that a State's "central bank" which acts as an arm of the Government in executing the Government's monetary control and fiscal policy represents the Government in its sovereign capacity, and is not a commercial (or business) enterprise within the purview of the provision. This presumption is, of course, rebuttable if the evidence in the instance of a given central bank does not bear it out.

The MSA,

The MSA, cited by the Dutch, affords an obvious illustration of an entity outside the purview of the provision. It is analogous, for purposes of the present discussion, to the Foreign Service and the State Department. It is not analogous to a business corporation engaged in commerce or activity for pecuniary gain. Its function is a high foreign policy function of a public Governmental character; the furnishing of grants and assistance to friendly countries (at a loss to the Treasury) for the humanitarian purpose of relieving impoverishment and the politico-military purpose of restoring economic viability, promoting political stability, and building the underpinnings of military strength.

The purpose the Dutch had in mind in citing the treaty of April 10, 1926, regarding immunity of government-owned vessels is not clear.

Article XXI, para. 2. As to the "position with reference to Cuba and the Philippines". - Since the Dutch are well acquainted in general with this situation, in which there has been no recent change, it is requested that the Dutch frame more precisely the exact question they wish to have clarified.

Article XXIII. The Panama Canal Zone is under the "authority" of the United States, but not under its "sovereignty". The wording of this provision is, inter alia, a device for making clear that the Panama Canal Zone is not covered by the treaty.

As to specifically naming the territories of each Party to which the treaty extends, such a technique may be feasible in a short-term and limited agreement, but it is not practicable in a long-term instrument of this type which is designed (it is hoped) to endure for an indefinite future during which many changes in the map can occur. The wording of the Article, therefore, ought to be flexible and self-adjusting to all such changes as they may occur.

Article XXIV, para. 1.
Article XII, para. 6. To the comments forwarded in A-12 of July 6, the Department may add that it would be quite agreeable to transpose the consultation provision of XII(6) to XII(4), as was done in the Danish case, and to use the Danish language.

Article XXIV, para. 2. In the Department's view, the "compulsion" idea is implicit in the wording of this paragraph. Its purport is that either Party has the right, after the exhaustion of normal diplomacy, to bring the case to the Court; and the other Party is obligated in that event to submit to the jurisdiction of the Court.

Article I. The reason for omission of this non-essential Article from the Japanese treaty was a consequence of negotiation. The wording was not sufficiently explicit and precise to suit Japanese taste.

SMITH
ACTING

A P P E N D I X " D "

CONFIDENTIAL--

(Informally annotated copy-- for U.S. use only)

DRAFT

TREATY OF

FRIENDSHIP, COMMERCE

AND NAVIGATION

BETWEEN THE UNITED

STATES OF AMERICA

AND THE

REPUBLIC OF PORTUGAL

(Annotated for WW--May, 1949, per HW)

April, 1946

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country or countries have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by: (a) the United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone; or (b) by Portugal, its adjacent islands, or its colonies, to one another.

3. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade or the Havana Charter for an International Trade Organization during such time as such Party is a contracting party to the General Agreement or is a member of the International Trade Organization. Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement or Charter.

4. The present Treaty does not accord any rights to engage in political activities.

5. No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial manufacturing, processing, shipping or other business activities

activities within the territories of the other Party, (1) claim or enjoy, either for itself or for its property, immunity (2) therein from taxation, suit, execution of judgment or other liability to which privately owned (3) and controlled enterprises are subject therein.

Article XXII

Annex 231

(1) NFTC regards the instant wording as putting the burden of proof on the government, rather than on the corporation, and thus preferable to the China Treaty counterpart. The control spoken of is the kind deriving from ownership or its equivalent.

(2) Note that this is in terms of the rights of companies, qua companies. Thus it in no way diminishes the rights of American minority interests to compensation for expropriations, under the rule of Article VI, paragraph 3 (which is in terms of property).

(3) A corporation of either Party is entitled to be acknowledged as a legal entity and to have its day in court, in the other Party, regardless of who may control it.

(4) This qualification limits the exception to the MFN "commercial" provisions of the treaty. It is mainly directed to tariff rates under Article XIV, paragraph 1. However, owing to the coconut-oil processing tax question, authority has not yet been granted so to limit it.

(5) This summary phraseology is borrowed from one sometimes used in other Portuguese treaties. The Portuguese may, however, want to say it some other way.

(6) This phraseology is designed to preserve the rule of the Treaty in those respects in which the Charter is silent (example: 30-day rule in Article XV) or in which the Treaty goes beyond the Charter without conflicting with it, but at the same time to preserve Charter rights in such vital matters as balance-of-payments difficulties.

(7) To care for balance-of-payments difficulties in the absence of GATT and ITO membership, we are prepared to offer a suitable restatement of Italian Treaty Additional Protocol (Paras. 1, 2 and 4).

(8) Gives right to blackball the outsiders, under Charter Article 98, paragraph 4.

(9) This word hardly covers a traditional arm of pure sovereignty, such as the Ministry of War, or the Foreign Service, as such. It does, nevertheless, cover entities having forms other than that of government corporation.

(10) Does not, obviously, mean control in the sense of being subject to the prescriptions of general public law; rather, it has the sense of "managed", "directed", "administered."

(11) The waiver of immunity is only for "business enterprises." The situation of other types of government entities, agents and activities is left open, without prejudice. Beds for the government's tourist hotel are covered, but those for the Army are not. Cf. Protocol paragraph 1(a), and ITO Article 29, paragraph 2 (first sentence).

(1) Note locale reference, both here and the two subsequent "thereins". In so far as the government business enterprise stays home, it is untouched.

(2) This paragraph, together with paragraph 1 of protocol, paragraphs 1 and 2 of Article XVII, and paragraph 4 of Article VI constitute treaty's effort to adjust its traditionally private-enterprise predilections to State-enterprise tendencies.

(3) Contrast "and" here with "or" above.

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APPENDIX "E"

AIR POUCH
PRIORITY

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(Security Classification)

DO NOT TYPE IN THIS SPACE
611.62A4/2-954

FOREIGN SERVICE DESPATCH

FROM : HICOG BONN

2181
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON

February 9, 1954
DATE

REF : OURDES 2114, February 4, 1954, and previous

RETURN TO L/T

For Dept. Use Only	ACTION	INFO
	E.4	DEPT. REP.2 DCM.2 OCI.6 GER.4 L.2
	REC'D 2/13	OTHER Com.8 T.3 FTC-2 JUS-1 CIA-5

SUBJECT: New Treaty of Friendship, Commerce and Navigation: Report on February 8, 1954 Meeting with German Negotiators

The 21st meeting for the negotiation of the subject treaty was held at the Foreign Office on February 8, 1954. The U.S. and German participants were the same as those reported in the reference despatch.

The February 8 meeting was devoted to a discussion of U.S. Article XVIII on cartels and state business practices.

Before entering into the detailed discussion of U.S. Article XVIII, the Germans agreed to hold a sub-committee meeting on U.S. Article XI, on taxation of persons and companies, on February 11.

Discussion on Paragraph 1

In order to resolve the difficulty reported upon in detail in the reference despatch, the U.S. side proposed substituting for the word "Party" in sentence 2, paragraph 1, the word "Government" so that the obligation would be on the executive and administrative branches of each government without committing their respective legislative bodies as to the enactment of legislation.

The Germans thought that this proposal was an interesting one, which, from a legal point of view would eliminate the essential concern voiced by them in the February 3 meeting. They noted that a similar formulation occurred in the agreement on economic cooperation between the Federal Republic of Germany and the United States. Though reserving their final position, they tentatively accepted this proposal.

Discussion on Paragraph 2

The Germans regretted that this paragraph had to be discussed in detail, as they could not foresee that they would be able to accept it; and they requested the U.S. team to state its frame and objectives. In response, the U.S. introduced its remarks by reminding the Germans that the treaty covered elsewhere the issue of expropriation to ensure that a private owner of property received fair reimbursement even though the expropriation was the result of a governmental nationalization program. They noted that whenever this rule of international law was

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DEPARTMENT OF STATE
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followed, elementary equitable treatment was guaranteed for private owners even though the U.S. Government might disagree with the basic policy of nationalization. However, some countries, specific mention being made of Roumania, had sought, or could seek, to obtain the effect of nationalization of private property by establishing government-controlled enterprises which, as a result of their subsidization, could run privately competing companies into bankruptcy. Thus, a government would be able to take over private property without compensation or with nominal compensation only. Paragraph 2, they stated, had been considered to be a good vehicle for like-minded countries to announce to the world at large their disapproval for such indirect expropriations.

Turning from these extreme situations to more common every-day affairs, they observed that this provision dealt with a facet of the general problem of what rules should be applicable when private business faced the state itself, such as had already been dealt with in part in Article XVII. In this connection, they noted that the provisions of U.S. Article VII concerning private business activities might have been adequate many years ago but were no longer sufficient today when the state, in fact, competed in many instances with private business enterprises. There would consequently have been a hole in the treaty in the absence of paragraph 2 which endeavored to make a step toward filling this gap. They stated that paragraph 2 constituted a pioneering provision which had only recently been worked out, the Italy Treaty having marked its first appearance. Its approach was therefore moderate and cautious, and its scope limited.

The U.S. side continued by mentioning that the provision covered only "trading or manufacturing enterprises", that is, the processing and conversion as well as the buying and selling of goods, operations which reflected only part of the behavior of state-owned organization in its relationship to private business. They realized further that state establishments sometimes were established not for economic reasons but to meet pressing social needs; they stated that it was not the intent of this paragraph to embarrass either party in projects such as slum clearance run on a non-profit basis and requiring state subsidies for paramount social reasons, and that an exception had been included for this purpose. They noted that a further exception was included to cover manufacture for government use (e.g., in the U.S., the manufacture of auto-license plates and the Government Printing Office, which had been established to satisfy the Government's own requirements).

The Germans, while appreciating these explanations, noted that the reasons underlying paragraph 2 appeared to be mostly of a political and idealistic nature with which the Federal German Government sympathized and agreed in principle. They emphasized, however, that there was a difference between believing in such principles and inserting a clause of this nature in a bilateral treaty which would become a binding commitment. They held that this paragraph was of little practical value to the trade between Germany and the United States. They noted that the Federal Government had been leading a pioneering fight in Europe for a free marketing order and for a free economy, which was reflected in the elimination of unnecessary state intervention in private business. In reviewing the historical developments in both countries, however, they concluded that Germany, in comparison with the United States, had a much more substantial degree of state-owned or state-controlled business activity. In this connection they referred to

an article entitled "Der Bund--der groesste Unternehmer" (The Federation--The Biggest Enterpriser"), published in the February 6, 1954 issue of the Frankfurter Allgemeine Zeitung. The Germans quoted from this article, noting that the Federation held a capital share of DM 2,801 million out of a total of DM 3,586 million in various enterprises such as mining; oil production and refining; electric power, gas and water works; aluminum and chemicals; iron works; banking; automobile factories and transportation holding companies, and many other enterprises including even a hosiery manufacturing plant. 1/

The Germans observed that the article did not mention the interests of the Laender, provinces, municipalities or combinations of municipalities. They explained that a large group of enterprises was being maintained by these administrative governmental units for the purpose of supplying low-cost services without benefit of competition, but that in Germany these units were partly producers of industrial goods, a situation without parallel in the United States which, however, had to be considered with respect to the present treaty. They emphasized that German public opinion and the Federal Government were opposed to socialization, a fact well known abroad and reflected in Germany's foreign trade relations.

Regarding the legal side of paragraph 2, they stated that, if the bilateral commitment were to be considered, the weight would not be on foreign trade but on internal economic and political policies. This, in their opinion, supplemented and influenced foreign trade relations to only a slight degree. The Germans concluded that they could not accept a commitment in a bilateral treaty which would establish a firm and definite direction for Germany's internal economic and political policies. They argued that the subject matter of paragraph 2 could not be decided upon by the Government but by the legislative bodies whose action could not be prejudiced. They noted that if they accepted this paragraph it would be binding upon their parliament for a long time to come. Such acceptance, they stated, would jeopardize ratification of the treaty since the Government would have exceeded its competence. They drew a parallel to the situation in the United States involving the Bricker amendment and expressed fear that the Bundestag might interpret their acceptance of this paragraph as an attempt by the Government to use an international treaty as a means to interfere in internal matters.

The U.S. side appreciated the informative statements made by the Germans, adding that the paragraph took account to a large degree of the varying historical traditions of the individual nations. They said that this paragraph did not intend to cover public utilities such as power, gas, and water, and that it did not include transportation facilities. They offered to consider a protocol clarification on this point, if the Germans thought that such a clarification would be helpful. They further declared that paragraph 2 did not involve a situation where the state enjoyed a monopoly, i.e., where private competition was non-existent. They then noted a subtle but perhaps significant differentiation, noting that this paragraph pertained to activities where the state entered into

1/ A complete translation of this lengthy article, with comment, will be transmitted to the Department as an enclosure to a separate despatch.

competition with private business and not vice versa, adding that the emphasis was placed on who took the initiative. They concluded by observing that although this paragraph had many ramifications, the United States had endeavored to limit its effects to bilateral relations without prejudicing a party's relations with third countries or its purely internal affairs.

The Germans replied that this paragraph also involved commercial policy considerations, stating that Germany was not so ambitious in its commercial policy aims as the United States. Whereas they understood the pioneering and high-minded spirit of some of the U.S. standard draft treaty's provisions, they emphasized that, as a matter of policy, the Federal Government had decided only to raise matters directly related to foreign trade in its future negotiations with third countries, and to exclude from their draft FCN treaty anything exceeding this frame for fear that it might be interpreted by third countries as a German attempt to meddle in their internal affairs. They explained that these considerations had prompted them to adopt softer language than that contained in the U.S. standard draft. Noting that paragraph 2 had not been incorporated in all U.S. FCN treaties, they expressed strong preference for sole consideration of paragraphs 1 and 3. They added that, aside from their theoretical and political objections, paragraph 2 also presented them with a major difficulty as regards principle. They observed that there were many forms of state ownership in Germany and that, in case the state only owned all of the shares of an enterprise without actually operating it, such an enterprise would have no different status under German law from a completely privately owned and operated company. They concluded that paragraph 2 therefore imposed more than national treatment since it could result in a demand for more rights for alien enterprises than those accorded to domestic companies. The U.S. side confirmed that this provision went beyond the national treatment rule of Article VII, although it would seem unlikely that a government would in fact wish to withhold the benefits envisaged from domestically owned firms.

The U.S. side said they would report the German views to the Department, and meanwhile requested that the Germans give further consideration to their position in light of the discussion. They suggested that the day's discussion be considered as a preliminary airing of views, and that attention should now be directed to the next paragraph.

Discussion of Paragraph 3

The Justice Ministry representative requested additional information since, in his opinion, the rule provided for by this paragraph was inconsistent with that presently applicable in Germany. He referred to a decision reached by the Reichsgericht in 1921 when the U.S. Shipping Board based its claim upon sovereign immunity, a position reversed by the present paragraph. He further requested clarification as to the scope of the paragraph, asking specifically for definitions of "corporations, associations, and government agencies and instrumentalities".

In response to the last question, the U.S. side explained that this paragraph did not attempt to curtail the sovereign immunity of the state itself when it acted in its sovereign capacity, and noted that the rule was stated in terms

of "enterprises" in order to emphasize this point. They stressed that the waiver of sovereign immunity pertained to commercial activities of the state when operating through entities created and dominated by it, but not to all state functions.

The Germans reviewed the procedure followed in Germany by noting that the lower courts were influenced by the 1921 decision of the Reichsgericht. They observed that the German Government had not yet made up its mind whether the judiciary branch could deviate from the 1921 decision. In this connection, they explained that difficulty resulted from the suggested U.S. text and inquired as to the significance of the words "claim and enjoy". They inquired also as to the practice presently followed in the United States which obviously was opposed to the principles of 1921 when the Reichsgericht decision was generally accepted as a concept of international law.

The U.S. team noted that the United States had been for some time breaking away from the classical theory and that paragraph 3 endeavored to crystallize the present U.S. practices, which were believed to reflect generally majority international practice in this connection. They stated that it represented a century of developments, commencing with the Tucker Act of 1853, passing through the Admiralty Act of the 1920's, and climaxing in the Congressional Reorganization Act of 1946. They added that, generally speaking, U.S. courts often asked for policy guidance from the Department of State before ruling on a foreign claim involving sovereign immunity, and that an over-all policy statement was issued on May 19, 1952, in a letter sent by the Acting Legal Adviser of the Department to the Acting Attorney General. A copy of this letter was handed to the German side.

The U.S. side stated further that paragraph 3 conveyed the new U.S. position whereby the United States on a reciprocity basis would refrain from espousing claims of U.S. entities in foreign courts with respect to sovereign immunity, within the scope of the proposed paragraph.

Regarding the words "claim and enjoy", they explained that they reflected the two facets which had to be considered with respect to immunity of state-owned enterprises: (1) if the enterprise claims immunity for itself in its plea to the court, and (2) what kind of judgment a court may grant if immunity is not claimed and recognized.

With respect to the definitions requested for "corporations, associations, and government agencies and instrumentalities", the U.S. side noted that this enumeration was illustrative, explaining that the United States usually chose the form of a corporation but this practice varied. The listing, they added, was to indicate that the precise juridical form of the government entity was irrelevant.

The Germans accepted this explanation and asked for a statement on experiences gained during other U.S. FCN treaty negotiations with respect to this provision. The U.S. team said that this paragraph had been included in generally all our FCN treaties since 1947, and that it reflected a gradual change in international concept which was aimed at eliminating the sometimes scandalous

abuses of sovereign immunity claims, special mention being made of AMTORG. They noted that the United States and the United Kingdom had been slower in moving from the classical theory and in accepting the new trend than many other countries, which appreciated the present change. There had been relatively little difficulty in negotiating this provision in other treaties.

The Germans reserved their final position on paragraph 3 until the next meeting scheduled to be held on February 10. They announced that they would be unable to discuss at that time U.S. Articles XIX or XXI, which required additional internal consideration. They suggested, therefore, and the U.S. side agreed to devote attention at the next meeting to U.S. Article XX and to German Articles 15, 21, 27, 28 and 43.

Carl H. Boehringer
Commercial Attache
Commercial Attache Division
Office of Economic Affairs

Coordinated with: Mr. Herman Walker, Jr.
OGC - Mr. S. Houston Lay S. Houston Lay

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APPENDIX "F"

DEPARTMENT OF STATE INSTRUCTION

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NO.: A-22 August 2, 1960

SUBJECT: Possible Revision of Treaty of Friendship, Commerce and Economic Development

UT

TO: The American Embassy MONTEVIDEO

Reference Embassy's despatch No. 1113, June 16, 1960.

During the eleven years since the signing of the treaty with Uruguay, it has been found necessary to restudy various provisions of the standard negotiating proposals for a treaty of this kind and to modify certain of them. Among the provisions thus modified as a matter of standard treaty policy are four contained in the treaty with Uruguay: social security (Article III (2)), practice of professions (Article V (1)(a)), taxation (Article IX (1)(2)(4)), and sovereign immunity (Article XVIII (5)).

The protocol signed May 19, 1955 brings the treaty into harmony with current policy as to the practice of professions. The specific textual changes that would be needed in order to reflect present policy with respect to social security, taxation and sovereign immunity are given below. The Department believes that on balance the best course would be to seek revision of the provisions of the treaty relating to these three subjects, and the Embassy may so inform the Uruguayan Government. If desirable, it may also indicate the precise nature of the revisions and the underlying reasons for proposing them. At the same time the Embassy should seek to elicit from the Uruguayans at least a general idea of the changes they regard as necessary in order to "bring the treaty up to date."

Additionally, the Department would prefer restatement of a number of other provisions which, while consistent with standard treaty policy, underwent considerable reworking during the course of the original negotiation and lack the clarity and inclusiveness of comparable provisions in more recent treaties of this kind. It does not wish to make specific proposals to this end, however, until the Uruguayan desires for revision become known. It may be that the Uruguayan proposals will involve the same provisions, in which case the possibility of textual improvements of this nature can be considered

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DEPARTMENT OF STATE L/T AUG 5 1960 OFFICE OF THE LEGAL ADVISER

DRAFTED BY: OT:CPT:CHSullivan:lh 7-28-60

APPROVED BY: Richard Heifman

CLEARANCES:
L/E - Mr. Bilder L/T - Miss Wilson EST - Mr. J. W. Wilson

DOCUMENT DECONTROLLED by Susan Haggerty, EB/OT/STA, 9/14/79

opportunistically, on an item-by-item basis. Any provisions the Uruguayans are disposed to accept in their present form the Department in all probability will prefer to leave untouched.

The specific changes with respect to social security, taxation and sovereign immunity which the Department wishes to obtain are as follows:

Article III, paragraph 2: The phrase "within the territories of the other Party" should be placed immediately after the words "nationals of either Party" and the commas setting it off should be deleted. The portion of the paragraph following the introductory phrase would then read "...nationals of either Party within the territories of the other Party shall be accorded national treatment in the application of laws and regulations establishing systems of compulsory insurance..."

The effect of this change is to exclude aliens from coverage under this provision unless they reside in the United States. The object is to bring the provision into conformity with the change in Congressional policy represented by the enactment in 1956 of an amendment to the Social Security Act which requires suspension of payment of earned benefits to nonresident aliens except under certain carefully qualified conditions. As a practical matter it is doubtful whether many Uruguayan nationals would be affected adversely by this change in Article III (2). Presumably only a small number of such nationals have occasion to come within the ambit of United States social security legislation; those who do so and reside in the United States are assured national treatment; and those who have earned full benefits under the United States system, by contributions made in the course of covered employment for ten years or more, are entitled to payment of benefits even though they do not reside in the United States.

Article IX, paragraph 1: The words "nationals and" immediately preceding "companies of either Party engaged in trade or business or in scientific, educational, religious or philanthropic activities within the territories of the other Party" should be deleted. The effect of this change is to remove nonresident aliens from coverage under the national treatment rule, thereby limiting the application of that rule to resident alien natural persons and to alien corporations and associations engaged in business or nonprofit activities.

This change derives from a recent restudy of the standard tax provisions of treaties of this kind by Treasury officers. This study disclosed technical problems making necessary certain amendments of the tax article. These problems concern mainly application of the national treatment rule to the taxation of nonresident aliens. United States tax laws make certain distinctions in treatment between United States citizens and resident aliens on the one hand and nonresident aliens on the other.

The purpose is chiefly to facilitate administration, and it is thought that the laws of other countries make comparable distinctions. For example,

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a nonresident alien engaged in business in the United States is subject to income tax withholding to a greater extent than the citizen. In some cases, however, the rules are more favorable to the alien than to the citizen; for one example, the alien is allowed a longer period after the close of the taxable year for filing tax returns.

Heretofore such differences were regarded as not resulting in fact in more burdensome taxation of the alien and hence as not inconsistent with the national treatment rule. The restudy has led, however, to the conclusion that some of the distinctions between the citizen and the nonresident alien might result in such material differences in taxation as to be held inconsistent with the national treatment standard. One of the provisions that causes particular concern is Section 6013 of the Internal Revenue Code, which denies to nonresident aliens the privilege of joint returns by husband and wife and the consequent advantage of income splitting.

It is thought that the practical effect of this change in Article IX (1) as regards the treatment of Uruguayan nationals in the United States and of United States citizens in Uruguay would be negligible. It generally would be quite impracticable for a natural person to carry on trade or business in a distant country without taking up residence there. The normal way to carry on such activity is through a company, and the standard for companies engaged in trade or business remains national treatment.

Article IX, paragraph 2: The words "or who are not engaged in trade or business" immediately following the term "nationals of either Party" should be deleted. This change is a natural consequence of that made in the preceding paragraph. Since the general scheme of the treaty is to accord most-favored-nation treatment in those situations in which national treatment can not be granted, it is requisite that this paragraph apply clearly and unequivocally to all nonresident aliens, including those from whom the right to national treatment was withdrawn as a result of the change in Article IX (1).

Article IX, paragraph 4: The following clause should be substituted for subparagraph (c): "(c) apply special provisions in extending advantages to its nationals in connection with joint returns by husband and wife, and as to the exemptions of a personal nature allowed to nonresidents in connection with income and inheritance taxes." The purpose of this revision is to take account of Section 6013 of the Internal Revenue Code, referred to above, and to assure against possible claims to the joint returns privilege under the most-favored-nation clause in Article IX (2). Without this specific qualification it might be possible by reason of Article IX (2) to claim the benefit of provisions in treaties with certain other countries that extend national treatment to certain categories of nonresident aliens. Resident aliens, of course, are entitled to file joint returns in the same way as citizens.

The second part of new subparagraph (c) is the same in substance as that appearing in the present text. It has been reformulated, however, in order to

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provide a more precise statement of scope and intent.

Article XVIII, paragraph 5: This paragraph should be deleted. The subject matter of this paragraph is being restudied within the United States Government in order to ascertain the best method of dealing generally with the various problems arising in connection with the immunity of state enterprises. Pending completion of the study and reformulation of this government's policy it has been thought desirable to avoid additional commitments on this subject matter. Accordingly, the deletion of this provision has been proposed with respect to treaty projects currently under negotiation and the paragraph containing it is being omitted from new proposals submitted to foreign governments.

Omission of this provision, of course, will in no way affect the rights of either treaty partner with respect to jurisdiction over foreign state enterprises within its territories, and it seems doubtful that the Uruguayan Government would have any particular interest in this paragraph. The United States, favoring a private-enterprise economy, does not establish state enterprises for engaging in business activities in foreign countries, and it is thought that such state business enterprises as Uruguay has or may in the future create are quite unlikely to seek to do business with the United States through establishments located in this country.

The waiver of sovereign immunity was added to the Department's treaty proposals shortly after the end of the Second World War, at a time when treaties were under consideration with a number of European countries that had recently nationalized extensive segments of private industry. It was feared that branches of the nationalized industries established in the United States might seek to avoid legal liabilities through claims to sovereign immunity. The anticipated difficulties did not materialize, however, and further consideration of the subject of sovereign immunity has resulted in the position being taken in certain offices within the government that bilateral treaty provisions of this kind do not constitute a satisfactory method of dealing with this subject.

Should the matter of bringing the Uruguay treaty up to date come to the point of negotiations looking toward the substitution of a complete new text or the framing of an amendatory protocol, the Department probably will wish to suggest that the protocol of May 19, 1955 be abandoned and the necessary modifications respecting Article V (1)(a) be made in the new text or written into the amendatory protocol.

If, in the Embassy's judgment, there is a reasonable prospect that the Uruguayan Government will follow up its expressions of interest in the treaty with specific proposals for "bringing the treaty up to date," steps will be taken to obtain the requisite authorization, pursuant to Department Circular 175 (FSC164-1-13-56), to undertake such renegotiation of the present text as may be necessary in the circumstances.

HERTER

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Rubin v. Islamic Republic of Iran, N.D.Ill., December 15, 2005

76 F.Supp.2d 16
United States District Court,
District of Columbia.

Stephen M. FLATOW, Plaintiff,
v.
The ISLAMIC REPUBLIC OF IRAN, The Iranian Ministry of Information & Security, Ayatollah Ali Hoseinie Khamenei, Ali Akbar Hashemi-Rafsanjani, Ali Fallahian-Khuzestani, and John Does 1-99, Defendants.

Civil Action No. 97-396 (RCL).
|
Dec. 10, 1999.

After obtaining judgment against foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act, private litigant levied writs of attachment upon real estate owned by foreign state and upon two bank accounts containing funds generated by Department of State's lease of real estate. United States intervened, and moved to quash writs of attachment. The District Court, Lamberth, J., held that: (1) real estate that was formerly used as site of embassy and as residences for diplomatic activities was not "used for commercial activity" due to fact that they were leased by United States to third parties after suspension of diplomatic relations; (2) account that was licensed by Treasury Department to Office of Foreign Missions for payment of maintenance and repair expenses relating to real estate was immune from attachment; and (3) account containing profits, and interest thereon, generated by leases of real estate was United States property.

Motion granted.

West Headnotes (7)

[1] **International Law**
Extent and effect of immunity

Whether property of foreign state is "used for commercial activity," and thus is subject to attachment following judgment obtained pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act, turns on foreign state's actions with respect to commercial use. 28 U.S.C.A. § 1610(a)(7).

3 Cases that cite this headnote

[2] **International Law**
Property of sovereign

Parcels of land belonging to foreign state and formerly used as site of its embassy and as residences for its diplomatic activities, were not "used for commercial activity" due to fact that they were leased by United States pursuant to Foreign Missions Act after diplomatic relations were suspended, and thus property was not subject to attachment to satisfy judgment obtained against foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act. State Department Basic Authorities Act of 1956, § 205(c), as amended, 22 U.S.C.A. § 4305(c); 28 U.S.C.A. § 1610(a)(7).

10 Cases that cite this headnote

[3] **International Law**
Property of sovereign

United States' assertion of custody over and maintenance of foreign state's diplomatic property pursuant to Foreign Missions Act was inherently sovereign, not commercial, act, and thus property was not subject to attachment following judgment obtained against foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act. State Department Basic Authorities Act of 1956, § 205(c), as amended, 22 U.S.C.A. § 4305(c); 28 U.S.C.A. § 1610(a)(7).

2 Cases that cite this headnote

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[4] **International Law**
Property of sovereign

Bank account that was licensed by Treasury Department to Office of Foreign Missions for payment of maintenance and repair expenses relating to real estate belonging to foreign state and formerly used as site of its embassy and as residences for its diplomatic activities before diplomatic relations were suspended was immune from attachment to satisfy judgment obtained against foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act, where account contained funds that were initially held in foreign state's diplomatic accounts. State Department Basic Authorities Act of 1956, § 205(c), as amended, 22 U.S.C.A. § 4305(c); 28 U.S.C.A. § 1610(a)(7).

4 Cases that cite this headnote

[5] **International Law**
Property of sovereign

Bank account containing profits, and interest thereon, generated by leases of Iranian diplomatic property after suspension of diplomatic relations between United States and Iran was not Iranian property regulated by Iranian Assets Control Regulations, but rather was United States property, and thus, under doctrine of sovereign immunity, was immune from attachment to satisfy judgment obtained against foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act. 28 U.S.C.A. § 1610(a)(7); 31 C.F.R. § 535.201.

7 Cases that cite this headnote

[6] **International Law**
Property of sovereign

Private litigant could not attach real property or bank accounts belonging to foreign state pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act after president had waived requirements of statute in interest of national security. 28 U.S.C.A. § 1610(f)(1); 31 C.F.R. § 535.311.

Cases that cite this headnote

[7] **International Law**
Property of sovereign

Provision of Foreign Sovereign Immunities Act (FSIA) that allowed attachment of property belonging to "agency or instrumentality of foreign state" did not apply to property belonging to foreign state itself. 28 U.S.C.A. § 1610(b)(2).

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter concerns yet another attempt by Plaintiff Stephen Flatow to satisfy the judgment he obtained almost two years ago against the Islamic Republic of Iran ("Iran") for its sponsorship of the terrorist group that murdered his daughter. Pursuant to the Foreign Sovereign

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Immunities Act, he has levied writs of attachment upon three parcels of real estate owned by the Islamic Republic of Iran, including the former Iranian embassy, and two NationsBank accounts containing funds generated by the State Department's lease of these properties. 28 U.S.C.A. § 1610(a)(7) & 1610(f)(1)(A) (West Supp.1999). Once again, however, the United States has intervened to quash the writs of attachment,[1] contending that the properties and accounts are immune from attachment under the Foreign Missions Act, 22 U.S.C. §§ 4301-4316 (1999), the Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1609 & 1610 (West Supp.1999), the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1702 (1999), the Vienna Convention on Diplomatic Relations,[2] and Article II of the Constitution. U.S. CONST. ART. II,, § 3, cl. 3 (granting the President the power "to receive Ambassadors and other public Ministers). Because the Court finds that these properties and accounts are immune from attachment under the Foreign Sovereign Immunities Act, the Court hereby GRANTS the United States' motion and the July 9, 1998 writs of attachment are hereby QUASHED. Thus, having found that plaintiff is barred from attaching the properties and accounts under the Foreign Sovereign Immunities Act, the Court need not determine whether their attachment under this Act would run afoul of the Constitution, the Foreign Missions Act, the International Emergency Economic Powers Act, or the Vienna Convention.

I. BACKGROUND

In April 1995, the Shaqaqi faction of the Palestine Islamic Jihad, a group that is funded exclusively by the Islamic Republic of Iran ("Iran"), bombed a tourist bus in Gaza, killing Stephen Flatow's 20-year-old daughter Alisa. *See Flatow v. The Islamic Republic of Iran,* 999 F.Supp. 1, 6-9 (D.D.C.1998). One year later, utilizing a newly-enacted amendment to the Foreign ***19** Sovereign Immunities Act, Flatow filed a wrongful death action against Iran, its Ministry of Information & Security and various high-level government officials. *See Civil Liability for Acts of State Sponsored Terrorism,* Pub.L. No. 104-208, Div. A., Title I § 101(c) [Title V, § 589, 110 Stat. 3009-172], (30 September 1996) *reprinted at* 28 U.S.C.A. § 1605(a)(7) (West Supp.1999) (creating jurisdiction over claims against foreign entities who provide material support for acts of extrajudicial killing, *inter alia*) (commonly called the "Flatow Amendment"); *see also Flatow,* 999 F.Supp. at 5. Iran failed to appear. Accordingly, this Court held an evidentiary hearing and determined that the plaintiff had "establishe[d] his claim or right to relief by evidence ... satisfactory to the Court." 28 U.S.C.A. § 1608(e) (West Supp.1999); *Flatow,* 999 F.Supp. at 5. Based upon the evidence presented at this hearing, the Court entered a default judgment against Iran, finding Iran and the co-defendants jointly and severally liable for compensatory damages, loss of accretions, solatium and $225,000,000.00 in punitive damages. *Flatow,* 999 F.Supp. at 5. To date, Flatow's efforts to satisfy his judgment against Iran have proven unsuccessful. *See, e.g., Flatow v. Islamic Republic of Iran,* 74 F.Supp.2d 18, 20 (D.D.C. 1999) (quashing writ of attachment against U.S. Treasury funds); *Flatow v. Islamic Republic of Iran,* 67 F.Supp.2d 535, 537-38 (D.Md. 1999) (quashing writs of execution against nonprofit foundation's property). In the instant matter, Flatow seeks to attach various parcels of real estate in Washington, D.C., belonging to Iran. Notably, these properties include the former Iranian embassy.[3] Flatow also seeks attachment of two NationsBank bank accounts, which are entitled "Blocked Iranian Diplomatic and Consular Property Renovation Account c/o Blocked Assets Administration, U.S. Department of Treasury" ("First Account") and "U.S. Department of State, Office of Foreign Missions, Iranian Renovation Account" ("Second Account"). The First Account comprises excess funds and interest generated from the leasing of these properties to third parties. The Second Account, which originally contained Iranian diplomatic and consular accounts, contains funds generated by the leases but used for maintenance and related expenses.

Despite its public proclamations of support for efforts[4] to bring state sponsors of terrorism to justice, the Clinton administration has intervened to forestall plaintiff Flatow's ability to satisfy his judgment. *See* Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, 63 Fed.Reg. 59201 (October 21, 1998) (exercising authority to waive requirements under § 117(d) and stating that such requirements "would impede the ability of the President to conduct foreign policy in the interest of national security"); ***20** *see also Flatow,* 74 F.Supp.2d at 20 (D.D.C. 1999). In this latest chapter in plaintiff's ongoing struggle to hold accountable those responsible for his daughter's murder, the United States contends, *inter alia,* that the Foreign Sovereign Immunities Act, the Foreign Missions Act, the International Emergency Economic Powers Act, the Vienna Convention on Diplomatic Relations and Article II of the Constitution bar the attachment of these properties and accounts. As explained below, because the Court finds that it lacks jurisdiction over the properties and accounts under the Foreign Sovereign Immunities Act, the Court need not reach the merits of the United States' other claims.[5]

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II. DISCUSSION

A. *The Foreign Sovereign Immunities Act*

The enumerated exceptions to the Foreign Sovereign Immunities Act ("FSIA") provide the exclusive source of subject matter jurisdiction over all civil actions against foreign states. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Accordingly, the FSIA must be applied in every action involving a foreign state defendant. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Unless one of the FSIA's exceptions applies, foreign states enjoy immunity from the jurisdiction of U.S. courts. 28 U.S.C.A. § 1604 (West 1999). Similarly, the property of a foreign state in the United States is immune from attachment or execution, unless an exception under sections 1610 or 1611 provides otherwise. 28 U.S.C.A. §§ 1610 & 1611 (West Supp.1999). Section 1610 enumerates the general exceptions to immunity from attachment or execution, while Section 1611 specifies particular types of property that are immune from execution.

*21 B. *Attachment under Section 1610(a)(7)*

Plaintiff contends that Section 1610(a)(7) of the FSIA authorizes the attachments here because the properties and accounts are "used for commercial activity" within the meaning of the FSIA and the judgment he seeks to enforce was awarded under Section 1605(a)(7), the state-sponsored terrorism exception. The United States does not contest the source of the judgment. Rather, the United States asserts that the property and accounts at issue do not meet the threshold requirement of the exception, *i.e.*, that the property is "used for commercial activity in the United States." 28 U.S.C.A. § 1610(a)(7). Plaintiff maintains that the critical inquiry regarding commercial use is the nature of the activity, not its purpose and that the identity of the commercial actor is immaterial to the inquiry. Thus, he characterizes these properties and accounts as commercial in nature because the United States' leasing of the properties is not an inherently sovereign action, but one that may be undertaken by a private actor. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (concluding that, for purposes of the FSIA's "commercial activity" exception, "when a foreign government acts, not as regulator of a market but in the manner of a private player within it," the activities are commercial).

While agreeing that the nature of the activity governs "commercial activity" analysis, *see* 28 U.S.C.A. § 1603(d); *see also Weltover*, 504 U.S. at 614, 112 S.Ct. 2160, the United States asserts that, for purposes of the FSIA, only the foreign state's actions are relevant, not those of the United States. The United States points out that Iran opposes the leases of its properties. *See Islamic Republic of Iran v. United States*, Case Nos. A4/A7/A5 (I:F and III); Dec. 129-A4/A7/A15-FT, at 1-2 (June 23, 1997, Iran-United States Claims Tribunal) (denying Iran's request to have leases terminated and noting that leases were "in order to prevent [the properties] falling into an irreversible state of disrepair"). In the alternative, the government argues that, even if a foreign state's actions are not critical to the applicability of this provision, the actions undertaken by the United States in this matter are sovereign, not commercial, in nature. That is, the government contends that the United States, through the State Department's Office of Foreign Missions, is acting in its sovereign capacity by taking custody of and leasing these properties pursuant to its "preserve and protect" responsibilities under the Foreign Missions Act, as well as discharging its duties under the Vienna Convention. *See* Foreign Missions Act, 22 U.S.C. § 4305(c) (providing that "[i]f a foreign mission has ceased conducting diplomatic, consular and other governmental activities in the United States, and has not designated a protecting power or other agent ... the Secretary, until the designation of a protecting power or other agent ... may preserve and protect any property of that foreign mission"); *see also* Vienna Convention on Diplomatic Relations, Article 45(a), T.I.A.S. 7502, 23 U.S.T. 3227 (1964) (providing that "[i]f diplomatic relations are broken off between two states ... (a) the receiving state must, even in the case of armed conflict, respect and protect the premises of the mission, together with its property and archives").

To address whether these properties and accounts are "used for commercial activity" for purposes of Section 1610(a)(7), the Court begins with the statutory language. Section 1610(a)(7) 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 upon a judgment entered by a court of the United States ... if
>
> > the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved ***22** with the act upon which the claim is based.

28 U.S.C.A. § 1610(a)(7). By its terms, the threshold requirement for invoking this provision is that the property is "used for commercial activity in the United States." "Commercial activity" is defined in two instances under the FSIA. First, the statute generally defines

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"commercial activity" as

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C.A. § 1603(d) (West 1999). The FSIA also provides a second, more specific definition, termed "commercial activity carried on in the United States by a foreign state," 28 U.S.C.A. § 1603(e) (West 1999), which is defined as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* This more specific definition relates to language found in one of the FSIA's enumerated exceptions to jurisdictional immunity. *See* 28 U.S.C.A. § 1605(a)(2) (abrogating foreign state immunity in actions "based upon a commercial activity carried on in the United States by the foreign state").

The Supreme Court has addressed the meaning of "commercial activity" under the FSIA, albeit in the context of the so-called "commercial activity exception," one of the Act's enumerated exceptions to jurisdictional immunity. 28 U.S.C.A. § 1605(a)(2) (West 1999). *See Republic of Argentina v. Weltover*, 504 U.S. 607, 611-14, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). While the precise provision at issue in *Republic of Argentina v. Weltover* is not implicated here, the Supreme Court's construction of the proper scope and meaning of "commercial activity" under the FSIA guides this Court's analysis. In *Weltover*, the Supreme Court determined that Argentina's default on certain currency stabilization bonds constituted an act "in connection with a commercial activity" that "had a direct effect in the United States" sufficient to subject Argentina to suit in the United States under the FSIA. 28 U.S.C.A. § 1605(a)(2). The Court began its analysis by noting that the definition of commercial activity provided in the FSIA "leaves the critical term 'commercial' largely undefined." *Weltover*, 504 U.S. at 612, 112 S.Ct. 2160. Drawing upon the historical background of the FSIA, however, the Court noted that the statute "largely codifie[d] the so-called 'restrictive' theory of foreign sovereign immunity," which distinguished actions "arising out of purely commercial transactions," *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) from those deriving from "powers peculiar to sovereigns." *Id.* at 704, 96 S.Ct. 1854. Thus, the Court instructed that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA." *Weltover*, 504 U.S. at 614, 112 S.Ct. 2160 (emphasis added). Thus, to determine whether a foreign state's actions are commercial, courts must examine "whether the particular *actions* that the foreign state performs (whatever the motive behind them) are the types of actions by which a private party engages in trade and traffic or commerce." *Id.* (citing Black's Law Dictionary 270 (6th ed.1990)) (emphasis added).

1. Real Property

The parties in the instant matter do not dispute that Iran's prior use of the real estate was sovereign in nature, not commercial. Prior to suspending diplomatic relations, the embassy and residences were used to support Iran's diplomatic activities in the United States, an inherently sovereign activity. *See, e.g., S & S Machinery Co. v. Masinexportimport*, 802 F.Supp. 1109, 1111-12 (S.D.N.Y.1992) ***23** (mission buildings are not used for commercial activity and do not fall within FSIA exception to immunity); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (3d Cir.1985) (stating that use of property as diplomatic residence "as a matter of law ... is not commercial activity"); *United States v. Arlington County*, 702 F.2d 485, 488 (4th Cir.1983); *United States v. Arlington County*, 669 F.2d 925, 934-35 (4th Cir.1982) (concluding that FSIA affords immunity to foreign state's apartment building that is used to house diplomatic personnel). As such, Iran's prior use of the properties does not render them commercial for purposes of the FSIA.

[1] [2] Plaintiff and the United States disagree as to whether the foreign state's use of the property for commercial activity is necessary for Section 1610(a)(7) to apply. Secondarily, they dispute whether the United States' custody over and leasing of the properties is sovereign or commercial in nature. This Court agrees with the United States that the provision's applicability turns on the foreign state's actions with respect to commercial use. Not only does the Supreme Court's interpretation of "commercial activity" in *Weltover* specifically refer to the foreign state's actions, *see Weltover*, 504 U.S. at 614, 112 S.Ct. 2160 (stating that "when *a foreign government acts*, not as a regulator of a market, but in the manner of a private player within it, the *foreign sovereign's actions* are commercial within the meaning of the FSIA") (emphasis added); *see also id.* (stating that "whether the particular *actions that the foreign state performs* (whatever the motive behind them) are the types of

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actions by which a private party engages in trade and traffic or commerce") (emphasis added), but practicality dictates such a finding. Among its purposes, the FSIA was designed to subject foreign states to the laws of the United States when they choose to engage in private commercial activity. *See Dunhill*, 425 U.S. at 704, 96 S.Ct. 1854. To effectuate this purpose, the statute creates various narrow windows of federal jurisdiction over foreign states. 28 U.S.C.A. §§ 1605 & 1610. But if the FSIA could be applied to foreign state property that is being used by a non-agent third party, it would expand the class of cases arising under the Act beyond those limited, enumerated exceptions to immunity prescribed by Congress, and thus would expose foreign states to far greater liability than was originally contemplated under the Act. 28 U.S.C.A. §§ 1605 & 1610.

[3] Alternatively, even if foreign state action were not critical to the applicability of the "commercial activity" attachment exception, the United States' taking custody over a foreign state's properties and maintaining them is an inherently sovereign, not a commercial act. Specifically, the United States, acting through the Office of Foreign Missions, took custody over the properties pursuant to its "preserve and protect" responsibilities under the Foreign Missions Act. *See* Foreign Missions Act, 22 U.S.C. § 4305(c) (providing that "[i]f a foreign mission has ceased conducting diplomatic, consular and other governmental activities in the United States, and has not designated a protecting power or other agent ... the Secretary, until the designation of a protecting power or other agent ... may preserve and protect any property of that foreign mission"). Put simply, although leasing of property by a private party might be commercial in nature, taking custody over diplomatic property under the authority granted by a federal statute or treaty is decidedly sovereign in nature. Indeed, such "power[ ][is] peculiar to sovereigns." *See Dunhill*, 425 U.S. at 703, 96 S.Ct. 1854. Accordingly, because the Court finds that the real properties at issue do not fall within the definition of commercial activity under the FSIA, the writ of attachment may not be enforced against such properties.

***24** *2. Bank Accounts*

[4] The NationsBank accounts are also immune from attachment, albeit for somewhat different reasons. To begin with, the Court finds that the Second Account does not constitute "property used for commercial activity" for purposes of Section 1610(a)(7). Rather, the Second Account was licensed by the Treasury Department to the Office of Foreign Missions for the payment of maintenance and repair expenses relating to the real estate. As outlined above, the United States' preservation and protection of the properties under the Foreign Missions Act is a sovereign act. Because these funds were specifically licensed to the Office of Foreign Missions to enable them to fulfill the United States' statutory responsibilities, their use is more properly characterized as sovereign than commercial.

Alternatively, another factor weighs against enforcing the attachment against these funds under the "commercial activity" attachment exception of the FSIA. Significantly, the Second Account originally contained Iranian diplomatic assets and was licensed to the Office of Foreign Missions by the Office of Foreign Assets Control. It is therefore regulated by the International Emergency Economic Powers Act and the Iranian Assets Control Regulations. As such, if the President had not exercised his authority to waive its requirements, *see infra*, the plain terms of Section 1610(f)(1)(A) appear to cover this account. 28 U.S.C.A. § 1610(f)(1)(A) (authorizing attachment of property in which financial transactions are prohibited or regulated by, *inter alia*, the International Emergency Economic Powers Act or its regulations). Thus, if this Court were to construe Section 1610(a)(7) to permit the attachment of blocked Iranian accounts, this interpretation would render Section 1610(f)(1)(A) superfluous. Instead, the Court finds it unlikely that Congress enacted two separate provisions of the same statute in order to achieve the same result. That is, if blocked accounts were already subject to attachment under Section 1610(a)(7), Congress would have had no need to enact an entirely new provision, Section 1610(f)(1)(A), to authorize the attachment of these very same funds.

[5] Different considerations compel this Court to find that the funds in the First Account are not subject to attachment. As noted above, the First Account contains the profits, and any interest thereon, generated by the leases of the diplomatic property. And, unlike the Second Account, the United States does not contend that this account contains any funds that were initially held in Iranian diplomatic accounts. Rather, the United States advances, *inter alia*, that the First Account may not be attached because it constitutes Iranian property that is "blocked" and regulated by the Iranian Assets Control Regulations. 31 C.F.R. § 535.201. This Court disagrees with the United States' characterization of this account as Iranian property. Instead, the Court finds that the First Account is more properly characterized as United States property, which is immune from attachment by virtue of the doctrine of sovereign immunity. *See Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21, 11 L.Ed. 857 (1846); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 243, 60 S.Ct. 488, 84 L.Ed. 724 (1940); *see also Neukirchen v.*

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Wood County Head Start, Inc., 53 F.3d 809, 811 (7th Cir.1995); *Automatic Sprinkler Corp. v. Darla Environmental Specialists*, 53 F.3d 181, 182 (7th Cir.1995); *State of Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C.Cir.1991); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (App.D.C.1936); *Flatow*, 74 F.Supp.2d at 20. Specifically, the Secretary of State, exercising discretion delegated by the Foreign Missions Act, 22 U.S.C. § 4305(c), elected to lease these properties to generate revenue for required repairs and maintenance. If the United States had not leased these properties, repairs and maintenance would still have to have been funded by the United ***25** States, most likely from tax revenues in the Treasury. Moreover, Iran opposed these leases from their inception. To designate the leased profits as Iranian property, when Iran would not otherwise have accrued these monies, accords Iran an undeserved windfall. Accordingly, because the funds in the First Account do not constitute Iranian property, they are not subject to the Iranian Assets Control Regulations. Nor does any provision of the FSIA apply to such funds. *See Flatow*, 74 F.Supp.2d at 20-24. Rather, as this Court has explained previously, *see id.*, because the funds in the First Account constitute United States property, sovereign immunity bars their attachment, absent an express waiver of consent. *Cf. Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 119 S.Ct. 687, 692, 142 L.Ed.2d 718 (1999) (Rehnquist, C.J.) (stating that it "is in accord with our precedent establishing that sovereign immunity bars creditors from attaching or garnishing funds in the Treasury").

C. *Attachment Under Section 1610(f)(1)(A)*

Alternatively, plaintiff advances that a second FSIA provision, Section 1610(f)(1)(A), authorizes the attachment of the properties and accounts because its plain terms cover the properties at issue. Section § 1610(f)(1)(A) provides

> Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. § 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. § 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

28 U.S.C.A. § 1610(f)(1)(A) (West Supp.1999). Specifically, plaintiff asserts that this provision is applicable because the property and accounts are regulated by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-02, and the Iranian Assets Control Regulations, which define property to

> include, but not by way of limitation, money, checks, drafts, bullion, *bank deposits, savings accounts*, debts, indebtedness, ... any other evidences of title, ownership or indebtedness, ... judgments, ... and *any other property, real*, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

31 C.F.R. § 535.311 (1999) (emphasis added).

While conceding that its plain terms may cover the properties and accounts at issue, the United States asserts that this section is unavailable to the plaintiff because the President has "waive[d] the requirements of this section in the interest of national security." *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub.L. 105-277, Title I, § 117, 112 Stat. 2681 (October 21, 1998) ("Section 117") (adding subsections 1610(f)(1)(A) & (B) and providing that "[t]he President may waive the requirements of this section in the interest of national security"); *see also* Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, 63 Fed.Reg. 59201 (October 21, 1998) (exercising authority to waive requirements under § 117(d) and stating that such requirements "would impede the ability of the President to conduct foreign policy in the interest of national security"). The United States maintains that the waiver ***26** provision, Section 117(d), covers both paragraphs of

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FSIA Section 1610(f).

Plaintiff opposes this construction and contends Section 117(d) does not extend to Section 1610(f)(1). Instead, he maintains that Section 117(d) only applies to Section 1610(f)(2) because that provision requires the Secretary of the Treasury and the Secretary of State to provide assistance in locating assets. 28 U.S.C.A. § 1610(f)(2)(A) (West 1999). In short, plaintiff reasons that the national security waiver provision only applies to Section 1610(f)(2) because it is the only provision of Section 117 that imposes "requirements" *per se.* To support this construction, plaintiff urges the Court to look past the statutory text to the legislative history to the amendment.

Whether Section 1610(f)(1)(A) authorizes these attachments turns on a determination of the proper scope of the President's waiver authority under Section 117(d). Having examined the statutory text, in the context of both Section 117 and the FSIA, the Court concludes that plaintiff's construction of Section 117(d) is refuted by the plain language of the statute. As such, this Court declines to accept plaintiff's invitation to delve into unreliable legislative history in search of a different meaning. *Cf. Public Citizen v. United States Dept. of Justice,* 491 U.S. 440, 472, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J. concurring) ("Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.)". Moreover, contrary to plaintiff's protest that giving full effect to the waiver provision produces an absurd-and hence unsanctionable-result, this Court finds that construing the waiver to cover both paragraphs of Section 1610(f) does not create a patently absurd result. Rather, given the deference traditionally afforded the President in the oft-sensitive area of foreign relations, *see, e.g., Regan v. Wald,* 468 U.S. 222, 242, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984), Congress' enactment of a waiver provision to counterbalance its enactment of a broad-reaching enforcement provision appears entirely reasonable.

The FSIA amendments at issue here were enacted as part of an end-of-the-year appropriations package. *See* Treasury and General Government Appropriations Act, 1999, *as contained in* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub.L. No. 105-277, § 101(h), Title I, § 117(a)-(d) (October 21, 1998). Specifically, section 117(a) of the Appropriations Act amended Section 1610 of the Foreign Sovereign Immunities Act by adding subsection (f), which authorizes attachment and execution in aid of judgments obtained against state sponsors of terrorism. 28 U.S.C.A. § 1610(f)(1)(A). Section 117(d) amended the same statute to provide for a Presidential waiver in the interest of national security.[6] *See* Waiver of Exception to Immunity from Attachment or Execution, Pub.L. 105-277, Title I, § 117(d), 112 Stat. 2681 (October 21, 1998) (stating that "[t]he President may waive the requirements of this section ... in the interest of national security"); *see also* Historical and Statutory Notes, 28 U.S.C.A. § 1610 (West Supp.1999).

[6] Contrary to plaintiff's assertions that "requirements" refers only to Section 1610(f)(2), the Court finds the language and structure of the amendment dictates a finding that the waiver applies to the entire Section 1610(f). First, the plain language of Section 1610(f)(1) imposes certain requirements, to wit, that certain regulated ***27** properties "*shall*" be subject to execution or attachment.... 28 U.S.C.A. § 1610(f)(1); *see also Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 118 S.Ct. 956, 961, 140 L.Ed.2d 62 (1998) (noting that " 'shall' ... normally creates an obligation impervious to judicial discretion"). Moreover, nothing else in the waiver provision counsels in favor of giving its language the unobvious construction plaintiff advances. Quite the contrary, the Court finds that the language "this section" plainly covers the entire Section 1610(f), and not just the second paragraph. Indeed, from a structural standpoint, if the waiver provision were intended to be restricted only to Section 1610(f)(2), it would more likely have appeared as an exception to that subsection, rather than as a separate provision altogether. In conclusion, because the statutory text does not bear out the construction plaintiff advances, the Court finds that the waiver provision applies to both Section 1610(f)(1) and 1610(f)(2). Moreover, as Congress' delegation to the President in this instance is clear, the President has properly exercised his authority to waive Section 1610(f). *See Dames & Moore v. Regan,* 453 U.S. 654, 657, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (stating that "[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress" and that "[t]hat in such a case, the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it' "). Accordingly, Section 1610(f)(1) is without operative effect and cannot authorize the attachments plaintiff seeks.

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4. *Attachment under Section 1610(b)(2)*

[7] Plaintiff also references Section 1610(b)(2) in support of the writs of attachment. Section 1610(b)(2) provides that

> any property in the United States of an *agency or instrumentality* of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State ..., if
>
> > the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C.A. § 1610(b)(2) (West 1999) (emphasis added). Put simply, this provision does not apply in the instant case. Critically, the assets in question belong to Iran, not an agent or instrumentality of Iran. Moreover, if Section 1610(b)(2) were construed to apply to foreign states, as well as their agents or instrumentalities, there would be no need for Section 1610(a)(7), which specifically refers to foreign states. Lastly, plaintiff does not maintain that the United States is acting as Iran's agent with respect to these properties, particularly in light of the fact that Iran opposes the lease of these properties. *See Islamic Republic of Iran v. United States*, Case Nos. A4/A7/A5 (I:F and III); Dec. 129-A4/A7/A15-FT, at 1-2 (June 23, 1997, Iran-United States Claims Tribunal). Accordingly, to the extent that plaintiff claims authority for the attachments under Section 1610(b)(2), the Court finds such assertions to be without merit.

III. CONCLUSION

As this Court has noted previously, *see Flatow*, 74 F.Supp.2d at 25, the Court regrets that plaintiff's efforts to satisfy his judgment against Iran have proven futile. Indeed, in light of his lack of success thus far, it appears that plaintiff Flatow's original judgment against Iran has come to epitomize the phrase "Pyrrhic victory." Yet, unless or until Congress decides to enact a law that authorizes the attachments ***28** plaintiff seeks, this Court lacks the proper means to assist him with such endeavors. *See, e.g.*, Bill to Modify the Enforcement of Certain Anti-Terrorism Judgments, and For Other Purposes, S.1796, § 1(3)(A), 106th Cong. (1999) (proposed but rejected bill that would have amended Section 1610(f) of the FSIA to permit, *inter alia*, the attachment of foreign mission property used for nondiplomatic purposes such as rental property, as well as any rental proceeds).

A separate order shall issue this date.

All Citations

76 F.Supp.2d 16

Footnotes

1 The United States appears pursuant to 28 U.S.C. § 517, which provides that the United States may appear in any court in the United States "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

2 The Vienna Convention on Diplomatic Relations, T.I.A.S. 7502, 23 U.S.T. 3227 (1964).

3 These properties are 3003-3005 Massachusetts Ave., N.W., Washington, D.C. 20008 (the Iranian Embassy and Chancery and the Iranian Ambassador's residence until April 8, 1980, when the Department of State took custody); 3410 Garfield Street, N.W., Washington, D.C. 20008 (the residence of the Iranian military attache); and 2954 Upton Street, N.W., Washington, D.C. 20008 (the residence of the Iranian Minister of Cultural Affairs).

4 *See, e.g.,* MEET THE PRESS (NBC Television Broadcast, November 7, 1999) (Interview with White House Chief of Staff John Podesta) (re-broadcasting February 26, 1996 videotape of President Clinton, where he stated "I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. If Congress passes this legislation, we can provide the compensation immediately."); *see also* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP.PRES.DOC. 717 (April 24, 1996) (commenting that "[t]his bill strikes a mighty blow against terrorism, and it is fitting that this bill becomes law during National Crime Victim's Rights Week, because it stands up for victims in so many important ways" and concluding that "America will never abide terrorists .... [w]e will not rest until we have brought them all to justice").

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5 In response to the United States' contention that the Foreign Missions Act and the Vienna Convention operate as separate bars to these attachments, plaintiff asserts that the more recently enacted amendments to the FSIA abrogate the scope of these laws. *See* 28 U.S.C.A. § 1610(f)(1)(A) (providing for attachment of properties "notwithstanding any other provision of law" including Section 4308(f) of the Foreign Missions Act); *see also* NORMAN J. SINGER, 1A SUTHERLAND ON STATUTORY CONSTRUCTION §§ 22.22, 22.34 (5th ed. 1995 & Supp.1997). *But see* 28 U.S.C.A. § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment ... the property in the United States of a foreign state shall be immune from attachment, arrest and execution...."). Without deciding the extent to which the recent FSIA amendments amend the Foreign Missions Act or the Vienna Convention, the Court wishes to note another subsection, one not addressed by the parties, that should be considered in determining whether the FSIA implicitly repeals portions of the Foreign Missions Act. *See* 28 U.S.C.A. § 1610(a)(4)(B) (West 1999) (providing exception to immunity for judgments establishing rights in immovable property, "[p]rovided, [t]hat such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission"). Notably, Section 1610(a)(4)(B) specifically reserves immunity for mission property where such property provides the basis for the judgment. By its plain terms, this provision appears to evince Congress' intent to render mission property immune from attachment under the FSIA, at least where such property provides the basis for the judgment. Such a reading may be further supported by reference to Section 1610(b)(2), which authorizes attachment and execution of certain types of judgments against foreign state agents or instrumentalities, but does not include the provision that governs actions involving real property, Section 1605(a)(4). *See* 28 U.S.C.A. § 1610(b)(2) (authorizing attachments of foreign state agent property that is not immune under section 1605(a)(2), (3), (5), or (7)). Alternatively, the absence of a similar restriction against attaching mission property in the provision covering judgments against state-sponsors of terrorism could also demonstrate Congress' intent to provide for maximum enforcement against terrorist-list nations, including attachment of mission property. *See* 28 U.S.C.A. § 1610(a)(7) (providing that judgments obtained pursuant to the state-sponsored terrorism exception may be enforced against property "*regardless of whether the property is or was involved with the act upon which the claim is based* ") (emphasis added).

6 Section 117(b) was a conforming amendment inserting text into Section 1606 of the FSIA, while Section 117(c) prescribed the effective date for the amendments. *See* Pub.L. No. 105-277, § 101(h), Title I, § 117(b) & (c) (October 21, 1998).

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13-2952-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DEBORAH D. PETERSON, *et al.*,

Plaintiffs-Appellees,

—against—

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT BANK MARKAZI, THE CENTRAL BANK OF IRAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Bank Markazi, the Central Bank of Iran, states that Bank Markazi is a joint-stock company organized under the laws of Iran and is wholly-owned by the Government of the Islamic Republic of Iran. No publicly held corporation directly or indirectly holds 10% or more of an ownership interest in Bank Markazi.

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JURISDICTIONAL STATEMENT

The District Court (Hon. Katherine B. Forrest, J.) had subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1330, 28 U.S.C. § 1331 and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. The District Court entered partial final judgment pursuant to Fed. R. Civ. P. 54(b) on July 9, 2013. Appellant's notice of appeal was timely filed on August 1, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in holding that Appellant Bank Markazi's purported admission that it owned the assets at issue in this action conclusively established Bank Markazi's ownership of the same even where the undisputed facts and applicable provisions of law negated any such finding of ownership.

2. Whether the District Court erred in holding that the test to determine immunity under FSIA § 1611(b)(1) and this Court's holding in *NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d 172 (2d Cir. 2011) is whether Appellant Bank Markazi generally was "engaged in activities protected by" that provision of the FSIA, and not whether the specific assets at issue in this action were used for central banking purposes.

3. Whether the District Court erred in holding that a statute, 22 U.S.C. § 8772, that explicitly and exclusively targets for adverse treatment assets in which Appellant Bank Markazi had an interest yet conspicuously avoids any mention of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, nevertheless abrogates that treaty.

4. Whether the District Court erred in holding that 22 U.S.C. § 8772 was not an invalid legislative act of adjudication under Article III of the United States Constitution notwithstanding the statute's explicitly stated purpose "to ensure that Iran is held accountable for paying [Plaintiffs-Appellees'] judgments" in this action.

5. Whether the District Court erred in holding that application of 22 U.S.C. § 8772 to award turnover to Plaintiffs-Appellees of assets in which Appellant Bank Markazi had an interest was not an impermissible taking under the Fifth Amendment to the United States Constitution even where those assets were not subject to attachment and execution under any provision of law at the time they were first restrained.

STATEMENT OF THE CASE

Plaintiffs' Commencement of Enforcement Proceedings in June 2008

Plaintiffs-Appellees ("Plaintiffs") are judgment creditors with billions of dollars in outstanding judgments against the Islamic Republic of Iran ("Iran").

(SPA-2). In June 2008, one of the Plaintiff groups (the "Peterson Plaintiffs") learned that an Iranian entity, namely Appellant Bank Markazi, the Central Bank of Iran ("Bank Markazi" or the "Bank"), had an interest in approximately $2 billion in security entitlements with respect to certain sovereign and supranational bonds held in an omnibus account of Clearstream Banking S.A. ("Clearstream") with Citibank N.A. ("Citibank") in New York. (A-Vol.V-1150; A-Vol.V-1386). At that time, Clearstream's customer was Banca UBAE SpA ("UBAE"), an Italian bank. (A-Vol.V-1151-52). UBAE's customer, in turn, was Bank Markazi. (A-Vol.V-1183-84). Prior to approximately February 2008, however, Bank Markazi had maintained a direct customer account with Clearstream. (*Id.*).

The Peterson Plaintiffs immediately commenced an enforcement proceeding in the Southern District of New York and served restraining notices on Clearstream and Citibank. (A-Vol.VI-1480). Following an evidentiary hearing on June 27, 2008 (A-Vol.V-1128-1213), Judge John G. Koeltl, acting as Part I judge, issued an Order vacating the restraints with respect to two security entitlements with a face value of $250 million because Bank Markazi had no interest in those assets. (A-Vol.VI-1502). Judge Koeltl left in place the restraints on the remaining security entitlements with a face value of $1.753 billion (the "Assets at Issue"). (*Id.*).

June 2009 Ruling That Clearstream Was Not a Proper Garnishee

In September 2008, Clearstream moved to vacate the restraints. Following briefing on that motion, the District Court (Jones, J.) held in an Order dated June 23, 2009 that "under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee" such that the Peterson Plaintiffs were not entitled to execute on the Assets at Issue. (A-Vol.XII-3317-18). However, Judge Jones left the restraints in place pending a determination of "whether Clearstream is, or could be made, a proper garnishee" if the Peterson Plaintiffs could establish a proper basis to return the parties to their pre-February 2008 positions under a fraudulent conveyance theory. (A-Vol.XII-3318). Yet the Peterson Plaintiffs never attempted to substantiate their fraudulent conveyance allegations, and the District Court never ruled on the matter.

Plaintiffs' Commencement of the Turnover Action in June 2010

In June 2010, the Peterson Plaintiffs commenced the underlying action against Citibank, Clearstream, UBAE and Bank Markazi for turnover of the Assets at Issue. Shortly after entering an appearance in that action, Bank Markazi in May 2011 moved to dismiss the Peterson Plaintiffs' claims on grounds of sovereign immunity under the FSIA.

Again, however, the District Court never ruled on Bank Markazi's motion. Instead, the District Court deferred further briefing to allow Citibank to interplead

additional judgment creditors of Iran. (A-Vol.V-1349-54). Subsequently, in December 2011, Plaintiffs filed their operative Second Amended Complaint and Clearstream renewed its motion to vacate the restraints.

Blocking of the Assets Pursuant to the February 2012 Executive Order

On February 5, 2012, President Obama issued Executive Order No. 13599, 77 Fed. Reg. 6659 (the "Executive Order"), pursuant to which "[a]ll property *and interests in property of* . . . the Central Bank of Iran" were blocked.[1] Pursuant to the Executive Order, Citibank immediately blocked the Assets at Issue based on Bank Markazi's interest in those assets. (A-Vol.XII-3280-81).

Thereafter, Bank Markazi again moved to dismiss the operative complaint in March 2012 on grounds of sovereign immunity under the FSIA and pursuant to the Treaty of Amity between the United States and Iran (the "Treaty of Amity" or the "Treaty").[2] Plaintiffs, in turn, moved for partial summary judgment in April 2012, contending that they were entitled to turnover of the now-blocked Assets at Issue under § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, Title II, § 201, 116 Stat. 2337.[3]

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1 Exec. Order No. 13599 is included in the Special Appendix at SPA-128.

2 The Treaty of Amity is included in the Special Appendix at SPA-108.

3 TRIA § 201 is included in the Special Appendix at SPA-124.

Enactment of 22 U.S.C. § 8772 in August 2012

While the parties' motions were *sub judice*, Congress in July 2012 enacted a new provision, 22 U.S.C. § 8772 ("§ 8772"), in response to Plaintiffs' sustained lobbying efforts.[4] Section 8772 formed part of the Iran Threat Reduction and Syria Human Rights Act of 2012, which the President signed into law in August 2012. By its express terms, § 8772 applies exclusively to the Assets at Issue, and its stated purpose is "to ensure that Iran is held accountable for paying [Plaintiffs'] judgments" in this action.

Subsequently, the parties engaged in supplemental briefing concerning whether Plaintiffs were entitled to turnover under § 8772.

February 28, 2013 Order and July 9, 2013 Partial Final Judgment

In an Opinion and Order dated February 28, 2013 (the "February 28 Order"), the District Court denied Clearstream's motion to vacate the restraints and Bank Markazi's motion to dismiss and granted Plaintiffs' motion for partial summary judgment. (SPA-1-75).

In the February 28 Order, the District Court *inter alia* held: (1) that the Assets at Issue were subject to turnover pursuant to TRIA § 201 as "assets of" Bank Markazi (SPA-47); (2) that the Assets at Issue—assuming they could be

[4] 22 U.S.C. § 8772 is included in the Special Appendix at SPA-104.

deemed "assets of" Bank Markazi—nevertheless were not immune from attachment and execution under FSIA § 1611(b)(1) as "the property of" a foreign central bank (SPA-53); (3) that § 8772 abrogated the Treaty of Amity (SPA-51-52); (4) that § 8772 was not an invalid legislative act of adjudication under Article III of the United States Constitution (SPA-65); and (5) that turnover pursuant to § 8772 was not an impermissible taking under the Fifth Amendment to the United States Constitution (SPA-69).

The District Court's subsequent July 9, 2013 Order entering partial final judgment pursuant to Fed. R. Civ. P. 54(b) (the "Partial Final Judgment") incorporated the findings and conclusions in the February 28 Order and directed turnover of the Assets at Issue to an account in the name of a Qualified Settlement Fund established for Plaintiffs' benefit. (SPA-76-90).

Bank Markazi timely appealed to this Court from the Partial Final Judgment by notice of appeal dated August 1, 2013. (A-Vol.IV-1126-27).[5]

[5] Likewise, Clearstream timely appealed from the Partial Final Judgment by notice of appeal dated August 2, 2013 (Civ No. 10-CV-4518 (KBF), Dkt. 476). Subsequently, however, Clearstream and Plaintiffs entered into a settlement agreement (*id.* Dkt. 490) providing that Clearstream would not pursue its appeal. The District Court so-ordered the settlement agreement on November 8, 2013 (*id.* Dkt. 527). On November 13, 2013, this Court granted Clearstream's Motion to Withdraw its appeal (13-2961, Dkt. 87).

STATEMENT OF THE FACTS

The Parties

Plaintiffs are judgment creditors purporting to hold outstanding judgments against Iran. (SPA-2). The underlying judgments against Iran were entered pursuant to the "anti-terrorism" exceptions to immunity enumerated in former FSIA § 1605(a)(7) (since repealed) and current FSIA § 1605A.

Bank Markazi is the Central Bank of Iran (SPA-4) and is thus a juridically distinct instrumentality of Iran pursuant to FSIA § 1603(b). Bank Markazi was not a party to the underlying actions that resulted in Plaintiffs' judgments against Iran, nor is Bank Markazi alleged to have played any role in the events that gave rise to those judgments.

Clearstream is an "international service provider for the financial industry offering securities settlement and custody-safekeeping services." (SPA-5). Prior to approximately February 2008, Bank Markazi maintained a direct customer account with Clearstream in Luxembourg. (A-Vol.V-1151-52).

UBAE is an Italian Bank and a client of Clearstream. (A-Vol.V-1151). In approximately February 2008, Bank Markazi's security entitlements were transferred from Bank Markazi's account with Clearstream in Luxembourg to a new customer account UBAE had opened with Clearstream, also in Luxembourg. (A-Vol.V-1151-52,83-84).

The Assets at Issue

At the time they were first restrained in June 2008, the Assets at Issue consisted of Clearstream's security entitlements vis-à-vis Citibank relating to Bank Markazi's investment in certain underlying sovereign and supranational bonds. (A-Vol.VI-1550-51). In the years since, the underlying bonds have matured in the ordinary course such that by the time the District Court entered its February 28 Order and subsequent Partial Final Judgment, the Assets at Issue consisted of the cash resulting from those bond redemptions, along with periodic interest payments since June 2008. (SPA-76). As of June 4, 2013, the aggregate value of the Assets at Issue was $1,895,600,513.03. (SPA-83).

SUMMARY OF THE ARGUMENT

The principal issue presented on this appeal concerns the distinction between Iranian *"interests"* in financial assets sufficient to trigger their blocking under the prevailing U.S. sanctions against Iran on the one hand—and actual *ownership* of those assets on the other. The District Court's most fundamental error was to conflate these two distinct concepts, and its Partial Final Judgment awarding turnover of the Assets at Issue to Plaintiffs is a direct result of that error.

The District Court held that Plaintiffs were entitled to turnover pursuant to two statutory provisions—TRIA § 201 and 22 U.S.C. § 8772. Yet by its plain terms, the first statute, TRIA § 201, applies only to the "blocked *assets of*" a

"terrorist party." Repeatedly and consistently, the United States Supreme Court has instructed that Congress's "use of the word 'of' [in a statute] denotes ownership." *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S.Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)).

TRIA § 201 provided no basis for turnover of the Assets at Issue here because Bank Markazi did not own those assets. Yet the District Court failed even to *consider* whether Bank Markazi could be deemed to own the Assets at Issue under applicable law, and instead relied solely on the Bank's purported "concessions" of beneficial ownership. (SPA-47).

This was error. Plainly, a party cannot become the owner of property it does not actually own merely by *claiming* ownership. As this Court has stated, "[i]t would be quite anomalous to hold" that a party claiming to be a beneficial owner *"is* a beneficial owner . . . while an identical [party] who makes no such statement is not such an owner." *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP,* 654 F.3d 276, 297 n.8 (2d Cir. 2011) (emphasis added).

As Clearstream demonstrated in extensive briefing, which the District Court failed entirely to consider, Bank Markazi had *no cognizable property interest* in the Assets at Issue under Article 8 of the New York Uniform Commercial Code—period. Indeed, more than three years before the Partial Final Judgment was

entered, the District Court (Jones, J.) unequivocally held in June 2009 that *"under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee"* such that Plaintiffs could not reach Bank Markazi's assets held by Clearstream (through UBAE) in Luxembourg by restraining *Clearstream's* corresponding assets in New York. (A-Vol.XII-3317) (emphasis added).

Evidently recognizing that the ownership requirement inherent in TRIA § 201 presented an insurmountable hurdle to turnover, Plaintiffs engaged in a sustained (and ultimately successful) effort to lobby Congress to enact the second statute at the center of this appeal, 22 U.S.C. § 8772. The overtly stated and plainly intended purpose of that new legislation was to *guarantee* turnover of the Assets at Issue to Plaintiffs.

Section 8772 unequivocally mandates that "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" "*shall be* subject to execution" by Plaintiffs in this action. 22 U.S.C. § 8772(a)(1) & (b) (emphasis added).

Yet despite its sole purpose of targeting assets in which Bank Markazi—an Iranian instrumentality—had an interest, § 8772 makes no reference to the Treaty of Amity. The Treaty imposes a number of specific obligations on the United States, and Bank Markazi had squarely raised the Treaty as a bar to turnover under

TRIA § 201 in the District Court *months before* Congress enacted § 8772. Under these circumstances, Congress's conspicuous silence concerning the Treaty in § 8772 cannot be read as a clear statement of congressional intent to abrogate the multiple Treaty provisions that preclude turnover of the Assets at Issue here.

Should the Court find it necessary to reach the constitutional issues raised on this appeal, however, § 8772 on its face is the type of statute that impermissibly "usurp[s] the adjudicative function assigned to the federal courts under Article III" of the United States Constitution. *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir. 1993). Yet the District Court nevertheless deemed § 8772 to be constitutional, reasoning that the statute was not "self-executing" because it nominally "left [it] to the Court" to make certain "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs. (SPA-65).

Again, this was error. The stated purpose of these required "determinations" was *"to ensure that* Iran is held accountable *for paying* [Plaintiffs'] judgments." 22 U.S.C. § 8772(a)(2) (emphasis added). A clearer expression of Congressional intent to determine the outcome of a pending case is hard to imagine. *See infra,* Section II.B.

All § 8772 required the District Court to find was that Bank Markazi had a "beneficial interest" in the Assets at Issue. 22 U.S.C. § 8772(a)(2)(A). Yet the statute simultaneously directed the District Court to "exclud[e]" from consideration

any property interest of Clearstream—the only party with a *direct, legally cognizable* interest in those assets. *See id.* Thus, the outcome of that "determination" was preordained, as Bank Markazi's "beneficial interest" in the Assets at Issue had already been established long before § 8772 was enacted in August 2012.

Months earlier, the Assets at Issue had been blocked in February 2012 pursuant to the Executive Order's sweeping language providing that "[a]ll property *and interests in property* of . . . the Central Bank of Iran" in the United States are blocked. Exec. Order No. 13599 § 1(b) (emphasis added). The Assets at Issue were blocked because Bank Markazi had an *interest in* those assets—not because the Bank *owned* them. Indeed, it is well-established that any "interest" in property may be subject to blocking; "[t]he interest need not be a legally protected one." *Holy Land Found. for Relief & Development v. Ashcroft,* 333 F.3d 156, 162-63 (D.C. Cir. 2003).

The District Court further erred by holding that turnover pursuant to § 8772 and TRIA § 201 does not constitute a taking in violation of the Fifth Amendment to the United States Constitution (*see* Section II.C, *infra*), and that TRIA § 201 overrides the heightened protection that FSIA § 1611(b)(1) confers on foreign central bank property (*see* Section I.B, *infra*). Finally, the District Court plainly exceeded its jurisdiction under the FSIA by including a sweeping injunction in its

Partial Final Judgment purporting to preclude Bank Markazi from asserting its property rights against Clearstream in Luxembourg (*see* Section III, *infra*).

For all of these reasons and the additional reasons discussed below, the District Court's Partial Final Judgment should be reversed.

STANDARD OF REVIEW

1. The District Court's determinations concerning the legal question of ownership are reviewed *de novo*. *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 115 (2d Cir. 2010).

2. The District Court's interpretation of a statute is reviewed *de novo*. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 203 (2d Cir. 2012).

3. The District Court's determinations concerning sovereign immunity are reviewed *de novo*. *NML Capital v. Republic of Argentina*, F.3d 254, 256-57 (2d Cir. 2012).

4. The District Court's interpretation of a treaty is reviewed *de novo*. *Swarna v. Al-Awadi,* 622 F.3d 123, 132 (2d Cir. 2010).

5. The District Court's determinations concerning the constitutionality of a statute are reviewed *de novo*. *Commack Self-Serv.*, 680 F.3d at 203.

ARGUMENT

I. The District Court's Conclusion That Plaintiffs Were Entitled to Turnover Under TRIA § 201 Was Reversible Error.

A. The Assets at Issue Do Not Meet the Statutory Requirements for Turnover Under TRIA § 201 Because They Are Not "Assets Of" Bank Markazi.

The District Court's holding that Plaintiffs were entitled to turnover of the Assets at Issue pursuant to TRIA § 201(a) (SPA-46) was reversible error. On its face, that provision provides a basis for turnover only of blocked assets actually *owned by* a "terrorist party." Yet Bank Markazi in no sense owned the Assets at Issue here—regardless of *which* source of law (the Uniform Commercial Code or Luxembourg law) the Court applies to determine ownership.

1. TRIA § 201 Would Provide a Basis for Turnover of the Assets at Issue Only if Bank Markazi Actually Owned Those Assets.

By its plain terms, TRIA § 201(a) permits attachment and execution only against "the blocked *assets of* [a] terrorist party (including the blocked *assets of* any agency or instrumentality of that terrorist party)." In a number of different contexts and for over a century, the United States Supreme Court has instructed that Congress's "use of the word 'of' [in a statute] denotes ownership." *Stanford*, 131 S.Ct. at 2196 (quoting *Poe*, 282 U.S. at 109).[6]

[6] *Accord. Flores-Figueroa v. United States,* 556 U.S. 646, 648 (2009) (holding that identity theft statute imposing criminal sanctions where an

In light of these controlling precedents and the well-established rule of construction that "statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there,"[7] the phrase "blocked *assets of*" in TRIA § 201(a) unequivocally requires that in order for a particular blocked asset to come within the statute's purview, the relevant "terrorist party" (or its agency or instrumentality) "must actually *own* it." *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 400 (S.D.N.Y. 2011) (emphasis in original); *accord. Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 437-41 (D.D.C. 2012) ("[T]he plain language, as informed by the common law, strongly indicates that Congress intended to permit terrorist victims to execute on only the assets 'of'—or, in other words, 'belonging to'—the terrorist state committing the act.").

Moreover, the United States Government repeatedly has made clear its position that TRIA § 201(a) requires ownership. *See* Brief of the United States of

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offender "knowingly transfers, possesses, or uses . . . a means of identification *of another person*" "requires the Government to show that the defendant knew that the means of identification at issue *belonged to another person*") (emphasis added); *Poe v. Seaborn,* 282 U.S. 101, 109 (1930) (use of the word "of" in statute imposing tax "upon the net income of every individual" denoted ownership); *Ellis v. United States,* 206 U.S. 246, 254, 59 (1907) ("the most natural meaning of [the statutory phrase] '*of the United States*' [wa]s '*belonging to the United States*'") (emphasis added).

[7] *Collazos v. United States,* 368 F.3d 190, 196 (2d Cir. 2004) (internal quotation omitted).

America as *Amicus Curiae* in Support of Appellees at 3, *Calderon-Cardona v. JPMorgan Chase Bank, N.A.,* No. 12-75 (2d Cir. Sept. 21, 2012) (Dkt. # 210) (TRIA § 201(a)'s "plain meaning and case law construing similarly worded statutes demonstrate" that TRIA § 201(a) "permit[s] attachment only of assets owned by the terrorist party or its agency or instrumentality—and do[es] not extend further to permit attachment of any assets blocked under the relevant OFAC sanctions regulations, which include both property and property interests of the terrorist party"); Statement of Interest of the United States of America in Response to Petitioners' Motion for Immediate Turnover of Funds at 10-11, *Rux v. ABN Amro Bank NV*, 08 Civ. 6588 (AKH) (S.D.N.Y. Jan. 12, 2009) (Dkt. # 185) (same); Brief for the United States as *Amicus Curiae* in Support of the Appellees at 14, *Rubin v. Islamic Republic of Iran*, No. 11-2144 (1st Cir. June 8, 2012) (same).

Yet contrary to the plain language of TRIA § 201(a) and the authorities cited above, some district courts have held that *any* blocked asset—irrespective of ownership—is available for distribution to a judgment creditor under TRIA § 201(a). *See, e.g., Hausler v. JPMorgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 533 (S.D.N.Y. 2010) (*"Hausler I"*) (finding that TRIA § 201(a) "contemplates execution . . . against all assets blocked pursuant to [an applicable sanctions regime]"); *Hausler v. JPMorgan Chase Bank,* N.A., 845 F. Supp. 2d 553, 567-68 (S.D.N.Y. 2012) (*"Hausler II"*) (adhering to prior holding in *Hausler I* despite the

United States Supreme Court's intervening decision in *Stanford*). Thus, a split exists among district courts in this Circuit concerning the proper interpretation of TRIA § 201(a).

In any event, however, the question of whether TRIA § 201(a) requires ownership is presently before another panel of this Court (the "*Calderon* Panel"), which almost certainly will resolve that question one way or the other. The district courts' conflicting opinions in *Calderon* and *Hausler II* have both been appealed to this Court as Case Nos. 12-75 and 12-1264, respectively. Both appeals are being considered in tandem and have been fully briefed, and the *Calderon* Panel heard oral argument on February 11, 2013 (*see* Case No. 12-75 and 12-1264, Dkt. # 244). The *Calderon* Panel's decision may be expected in the near future and likely will bind this Court as well.[8]

Assuming that the *Calderon* Panel resolves this critical question of statutory interpretation in accordance with the plain wording of the statute and finds that TRIA § 201(a) requires ownership, the District Court's reliance on that provision

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[8] *See, e.g., Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 101 n.12 (2d Cir. 2005) ("Generally, this court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.") (internal quotation and citation omitted).

as a basis for turnover was error because Bank Markazi plainly did not own the Assets at Issue under applicable law.

2. The Assets at Issue Were Blocked Because Bank Markazi Had a Beneficial Interest in Those Assets—Not Because the Bank *Owned* Them.

The fact that the Assets at Issue were blocked pursuant to the Executive Order in no way demonstrates that Bank Markazi owned those assets. Instead, Bank Markazi's undisputed beneficial *interest* in the Assets at Issue was sufficient to trigger their blocking under the Executive Order, which contains sweeping language providing that "[a]ll property *and interests in property* of . . . the Central Bank of Iran" in the United States are blocked. Exec. Order 13599 § 1(b) (emphasis added).

Yet "interests" in property and "ownership" are distinct concepts; the former category is far more expansive than the latter. *See Exp.-Imp. Bank,* 609 F.3d at 121 (a party's "lack of 'ownership' is not dispositive" of whether that party has an "interest in" property; it merely "suggests that whatever interests or rights exist, if any, are limited"). Indeed, the other statute at issue on this appeal—§ 8772—explicitly recognizes this critical distinction by characterizing the Assets at Issue as "equal in value to"—and thus *distinct from*—the "financial *asset[s] of Iran"* that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad."* 22 U.S.C. § 8772(a)(1)(C) (emphasis added).

For purposes of blocking, "OFAC defines [the term] 'interest' as *'an interest of any nature whatsoever*, direct or indirect,' and property as any 'property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.'" *Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch,* 919 F. Supp. 2d 411, 418 (S.D.N.Y. 2013) (quoting 31 C.F.R. §§ 544.305 & 544.308) (emphasis added). Applying this expansive definition, "OFAC block[s] assets based on interests in property and the use to which such property was put, *not based on who own[s] the property in question.*" *Bank of New York v. Norilsk Nickel*, 14 A.D.3d 140, 147 (1st Dep't 2004) (emphasis added); *accord. Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002); *Holy Land Found.,* 333 F.3d at 162-63.

Consequently, the blocking of the Assets at Issue is not indicative of Bank Markazi's ownership of those assets. Instead, it merely reflects the fact that Bank Markazi had an "interest" in them.

3. The District Court Never Ruled on the Dispositive *Legal* Question of Ownership.

The District Court's conclusion that "Bank Markazi is the only owner" of the Assets at Issue (SPA-47) was based solely on a finding that Bank Markazi had "repeatedly conceded" its purported beneficial ownership of the Assets at Issue,

coupled with an erroneous characterization of Clearstream's position as being that Clearstream "ha[d] no legally cognizable interest" in the assets. (SPA-47,49).[9]

Yet the District Court ignored that ownership "is a mixed question of law and fact." *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers,* 442 F.3d 101, 111 (2d Cir. 2006). Plainly, a party cannot become the owner of property it does not actually own merely by *claiming* ownership.[10]

That the District Court characterized Bank Markazi's ownership as "beneficial" makes no difference. Because "beneficial ownership is a legal question," Bank Markazi's *assertions* of ownership "add nothing to [the Bank]'s rights" under applicable law. *CSX Corp.,* 654 F.3d at 297 n.8; *see id.* ("It would be quite anomalous to hold that a [party] who makes such a remark [asserting ownership] is a beneficial owner . . . while an identical [party] who makes no such statement is not such an owner."); *see also Pfizer Inc. v. Teva Pharmaceuticals*

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9 As the District Court later acknowledged, the court overlooked at least three instances in which Clearstream *had* asserted an interest in the Assets at Issue. (A-Vol.4-1018n.1); *see* Clearstream's Consol. Mem. (A-Vol.VI-1568,78); Clearstream's Supp. Mem. (A-XXI-6011).

10 The sole instance in which Bank Markazi asserted its beneficial ownership of the Assets at Issue was in connection with the Bank's original May 2011 motion to dismiss Plaintiffs' then-operative complaint on sovereign immunity grounds. (A-Vol.V-1253; A-Vol.V-1329). Importantly, however, the other parties' filings—including Clearstream's—were all under seal at that time and unavailable to Bank Markazi. Consequently, Bank Markazi expressly reserved its right to amend or supplement its arguments if and when it gained access to the sealed filings. (A-Vol.V-1230n.3).

USA, Inc., 803 F. Supp. 2d 409, 425 n.33 (E.D. Va. 2011) (party's subjective understanding of the term "beneficial owner" as used in a contract was "entirely beside the point because the term 'beneficial owner' . . . is a legal term for the court to decide"); *New York State Nat'l Org. for Women v. Terry,* 159 F.3d 86, 97 n.7 (2d Cir. 1998) ("[J]udicial admissions . . . are statements of fact rather than legal arguments made to a court.").

To determine whether Bank Markazi may be deemed the beneficial owner of the Assets at Issue, the District Court first should have identified "the appropriate standards for determining beneficial ownership," which is "a question of law." *Wilson v. Comm'r,* 560 F.2d 687, 690 (5th Cir. 1977).[11] Then, the court should have applied those standards to determine "whether [Bank Markazi] meets them and qualifies as" the beneficial owner of the Assets at Issue, which is a question of fact. *Id.*

The District Court's failure to undertake *either* step of the two-step inquiry necessary to determine beneficial ownership was reversible error. Moreover, as

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[11] As this Court has stated, "[t]here appears to be no generally accepted or universal definition of the term 'beneficial owner.'" *CSX Corp.,* 654 F.3d at 296; *see also GAF Corp. v. Milstein,* 453 F.2d 709, 715 (2d Cir. 1971) (describing beneficial ownership as an "amorphous and occasionally obfuscated concept[]"). One potential "general definition of [the term] 'beneficial owner,'" however, is that it refers to a person or entity that "has most to all of the traditional property rights of the owner, except for actual legal title to the property." *Pfizer,* 803 F. Supp. 2d at 425.

demonstrated in Section II.A.5, *infra,* the District Court's reliance on the common law concept of beneficial ownership was fundamentally flawed in any event because Article 8 of the U.C.C., not the common law of property, determines the nature of Bank Markazi's property interest, if any, in the Assets at Issue.

4. New York Law Determines Whether Bank Markazi Owned the Assets at Issue Here.

To determine the question of ownership, the District Court should have applied New York law in the first instance. "In the absence of a superseding federal statute or regulation, state law generally governs the nature of any interests in or rights to property that an entity may have." *Exp.-Imp. Bank,* 609 F.3d 117. The key test is whether a federal statute such as TRIA § 201 "itself creates . . . property rights" or instead "merely attaches consequences, federally defined, to rights created under state law." *Id.* at 117 (quoting *United States v. Craft,* 535 U.S. 274, 278 (2002)).

TRIA § 201 plainly falls into the latter category because it does not purport to create any property rights under federal law. "Nowhere in TRIA is there a definition of 'property' or 'property ownership,' or any other indication that the statute intends to create a special regime of federal property interests or rights." *Calderon,* 867 F. Supp. 2d at 400. Thus, TRIA § 201 "provides no guidance for determining *which blocked assets* are 'of that terrorist party.'" *Id.* at 401

(emphasis added); *accord. Peterson v. Islamic Republic of Iran,* 938 F. Supp. 2d 93, 96 (D.D.C. 2013) (same).

Consequently, "state law fills an interpretive gap in TRIA by giving meaning to the phrase 'of that terrorist party.'" *Calderon,* 867 F. Supp. 2d at 405. TRIA § 201 thus leaves "ample room" for the application of New York law to determine "which subset of 'blocked assets' constitutes those that are 'of that terrorist party' and that should therefore be subject to attachment." *Id.* at 403.

5. Under the New York U.C.C., Bank Markazi Did Not Own the Assets at Issue Even Assuming *Arguendo* That the Presence of UBAE as an Additional Securities Intermediary Could Be Disregarded Under Plaintiffs' (Unproven) Fraudulent Conveyance Theory.

Had the District Court undertaken the requisite inquiry to determine whether Bank Markazi can be deemed to have owned the Assets at Issue under applicable law, it would have found that the answer to that dispositive question is "no." The pertinent source of New York law to determine ownership of the security entitlements first restrained in June 2008 in Clearstream's omnibus account with Citibank is Article 8 of the New York Uniform Commercial Code.[12]

[12] Alternatively, if the question of ownership under TRIA § 201 were determined by federal common law, as at least one court has held, application of federal common law likewise would lead to application of the U.C.C. here. *See Estate of Heiser v. Islamic Republic of Iran,* 885 F. Supp. 2d at 448 (applying U.C.C. Article 4A to determine ownership of blocked EFTs in the context of a federal common law analysis); *accord.* U.S. Amicus

Under N.Y.C.P.L.R. § 5201(c)(4), therefore, "section 8-112 of the uniform commercial code . . . govern[ed] *the extent to which and the means by which"* Plaintiffs could reach "any interest in" those security entitlements "by garnishment, attachment or other legal process" (emphasis added). U.C.C. § 8-112(c) provides in pertinent part 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" (emphasis added).

As of June 2008, the "securities intermediary with whom [Bank Markazi]'s securities account [wa]s maintained" was UBAE—not Clearstream. Consequently, the District Court (Jones, J.) ruled in June 2009 that *"under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee."* (A-Vol.XII-3317) (emphasis added).

Inserting the names of the relevant parties here, Official Comment to U.C.C. § 8-112(c) makes clear that Plaintiffs had no legal recourse against Clearstream with respect to Bank Markazi's security entitlements maintained in UBAE's customer account with Clearstream in Luxembourg:

Brief in *Calderon,* at 23, note (even under federal common law, "[t]he Uniform Commercial Code would presumably constitute a particularly relevant source" of law).

> If [Bank Markazi] holds securities through [UBAE], and [UBAE] in turn holds through [Clearstream], [Bank Markazi]'s property interest is a security entitlement against [UBAE]. Accordingly, [Bank Markazi]'s creditor cannot reach [Bank Markazi]'s interest by legal process directed to [Clearstream].

U.C.C. § 8-112 cmt. 3.[13] The *only* issue the June 2009 Order left open was "whether Clearstream is, or could be made, a proper garnishee," assuming *arguendo* Plaintiffs could show that the transfer from Bank Markazi's account with Clearstream to UBAE's account with Clearstream in February 2008 constituted a fraudulent conveyance such that a direct customer relationship between Bank Markazi and Clearstream could be deemed to exist. (A-Vol.XII-3318). Plaintiffs never even attempted to make that showing.

a. Bank Markazi's Property Rights Are Determined by the New York U.C.C. and Luxembourg Law, the Law to Which the U.C.C.'s Choice of Law Provisions Refer.

U.C.C. Article 8 refers to the laws of Luxembourg—the jurisdiction where Bank Markazi maintained its account with Clearstream (A-Vol.VI-1608-09; A-Vol.VII-1944,47)—to determine Bank Markazi's property rights vis-à-vis Clearstream.

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[13] "Bank Markazi" has been inserted in place of the term "Debtor," UBAE in place of the term "Broker," and Clearstream in place of the term "Clearing Corporation" in this quote from U.C.C. § 8-112 cmt. 3. N.Y.U.C.C. § 8-112 is included in the Special Appendix at SPA-148.

Specifically, U.C.C. § 8-112(b)(2) provides that "[t]he local law of the securities intermediary's jurisdiction . . . governs . . . the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement." Here, the "law of the securities intermediary's jurisdiction" is Luxembourg law pursuant to U.C.C. § 8-112(e)(2), which provides that where "an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction." Clearstream's General Terms and Conditions expressly provide that they "shall be governed by and construed in accordance with the laws of the Grand Duchy of Luxembourg." (A-Vol.VII-1744, Art. 61).

b. Under Luxembourg Law, Bank Markazi Did Not Own the Assets at Issue, Consisting of Clearstream's Security Entitlements With Citibank in New York, at the Time They Were First Restrained in June 2008.

The expert opinion Clearstream proffered in the District Court, consisting of three memoranda prepared by its Luxembourg counsel, Arendt & Medernach ("Arendt"), demonstrates that under Luxembourg law, Bank Markazi cannot be deemed the owner of the assets restrained in Clearstream's omnibus account with Citibank in New York (A-Vol.VI-1600; A-Vol.VI-1602; A.Vol.XV-4220). As Arendt explains, Article 6 of the Luxembourg law of 1 August 2001 on the

Circulation of Securities and Other Financial Instruments (the "Luxembourg Securities Act") provides in pertinent part:

> The depositor has a right *in rem* of an intangible nature, up to the number of securities and other financial instruments booked to its account, on the entirety of the securities and other financial instruments of the same kind deposited with or held in an account by its depository.

(A-Vol.XV-4221). This "right *in rem* can only be enforced by the depositor against its depository." (*Id.*).

Arendt further explains that Bank Markazi has "no rights against Citibank but it can only exercise its rights to the securities against Clearstream." (A-Vol.XV-4222). The fact that *Clearstream's* security entitlements vis-à-vis Citibank were held in Clearstream's omnibus account in New York does not change the analysis under Luxembourg law, as Arendt states: "[A] right *in rem* can pursuant to Article 6 of the Securities Act only be exercised by the depositor against its custodian, even if its custodian (here Clearstream) has subdeposited the Securities with a higher tier intermediary." (A-Vol.VI-1603).

c. Application of the U.C.C. Leads to the Same Result: Bank Markazi Did Not Own the Assets at Issue at the Time They Were First Restrained.

Application of the U.C.C. leads to the same result: Bank Markazi had no cognizable property interest in the assets Plaintiffs restrained in New York, consisting of Clearstream's security entitlements vis-à-vis Citibank.

Under U.C.C. Article 8, Clearstream acquired its security entitlements against Citibank when Citibank credited those assets by book entry to Clearstream's omnibus account with Citibank in New York. Likewise, Bank Markazi acquired its corresponding security entitlements against Clearstream by book entry to its customer account with Clearstream in Luxembourg. *See* U.C.C. § 8-501(b) ("[A] person acquires a security entitlement if a securities intermediary . . . indicates by book entry that a financial asset has been credited to the person's securities account."); U.C.C. § 8-102(a)(7) (defining an "entitlement holder" as "a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary").[14]

A security entitlement represents "a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security." U.C.C. § 8-110 cmt. 1.[15] Consequently, Clearstream acquired the sole property interest in the security entitlements maintained in its omnibus account with Citibank in New York, just as Bank Markazi acquired the sole property interest in the security entitlements maintained in its customer account with Clearstream in Luxembourg. *See Fidelity Partners, Inc. v. First*

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14 N.Y.U.C.C. § 8-501 is included in the Special Appendix at SPA-151; N.Y.U.C.C. § 8-102 is included at SPA-132.

15 N.Y.U.C.C. § 8-110 is included in the Special Appendix at SPA-142.

Trust Co. of N.Y., 58 F. Supp. 2d 52, 54 (S.D.N.Y. 1997) (where Philippine judgment debtor held a security entitlement through ING Bank of Manila, which in turn held its interest in the underlying bonds at issue through a securities account in Brussels, Belgium, court held that "[debtor]'s interest in the bonds is located in the Philippines, where the debtor resides, and where ING Bank of Manila – upon whose books the debtor's interest is represented – is located.").

U.C.C. § 8-503(c) further confirms the absence of any cognizable property interest of Bank Markazi in Clearstream's security entitlements maintained in Clearstream's omnibus account with Citibank. That provision makes clear that "[a]n entitlement holder's property interest with respect to a particular financial asset . . . may be enforced *against the securities intermediary only* by exercise of the entitlement holder's rights under Sections 8-505 through 8-508." U.C.C. § 8-503(c) (emphasis added).[16]

As the Official Comment to § 8-503 explains, "[t]he entitlement holder cannot assert rights directly against other persons, such as other intermediaries through whom the intermediary holds the positions." U.C.C. § 8-503 cmt. 2. This is so because "[a] security entitlement is not a claim to a specific identifiable

[16] N.Y.U.C.C. § 8-503 is included in the Special Appendix at SPA-156.

thing" but rather "a package of rights and interests that a person has against the person's securities intermediary and the property held by the intermediary." *Id.*

Hence, "[t]he idea that discrete objects might be traced through the hands of different persons has no place in the Revised Article 8 rules for the indirect holding system." *Id.* For the same reason, common-law property concepts such as beneficial ownership are fundamentally incompatible with the modern, indirect holding system for securities under U.C.C. Article 8. *See id.* ("[T]he incidents of [an entitlement holder's] property interest are established by the rules of Article 8, *not by common law property concepts."*) (emphasis added); *S.E.C. v. Credit Bancorp, Ltd.,* No. 99 CIV. 11395 (RWS), 2000 WL 1752979, at *24 (S.D.N.Y. Nov. 29, 2000) ("Where, as here, the U.C.C. states specifically that an entitlement holder's property rights over assets held by its securities intermediary are defined by the U.C.C. and not by the common law, and specific U.C.C. provisions are identified as the 'only' mechanism for enforcing those rights, then the common law has been supplanted.").

d. Bank Markazi Did Not Become the Owner of the Cash Credited to Clearstream's Omnibus Account With Citibank When the Underlying Bonds Matured in the Ordinary Course of Business.

The fact that the underlying bonds had matured in the ordinary course by the time the District Court entered the February 28 Order did not transform Bank Markazi into the owner of the resulting cash credited to Clearstream's omnibus

account with Citibank. Courts do not "permit[] a party to benefit from the tainted results of an improper attachment." *Calais Shipholding Co. v. Bronwen Energy Trading Ltd.,* No. 07 Civ. 10609(PKL), 2009 WL 4277246, at *3 (S.D.N.Y. Nov. 24, 2009). Accordingly, where, as here, "there was no property of the defendant that could have been attached in the first instance," "[n]o alchemy by the [garnishee] bank [can] transform[] [property] that cannot be attached into property of the defendant that can be attached." *Setaf-Segat v. Cameroon Shipping Lines S.A.,* No. 09 Civ. 6714(JGK), 2009 WL 4016502, at *1 (S.D.N.Y. Nov. 16, 2009).

This Court has applied this fundamental principle in at least two cases involving electronic fund transfers ("EFTs"), which are not attachable under *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.,* 585 F.3d 58 (2d Cir. 2009). Thus, in *Scanscot Shipping Services GmbH v. Metales Tracomex LTDA*, 617 F.3d 679, 682 (2d Cir. 2010), this Court rejected a creditor's argument that the garnishee bank's transfer of EFTs to a separate suspense account in compliance with an attachment order "created an attachable interest even where none may have previously existed." *Accord. India S.S. Co. v. Kobil Petroleum Ltd.,* 663 F.3d 118, 121 (2d Cir. 2011) (where garnishee bank paid proceeds from EFTs into court registry in response to an attachment order, creditor could not attach check issued by court registry, as the check "represented the proceeds of EFTs now deemed to be beyond the reach of the district court").

Bank Markazi in any event cannot be deemed the owner of any cash credited to Clearstream's omnibus account with Clearstream. Under Luxembourg law, Bank Markazi's property right is limited to a claim against Clearstream for return of any cash credited to Bank Markazi's account with Clearstream. Bank Markazi's property right does not extend to cash maintained in Clearstream's omnibus account with Citibank. (A-Vol.VI-1600-01). Similarly, Bank Markazi's rights under the U.C.C. are limited to the right to be paid by Clearstream, its immediate intermediary, once Clearstream has received a payment or distribution. *See* U.C.C. § 8-505(b).[17]

Further—and importantly, Clearstream did not operate as a mere pass-through to Bank Markazi when cash was credited to Clearstream's omnibus account at Citibank. Such cash represented a debt that Citibank owed *to Clearstream*—not Bank Markazi. *See, e.g., Shapiro v. McNeill,* 92 N.Y.2d 91, 98 (N.Y. 1998) (noting that there is a "contractual debtor/creditor relationship between a bank and its depositor"). When Clearstream received a payment into its cash account with Citibank, Clearstream credited Bank Markazi's account by book entry in Luxembourg, but Clearstream did not debit its omnibus account with Citibank accordingly; instead, the cash in the omnibus account remained available

[17] N.Y.U.C.C. § 8-505 is included in the Special Appendix at SPA-161.

for Clearstream to use as it saw fit—for *any* transaction on behalf of *any* of Clearstream's customers. (A-Vol.V-1139-40,45,85).

B. Assuming *Arguendo* that the Assets at Issue Could Be Deemed "Assets of" Bank Markazi, the Special Protection FSIA § 1611(b)(1) Extends to "the Property of" a Foreign Central Bank Overrides TRIA § 201.

Should this Court conclude—contrary to Bank Markazi's showing above—that the Assets at Issue may be deemed "assets of" Bank Markazi within the meaning of TRIA § 201, then those assets necessarily also would constitute "the property of" a foreign central bank within the meaning of FSIA § 1611(b)(1).[18] That provision of the FSIA immunizes from attachment and execution "the property . . . of a foreign central bank or monetary authority held for its own account." 28 U.S.C. § 1611(b)(1).

Consequently, the Assets at Issue presumptively would be immune from attachment and execution under this Court's holding in *NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d 172 (2d Cir. 2011). Where, as here, "funds are held in an account in the name of a central bank or monetary authority, the funds are *presumed to be immune* from attachment under § 1611(b)(1)." *Id.* at 194 (emphasis added). The test for immunity under § 1611(b)(1) is whether the

[18] FSIA § 1611 is included in the Special Appendix at SPA-122.

specific "*funds* are . . . being used for central banking functions as such functions are normally understood." *Id.* (emphasis added).

To overcome the presumption of immunity, Plaintiffs had the burden of "demonstrating with specificity" that the Assets at Issue *were not* being used by Bank Markazi for central banking functions, such as maintaining and investing the Bank's foreign currency reserves. *Id.; see id.* at 195 ("the accumulation of foreign exchange reserves" is a "paradigmatic central banking function[]"). Plaintiffs never even attempted to meet that burden.

Yet the District Court nevertheless found that the Assets at Issue were not immune from attachment and execution under FSIA § 1611(b)(1) based on a finding that Bank Markazi *as an entity* purportedly "is not entitled to immunity" because the Executive Order "suggests" that "Bank Markazi is not engaged in activities protected by § 1611(b)." (SPA-53). This was error.

1. Plaintiffs Never Even Attempted to Overcome the Presumption of Immunity Under This Court's Holding in *NML Capital.*

The District Court cited no evidence that the Assets at Issue were used for anything other than central banking purposes at the time they were first restrained in June 2008—and no such evidence exists. On the contrary, the record is entirely *consistent with* Bank Markazi's position throughout this litigation that the Assets at

Issue were used for the classic central banking purpose of investing Bank Markazi's currency reserves.

First, the Assets at Issue related to an investment by Bank Markazi in certain U.S. dollar-denominated bonds "issued by sovereigns like the Republic of Italy or 'supranationals' such as the European Investment Bank." (A-Vol.V-1396). As Clearstream's Executive Vice President and Head of Business Management, Mark Gem, testified during a hearing in the District Court (Koeltl, J.) in June 2008, such "very high grade securities . . . would all tend to appeal to central banks, for example, as stores of reserve investments." (A-Vol.V-1149).

Second, Ali Asghar Massoumi, the Head of Bank Markazi's Foreign Exchange Negotiable Securities Section, submitted an affidavit in the District Court confirming that the Assets at Issue were "examples of the type of bonds in which Bank Markazi invests part of its reserves." (A-Vol.V-1330). The purpose of such investments, Mr. Massoumi explained, is "to instill market confidence, and promote [the] central bank's primary objective of price stability." (*Id.*).

2. The Heightened Protection FSIA § 1611(b)(1) Confers on Central Bank Property Overrides TRIA § 201

Like TRIA § 201, FSIA § 1611(b) contains its own "notwithstanding" clause. *See* 28 U.S.C. § 1611(a) & (b) ("the property . . . of a foreign central bank or monetary authority held for its own account" "shall be immune from attachment and from execution" *"[n]otwithstanding* the provisions of [FSIA] section 1610")

(emphasis added). Yet the District Court held that TRIA § 201 trumps FSIA § 1611(b)(1) *solely* on the basis that the former was "enacted well after §1611(b) was adopted in 1976."[19] (SPA-53).

Two basic principles of statutory construction militate against that result. *First,* TRIA § 201 "must be read in the context of the overarching statutory scheme of the FSIA." *Levin v. Bank of New York*, No. 09 CV5900 (RPP), 2011 WL 812032, at *10 (S.D.N.Y. Mar. 4, 2011).[20] "Section 1609 [of the FSIA] . . . provides that where a valid judgment has been entered against a foreign sovereign, property of that foreign state is immune from attachment and execution *except* as provided in the subsequent sections, Sections 1610 and 1611." *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 48 (2d Cir. 2010) (emphasis in original). TRIA § 201, in turn, is "codified as a note to Section 1610 of the FSIA." *Id.; accord. Weininger,* 462 F. Supp. 2d at 498 (TRIA section 201 "is appended to [FSIA] § 1610, which provides the sole bases for exceptions to immunity from execution of property").

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19 Only one other court had previously reached the same conclusion. *See Weininger v. Castro,* 462 F. Supp. 2d 457, 499 (S.D.N.Y. 2006). Importantly, however, none of the other sovereign defendants had appeared in that case to contest jurisdiction under the FSIA. *See id.* at 463.

20 *See Dodd v. United States,* 545 U.S. 353, 370 n.10 (2005) ("Our cases make clear that when interpreting a particular section of a statute, we look to the entire statutory scheme rather than simply examining the text at issue.") (citation omitted).

The legislative history of TRIA § 201 "suggests that Congress placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009). Accordingly, the "notwithstanding" clause in TRIA § 201(a) was not intended to alter the basic statutory framework of the FSIA whereby the immunity of central bank property under § 1611(b)(1) overrides any exception to immunity pursuant to § 1610.

Second, as the more specific provision extending special protection to the property of a foreign central bank held for its own account, FSIA § 1611(b)(1) must take precedence over TRIA § 201, which applies generally to the assets of "any agency or instrumentality" of a "terrorist party." *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, *regardless of their temporal sequence*.") (emphasis added); *Creque v. Luis*, 803 F.2d 92, 94-95 (3d Cir. 1986) (more specific statutory provision took precedence over more general provision even where the latter was enacted later in time and purported to apply "notwithstanding any other provision of law").

The heightened immunity of central bank property under FSIA § 1611(b)(1) reflects a Congressional policy determination that central banking assets should

receive special protection from attachment and execution. *See NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d at 188 (the FSIA does not treat "foreign central banks . . . as generic 'agencies and instrumentalities' of a foreign state" but rather extends "special protections" to central banks "befitting the particular sovereign interest in preventing the attachment and execution of central bank property") (internal quotation and citation omitted).

C. Turnover Pursuant to TRIA § 201 Contravenes Both the United States Supreme Court's Holding in *Plaut* and the Treaty of Amity.

Finally, Bank Markazi submits that turnover of the Assets at Issue to Plaintiffs pursuant to TRIA § 201 is improper for at least two additional reasons. Bank Markazi acknowledges that this Court may be constrained under *Weinstein* to find that at least some of these additional arguments do not preclude turnover. However, Bank Markazi must raise these arguments here to preserve them for further review as appropriate.[21]

First, Bank Markazi respectfully disagrees with *Weinstein's* conclusion that turnover pursuant to TRIA § 201 is compatible with the United States Supreme Court's holding in *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 219 (1995) that a statute which "retroactively command[s] the federal courts to reopen final judgments" violates the separation of powers between the legislative and judicial

[21] *See, e.g., Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001).

branches of Government under Article III of the United States Constitution. *See Weinstein,* 609 F.3d at 50-51. On the contrary, TRIA § 201 retroactively seeks to impose liability for Plaintiffs' judgments against Iran on Bank Markazi, which was not a party to the underlying actions that resulted in those judgments and was never alleged to have played any role in the events at issue.

Second, turnover pursuant to TRIA § 201 violates multiple provisions of the Treaty of Amity for many of the same reasons discussed immediately below in connection with § 8772. As demonstrated there, this Court is not bound by *Weinstein's dicta* in any event—and the actual *holding* with respect to the Treaty in *Weinstein* pertained to only two of the five Treaty provisions Bank Markazi has invoked here.

II. The District Court's Application of 22 U.S.C. § 8772 to Order Turnover to Plaintiffs of the Assets at Issue Contravenes the Treaty of Amity Between the United States and Iran and the United States Constitution.

A. Turnover of the Assets at Issue Pursuant to § 8772 Contravenes the Treaty of Amity Between the United States and Iran.

Evidently recognizing that the ownership requirement inherent in TRIA § 201 precludes turnover of the Assets at Issue under that provision, Plaintiffs successfully lobbied Congress to enact new, bespoke legislation explicitly targeted at this action. As demonstrated below, the new provision, § 8772, contravenes

both the separation of powers under Article III of the United States Constitution and the Fifth Amendment's Takings Clause. *See infra,* Section II.B-C.

Yet this Court need not reach those constitutional issues if it finds that the Treaty of Amity between the United States and Iran precludes turnover of the Assets at Issue here. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (courts must "construe [a] statute to avoid" constitutional problems whenever "an alternative interpretation of the statute is 'fairly possible'") (internal citation omitted).

1. The Generic "Notwithstanding" Clause in § 8772, Which Conspicuously Fails to Mention the Treaty, Is Not a Clear Indication of Congressional Intent to Abrogate the Treaty.

The Treaty of Amity is self-executing, and accordingly has the force and effect of a legislative enactment. *Brzak v. United Nations,* 597 F.3d 107, 111 (2d Cir. 2010) (quoting *Medellin v. Texas,* 552 U.S. 491, 505-06 (2008)).[22] The Treaty remains in full force and effect. Indeed, courts in the United States continue to apply the Treaty, and American litigants continue to rely on its provisions for their own benefit. *See, e.g., McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) ("We hold that the Treaty of Amity, construed under

[22] *See McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) ("The Treaty of Amity, like other treaties of its kind, is self-executing.").

Iranian law, provides [the American plaintiff] with a private right of action against the government of Iran.").

The United States Supreme Court has instructed that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (internal quotation and citation omitted). Section 8772 contains no such expression of a clear Congressional intent to abrogate the Treaty.

Yet the District Court relied on *Weinstein,* 609 F.3d 43, to hold that the phrase "notwithstanding any other provision of law" in § 8772(a)(1) "evinces clear Congressional intent to abrogate treaty language inconsistent with . . . § 8772." (SPA-52). However, *Weinstein* addressed a *different statute,* TRIA § 201, and the *Weinstein* Court's statement that "even assuming, *arguendo,* that there were a conflict between [the Treaty and TRIA § 201], the TRIA would have to be read to abrogate that portion of the Treaty" is classic *dicta* that cannot bind this Court in any event. *Weinstein,* 609 F.3d at 53; *see, e.g., Alsol v. Mukasey,* 548 F.3d 207,

217 (2d Cir. 2008) (*dicta* in a prior opinion "does not control in [subsequent] proceedings").[23]

Unlike TRIA § 201, § 8772 includes particularized language providing that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law[.]"* 22 U.S.C. § 8772(a)(1) (emphasis added). Thus, Congress was quite specific about which "provision[s] of law" it intended to abrogate in § 8772—yet Congress failed to include any reference whatsoever to the Treaty in § 8772.

This failure is all the more telling given that: (1) § 8772 on its face applies exclusively to assets in which Bank Markazi—an Iranian instrumentality—had an interest, and (2) Bank Markazi had previously argued—months before the wording of § 8772 was finalized—that the Treaty precludes Plaintiffs' claim under TRIA § 201 in this very same action (A-Vol.XIII-3646-48), a fact that Plaintiffs' counsel, who evidently were closely involved in the drafting of § 8772, cannot have overlooked. *See infra,* Section II.B.3.

Accordingly, the rationale that "Congress is not required to investigate the array of international agreements that arguably provide some protection that it

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[23] *See Indep. U.S. Tanker Owners Comm. v. Skinner,* 884 F.2d 587, 595 (D.C. Cir. 1989) (the phrase "even assuming *arguendo"* in a court's opinion is indicative of *dicta*); *Calderon*, 867 F. Supp. 2d at 405 (characterizing the quoted language in *Weinstein* as *dicta*).

wishes to annul and then assemble a check-list reciting each one"[24] plainly does not apply to § 8772. On the contrary, the conspicuous omission of any reference to the Treaty in § 8772 despite its obvious relevance to the very issues the statute purports to determine suggests that Congress in fact was reluctant to abrogate the Treaty. *See United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988) (Congress's failure to reference a plainly pertinent treaty in a statute even where the relevant treaty provisions "had been raised repeatedly" prior to the statute's enactment "reflects equivocation and avoidance" rather than a clear statement of Congressional intent).

2. Turnover of the Assets at Issue Based on the District Court's Erroneous Reading of § 8772 as Abrogating the Binding Treaty of Amity Contravenes Multiple Provisions of the Treaty.

The District Court not only rejected Bank Markazi's showing that the "notwithstanding" clause in § 8772 cannot be deemed a clear indication of Congressional intent to abrogate the Treaty of Amity, it further relied on *Weinstein* to find that *all* of "the Treaty of Amity provisions cited by Bank Markazi are inapposite." (SPA-51).

This was error. The District Court overlooked that *Weinstein* dealt with *only two of the five* Treaty provisions relied on by Bank Markazi—and it did so in the

[24] *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir. 2000).

context of a *different statute,* namely TRIA § 201. *See Weinstein,* 609 F.3d at 53 (discussing Articles III.1 and IV.2 of the Treaty). *Weinstein* did not so much as mention—much less find "inapposite"—the remaining three provisions upon which Bank Markazi relies (Articles III.2, IV.1 and V.1).

The Treaty imposes a number of specific obligations on the United States. In particular, the Treaty requires the United States: *first,* to refrain from "applying unreasonable or discriminatory measures that would impair the[] legally acquired rights and interests" of Iranian "nationals and companies," and from subjecting the acquisition or disposal of property by Iranian "nationals and companies" to treatment "less favorable than that accorded nationals and companies of any third country" (Art. IV.1 and V.1); *second,* "at all times [to] accord fair and equitable treatment to nationals and companies" of Iran and "to their property and enterprises" (Art. IV.1); *third,* to afford "[n]ationals and companies" of Iran "freedom of access to the courts of justice and administrative agencies" in the United States (Art. III.2); *fourth,* to refrain from taking the property of Iranian "nationals and companies," "except for a public purpose" and upon "prompt payment of just compensation" (Art. IV.2); and *fifth,* to recognize the "judicial status" of "[c]ompanies constituted under the applicable laws and regulations" of Iran (Art. III.1).

The District Court's Partial Final Judgment pursuant to § 8772 contravenes each of the Treaty provisions just cited. *First,* turnover of the Assets at Issue pursuant to § 8772 violates Articles IV.1 and V.1 by targeting Bank Markazi for adverse treatment while expressly excluding *even other "terrorist parties"* from comparable treatment. *See* 22 U.S.C. § 8772(c) ("Nothing in this section 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] proceedings.").[25]

Second, turnover pursuant to § 8772 similarly contravenes Art. IV.1 of the Treaty. A state may breach its obligation to accord fair and equitable treatment when its individualized legislative or regulatory decision-making is primarily driven by political considerations. *Azurix Corp. v. Republic of Argentina,* ICSID Case No. ARB/07/12, Award, ¶¶ 373-75 (July 14, 2006) (A-Vol.XXI-5966-67); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

Third, Congress's attempt to determine virtually every issue in this action by way of retroactive legislation cannot be reconciled with Article III.2 of the Treaty.

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[25] Notably, the original draft of the provision that ultimately became § 8772 would have applied to the property of any "terrorist party." (A-Vol.XIX-5548-55). Yet all references to a "terrorist party" or "terrorist parties" in the draft provision were later removed and replaced with references only to "Iran." (A-Vol.XIX-5559-61).

While § 8772 may not formally constrain Bank Markazi's "access to the courts," it leaves virtually nothing for the courts to decide, thereby rendering such access illusory.

Fourth, for the reasons discussed below with respect to the Fifth Amendment's Takings Clause, turnover of the Assets at Issue pursuant to § 8772 violates Art. IV.2 of the Treaty. *See infra,* Section II.C. In particular, the rule that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B"[26] is equally applicable as a matter of international law.[27]

Fifth—and finally, Congress's definition of "Iran" in § 8772(d)(3) to "mean[] the Government of Iran, *including the central bank or monetary authority of that Government,"* contravenes Art. III.1 of the Treaty. In this respect, Bank Markazi respectfully disagrees with the *Weinstein* Court's interpretation of *Sumitomo Shoji America Inc. v. Avagliano,* 457 U.S. 176 (1982). The "juridical status" language that is pertinent here was never discussed in *Sumitomo. See*

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26 *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

27 *See, e.g.,* U.N. G.A. Res. 1803 (XVII), ¶ 4, U.N. Doc. A/RES/1803 (Dec. 14, 1962) (public purposes that may justify expropriation include "reasons of public utility, security or the national interest which are *recognized as overriding purely individual or private interests,* both domestic and foreign") (emphasis added).

Sumitomo, 457 U.S. at 181-82. Bank Markazi wishes to preserve this issue for further review as appropriate.[28]

B. The District Court's Conclusion that § 8772 Does Not Violate the Separation of Powers Under Article III of the United States Constitution Ignores the Statute's Expressly Stated Purpose *"to Ensure"* Turnover of the Assets at Issue to Plaintiffs.

1. Standard for Determining the Constitutionality of § 8772 under Article III.

As this Court has explained, the key inquiry in determining whether a statute such as § 8772 violates the separation of powers between the legislative branch and the judiciary under Article III of the Constitution is whether the statute "usurp[s] the adjudicative function assigned to the federal courts under Article III" or instead

[28] Were this Court to find that § 8772 abrogates the Treaty as a matter of domestic U.S. law, § 8772 still would not relieve the United States of its Treaty obligations to Iran as a matter of international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 115(1)(b) (1987) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."). Article XXI.2 of the Treaty provides that "any dispute" concerning "interpretation or application of the present Treaty . . . shall be submitted to the International Court of Justice." Accordingly, if the District Court's Partial Final Judgment were affirmed following exhaustion of all opportunities for relief on direct review, Iran (on behalf of Bank Markazi) would have a cause of action against the United States before the International Court of Justice ("ICJ") for violation of the Treaty and the law of nations. However, exhaustion of Bank Markazi's domestic remedies in the United States is a precondition to any such claim under the "well-established rule of customary international law" that "local remedies must be exhausted before international proceedings may be instituted." *Interhandel (Switzerland v. U.S.)*, 1959 I.C.J. 6, 1959 WL 2, at *27 (Mar. 21).

merely "chang[es] the law applicable to pending cases." *Axel Johnson,* 6 F.3d at 81; *compare Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 438 (1992) (statute was constitutional where it "compelled changes in law, not findings or results under old law") *with United States v. Klein,* 80 U.S. 128, 146 (1871) (Congress may not constitutionally "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]").

In practice, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw." *Axel Johnson,* 6 F.3d at 81. "Whether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question in cases in which, as a practical matter, simple adherence to the 'new' standard in effect mandates a particular result." *Benjamin v. Jacobson,* 124 F.3d 162, 174 (2d Cir. 1997), *vacated on other grounds,* 172 F.3d 144 (2d Cir. 1999).

Yet at its core, Article III commands that Congress may not predetermine the results in any given case. "Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases." *Lindh v. Murphy,* 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds,* 521 U.S. 320 (1997).

The Seventh Circuit in *Lindh* illustrated this critical distinction with the following hypothetical: While "Congress *cannot* say that a court must award Jones

$35,000 for being run over by a postal truck," the court explained, Congress *may,* for example, "prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages," or "establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed." *Id.* (citations omitted, emphasis added). The latter is constitutional; the former is not.

2. The Article III Violation Inherent in § 8772 Is Evident on the Face of the Statute.

Section 8772 unequivocally requires that "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" "*shall be* subject to execution" by Plaintiffs in this action. 22 U.S.C. § 8772(a)(1) & (b) (emphasis added). On its face, therefore, § 8772 is akin to the hypothetical statute in *Lindh* providing that the "court must award Jones $35,000." *Lindh,* 96 F.3d at 872. Congress's overt attempt in § 8772 to determine the outcome of this case plainly "usurp[s] the adjudicative function assigned to the federal courts under Article III." *Axel Johnson,* 6 F.3d at 81.

Yet relying solely on the statute's formal "structure," the District Court nevertheless found § 8772 to be constitutional under Article III, reasoning that § 8772 "does not itself 'find' turnover required" and hence "is not a *self-executing* congressional resolution of a legal dispute." (SPA-65) (emphasis added). Instead,

the District Court found that § 8772 nominally "left [it] to the Court" to make certain "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs. (*Id.*). That, the District Court held, was all Article III requires.

This was error. Section 8772 nominally required the District Court to make only two "determinations" "prior to an award turning over" the Assets at Issue to Plaintiffs: (1) that "Iran" (defined to include Bank Markazi[29]) had a "beneficial interest in" the Assets at Issue; and (2) "that no other person possesses a constitutionally protected interest in the [Assets at Issue]." 22 U.S.C. § 8772(a)(2).

Yet the stated purpose of these "determinations" was *"to ensure that* Iran is held accountable *for paying* [Plaintiffs'] judgments." 22 U.S.C. § 8772(a)(2) (emphasis added). Congress thus made crystal clear its intent to determine the outcome of this action in Plaintiffs' favor.

It is axiomatic that "statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton,* 549 U.S. 84, 91 (2006). Here, the plain and ordinary meaning of "to ensure" in § 8772(a)(2) is *"to guarantee* (a thing) to a person." Oxford English Dictionary (2d ed. 1989)

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[29] See § 8772(d)(3) ("The term 'Iran' means the Government of Iran, *including the central bank or monetary authority of that Government* and any agency or instrumentality of that Government.") (emphasis added).

(emphasis added); *accord., e.g.,* Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("to ensure" means "[t]o make sure, certain, or safe; guarantee").

When construing federal statutes, courts in a variety of contexts have interpreted the phrase "to ensure" in accordance with that plain and ordinary meaning. *See, e.g., Nat'l Petrochemical & Refiners Ass'n v. E.P.A.,* 630 F.3d 145, 153 (D.C. Cir. 2010) (where statute provided that Environmental Protection Agency "shall promulgate regulations *to ensure* that transportation fuel sold or introduced into commerce in the United States" meets certain standards, court held that "Congress thus delegated authority to EPA *to make certain* that" those standards were met) (first emphasis in original, second emphasis added); *United States v. Ray,* 273 F. Supp. 2d 1160, 1165-67 (D. Mont. 2003) (where "Congress did not define [the phrase] 'ensure'" in statute establishing judicial reporting requirements, court held that "[t]o ensure means *to guarantee* or to warrant") (emphasis added); *Corey H. v. Bd. of Educ.,* 995 F. Supp. 900, 913 (N.D. Ill. 1998) ("by repeatedly using the word 'ensure,'" Individuals with Disabilities Education Act "unambiguously require[d] the state *'to make certain'* that the [Act]'s statutory requirements are carried out by local school districts") (quoting Webster's II New Riverside University Dictionary 434 (1994)) (emphasis added).

Thus, the stated purpose of the "determinations" required by § 8772 is to "make certain" or "guarantee" turnover of the Assets at Issue to Plaintiffs. On that

basis, Congress carefully crafted the two "determinations" § 8772 required the District Court to make to ensure their resolution in Plaintiffs' favor.

First, the requisite finding that Bank Markazi had a "beneficial interest" in the Assets at Issue was predetermined because that fact already had been established by the time Congress enacted § 8772 into law in July 2012. Indeed, the Assets at Issue had been blocked several months previously pursuant to the Executive Order precisely *because* Bank Markazi had a beneficial interest in them. *See Norilsk Nickel,* 14 A.D.3d at 147 (emphasis added) ("OFAC block[s] assets based on interests in property and the use to which such property was put, not based on who own[s] the property in question."); *Global Relief Found.*, 315 F.3d at 753 (for purposes of determining the interests in property that are subject to blocking, "beneficial rather than legal interests matter"); *accord. Holy Land Found.,* 333 F.3d at 162-63 (any "interest" in property may be subject to blocking; "[t]he interest need not be a legally protected one").

Moreover, § 8772(a)(2)(A) expressly required the District Court to "exclud[e]" from consideration any "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." 22 U.S.C. § 8772(a)(2)(A). By commanding the District Court to deem irrelevant any interest of Clearstream—the only party with a *direct, legally*

cognizable interest in the Assets at Issue—the statute guaranteed the outcome of the District Court's first "determination" in Plaintiffs' favor.

Second, the required finding pursuant to § 8772(a)(2)(B) "that no other person possesses a constitutionally protected interest in the [Assets at Issue] under the Fifth Amendment to the Constitution of the United States" was similarly predetermined. Once Clearstream's interest in the Assets at Issue was excluded from consideration pursuant to § 8772(a)(2)(A), the District Court could not possibly have found that any *other* party had a constitutionally protected interest in those assets.

3. The Circumstances Surrounding the Enactment of § 8772 Further Underscore Congress's Intent to Determine the Outcome of this Action in Plaintiffs' Favor.

The circumstances surrounding the enactment of § 8772 further confirm the statute's explicitly stated purpose of guaranteeing turnover of the Assets at Issue to Plaintiffs. To cite just one contemporaneous example, a February 2, 2012 press release issued by Senator Robert Menendez of New Jersey, one of two original Senate Co-Sponsors of the provision that ultimately became § 8772, stated that the new provision *"makes it so that"* Plaintiffs *"will be able to attach* two billion [sic]

in Iranian Central Bank assets being held at a New York Bank." (A-Vol.XIX-5574) (emphasis added). Evidently, that was always the Senator's intent.[30]

Moreover, Plaintiffs' counsel appear to have exercised substantial influence over the wording of the provision that ultimately became § 8772 throughout the legislative process. Senator Menendez's communications director was quoted in a May 22, 2012 article in the publication *Roll Call* as stating that the Senator "for months ha[d] been working with all of the plaintiff groups *to ensure that* the approximately $2.5 billion [sic] in Iranian blocked assets located in New York *are available"* for distribution to Plaintiffs. (A-Vol.XIX-5557) (emphasis added). The same article revealed that "lawyers and lobbyists" for various Plaintiff groups were still "jockeying" over the precise text of the new provision at that time. (A-Vol.XIX-5556).

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30 While an individual legislator's statement ordinarily is entitled to "limited weight," Senator Menendez's press release is plainly relevant here because of its "consistency . . . with the general language of the statute itself." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008).

C. Turnover of the Assets at Issue Pursuant to § 8772 Constitutes an Impermissible Taking under the Fifth Amendment to the United States Constitution.

1. Section 8772's Retroactive Legalization of Plaintiffs' Improper Restraint of the Assets at Issue Violates the Takings Clause.

With barely any discussion, the District Court brushed away Bank Markazi's showing that § 8772 effects a taking by retroactively legalizing Plaintiffs' improper restraint of the Assets at Issue *more than three and a half years* before they were blocked in February 2012.[31] (SPA-69). Yet it is well-established that the retroactive application of civil statutes may constitute a taking where they "upset settled transactions." *E. Enterprises v. Apfel*, 524 U.S. 498, 501 (1998). The "ban on retrospective legislation embrace[s] all statutes, which, though operating only from their passage, affect vested rights and past transactions." *Landgraf*, 511 U.S. at 268 (internal quotation and citation omitted).

Section 8772 is precisely such a statute. While Bank Markazi's "reasonable investment-backed expectations"[32] are relevant in this context, the District Court's focus on whether Bank Markazi could have had a "reasonable expectation" that its

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[31] The Takings Clause of the Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. Amend. V. *See* Special Appendix at SPA-103.

[32] *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980).

interests would not be diminished or extinguished *after* the Assets at Issue were blocked in February 2012 (SPA-69) was misplaced.

Instead, the relevant point in time to determine Bank Markazi's reasonable expectation was June 2008, when the Assets at Issue were first restrained. *See, e.g.*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (considering alleged regulatory taking in light of reasonable expectations at the time of investment). At that time, Bank Markazi plainly *did* have a reasonable expectation that its interests would not be diminished or extinguished because the Assets at Issue were not subject to attachment or execution under then-existing law. *See supra,* Section I.A.5.

2. Distribution of the Assets at Issue to Plaintiffs Is Not a Valid Public Purpose Under the Takings Clause.

Under the Takings Clause, § 8772's stated purpose "to ensure that Iran is held accountable for paying [Plaintiffs'] judgments" cannot justify the taking of property in which Bank Markazi had an interest. 22 U.S.C. § 8772(a)(2). Indeed, "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Yet here, the District Court concluded that *any* provision that somehow references "the unusual and extraordinary threat" allegedly posed by Iran *ipso facto* "does not violate the public use requirement" of the Takings Clause. (SPA-70).

This was error. While § 8772 deems turnover of the Assets at Issue to Plaintiffs to be "in furtherance of the broader goals of this Act to sanction Iran," that plainly cannot be deemed the statute's *primary purpose.* At most, it is an incidental or pretextual purpose that cannot cure the Takings Clause violation inherent in § 8772. *See Kelo,* 545 U.S. at 490 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with *only incidental or pretextual public benefits,* are forbidden by the Public Use Clause.") (emphasis added); *see generally Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

III. The District Court's Permanent Injunction Precluding Bank Markazi From Asserting Its Property Rights Against Clearstream in Luxembourg Is an Impermissible Restraint of Bank Markazi's Property Outside the United States.

This Court has made clear that "a district court sitting in Manhattan does not have the power to attach [a foreign sovereign's] property in foreign countries." *EM Ltd. v. Republic of Argentina,* 695 F.3d 201, 208 (2d Cir. 2012).[33] Equally

[33] *Accord. Bank of Tokyo-Mitsubishi, UFJ, Ltd. N.Y. Branch v. Peterson,* No. 12 Civ. 4038 (BSJ), 2012 WL 1963382, at *2 n.3 (S.D.N.Y. May 29, 2012); *Elliott Assocs., L.P. v. Banco De La Nación,* No. 96 Civ. 7916 (RWS), 2000 WL 1449862, at *3 (S.D.N.Y. Sept. 29, 2000); *Fidelity Partners, Inc. v.*

clearly, this Court has held that under the FSIA, "courts . . . may not grant, by injunction, relief which they may not provide by attachment." *S&S Mach. Co. v. Masinexportimport,* 706 F.2d 411, 418 (2d Cir. 1983). Indeed, "[t]he FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property." *Id.*

Yet that is precisely what the Partial Final Judgment purports to do here in the form of a sweeping injunction (the "Injunction") which—if allowed to stand—would "permanently restrain[] and enjoin[]" Bank Markazi "from instituting or prosecuting any claim or pursuing any actions against Clearstream *in any jurisdiction* or tribunal arising from *or relating to* any claim (whether legal or equitable) to the [Assets at Issue]." (SPA-87 ¶13) (emphasis added).

Bank Markazi objected to the Injunction, but the District Court nevertheless proceeded to enter the Injunction over Bank Markazi's objection.[34]

Yet to the extent the Partial Final Judgment purports to preclude Bank Markazi from asserting its property rights against Clearstream *in Luxembourg,* the

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Philippine Exp. & Foreign Loan Guarantee Corp., 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996).

[34] In response to Bank Markazi's objection, the District Court modified the wording of the Injunction only very slightly in a manner that is not pertinent here.

District Court plainly exceeded its jurisdiction under the FSIA. Nor did either of the two other statutes at issue on this appeal, 22 U.S.C. § 8772 and TRIA § 201, confer jurisdiction on the District Court to adjudicate Bank Markazi's property rights outside the United States. On the contrary, § 8772 explicitly recognizes that the Assets at Issue in New York are distinct from—albeit "equal in value to"—the "financial asset[s] of Iran" (defined to include Bank Markazi) that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad.*" 22 U.S.C. § 8772(a)(1)(C) (emphasis added).[35]

The Injunction was included in the Partial Final Judgment at Clearstream's request and reflects its stated concern that "[e]xecuting against Clearstream's cash account at Citibank would leave Clearstream without the ability to cover the cash credited to Bank Markazi's account, thereby exposing Clearstream to the risk of turnover *of its cash* to Plaintiffs while its liability to Bank Markazi remains unresolved[.]" (A-Vol.XV-4164) (emphasis added).

Yet Clearstream's continued, potential liability to Bank Markazi is an unavoidable consequence of Congress's ill-advised attempt in § 8772 to override

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[35] To be clear, Bank Markazi is not asking this Court to determine the nature and extent of Bank Markazi's rights against Clearstream in Luxembourg. Instead, the sole question before the Court here is whether the District Court had jurisdiction to enjoin Bank Markazi from asserting whatever property rights it may have against Clearstream outside the United States.

U.C.C. Article 8 and guarantee turnover of the Assets at Issue to Plaintiffs in a manner that is fundamentally at odds with the modern, indirect holding system for securities. The District Court lacked authority to shield Clearstream—at Bank Markazi's expense—from the inevitable adverse consequences of § 8772 by enjoining Bank Markazi from exercising its property rights against Clearstream in Luxembourg. The FSIA, and this Court's precedents, preclude such relief.

CONCLUSION

For the reasons set forth herein, the District Court's Partial Final Judgment should be reversed.

Dated: New York, New York
November 14, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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13-2952-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DEBORAH D. PETERSON, *et al.*,

Plaintiffs-Appellees,

—against—

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT BANK MARKAZI, THE CENTRAL BANK OF IRAN

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SUMMARY OF THE ARGUMENT[1]

Plaintiffs have failed to rebut Bank Markazi's showing that they cannot meet the requirements for turnover of the Assets at Issue under TRIA § 201 because Bank Markazi never owned those assets, and that the second statute the district court relied on, § 8772, was not a valid basis for turnover because it contravenes the Treaty of Amity as well as the separation of powers under Article III of the Constitution and the Fifth Amendment's Takings Clause.

Plaintiffs conflate Bank Markazi's undisputed "interest" in the Assets at Issue with the showing of *ownership* required to satisfy the "assets of" requirement of TRIA § 201. They also argue that various non-authoritative, purported sources of federal law should determine whether the Assets at Issue are "assets of" Bank Markazi—while failing to mention that the D.C. Circuit in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) recently applied Article 4A of the U.C.C. *as a matter of federal common law* to determine the ownership of blocked EFTs under TRIA § 201. Regardless of whether this Court applies the U.C.C. here as a matter of state or federal law, the Assets at Issue were not "assets of" Bank Markazi under U.C.C. Article 8.

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[1] Unless otherwise defined herein, all defined terms are as defined in Bank Markazi's opening brief (Document No. 190-1).

Unlike TRIA § 201, § 8772 contains no requirement of ownership. Yet as demonstrated in Bank Markazi's opening brief, § 8772 violates multiple provisions of the Treaty of Amity. Plaintiffs' argument that § 8772 is a valid exercise of the United States' right to take measures "*necessary* to protect its *essential* security interests" under Article XX.1(d) of the Treaty ignores that the Assets at Issue will remain blocked in any event until such time as the Government concludes that their blocking is no longer in the interest of the United States. Turnover of these assets to Plaintiffs therefore is not "necessary" to protect any "essential security interests" of the United States within the meaning of the Treaty.

Nor, contrary to Plaintiffs' assertions, is there anything "ironic" about Bank Markazi's showing that § 8772 constitutes an impermissible legislative intrusion into matters reserved for the judiciary under Article III of the Constitution. The "principal function" of the separation of powers is to "safeguard against the encroachment or aggrandizement of one branch [of Government] at the expense of the other." *Clinton v. City of New York,* 524 U.S. 417, 482 (1998) (citation omitted). In the Article III context, vindication of this core purpose plainly does not depend on the identity of the litigants in this or any other case.

By commanding the district court to exclude from consideration any interest of Clearstream—the only party with a legally cognizable interest in the Assets at Issue—§ 8772 indirectly compelled the court below to find that Bank Markazi

holds "equitable title to, or the beneficial interest in" those assets just as surely as if the statute had directly commanded the district court to make that finding. Consequently, § 8772 runs afoul of the controlling Constitutional principle that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *United States v. Klein*, 80 U.S. 128, 146 (1871).

Plaintiffs' argument that this Court's opinion in *Weinstein* precludes Bank Markazi's showing under the Takings Clause ignores the troubling retroactivity concerns that § 8772 presents in this case. The Court's application of TRIA § 201 in *Weinstein* raised no such concerns and accordingly is not dispositive of the issue presented here. Importantly, Plaintiffs do not contest that the appropriate point in time to determine Bank Markazi's investment-backed expectations was when the Assets at Issue were first restrained in June 2008. At that time, Bank Markazi had no reason to expect that Congress would take the unprecedented step of enacting legislation mandating the turnover to judgment creditors of Iran of assets held in connection with the classic central banking purpose of investing foreign currency reserves.

Finally, irrespective of the Court's determination of any other issue presented by this appeal, the extraterritorial Injunction the district court included in its Partial Final Judgment must be vacated because the district court

unquestionably lacked subject matter jurisdiction to issue it. None of the statutes at issue in this appeal conferred jurisdiction on the court below to issue the sweeping Injunction purporting to enjoin Bank Markazi from asserting its property rights against Clearstream in Luxembourg. Plaintiffs' argument that Bank Markazi somehow waived its objection to the Injunction is meritless because an objection to subject matter jurisdiction can never be waived. Moreover, the only party that might have had standing to defend the Injunction before this Court—Clearstream—has opted not to pursue an appeal after entering into a settlement with Plaintiffs, and Plaintiffs lack standing to defend the Injunction in Clearstream's stead.

ARGUMENT

I. The Assets at Issue Are Not Subject to Execution as "Assets of" Bank Markazi under TRIA § 201.

A. TRIA § 201 Requires Actual Ownership; a Mere "Beneficial Interest" Sufficient to Trigger the Blocking of Assets Does Not Suffice.

For all of the following reasons, Plaintiffs have failed to rebut Bank Markazi's showing that the Bank cannot be deemed the owner of the Assets at Issue under applicable law (namely Article 8 of the U.C.C. and Luxembourg law). *First,* Plaintiffs consistently conflate Bank Markazi's amorphous "interest" in the Blocked Assets that triggered their blocking under the Executive Order with the

distinct legal concept of beneficial *ownership*.[2] Yet underlying Plaintiffs' entire argument is a fundamental, unanswered question: if Plaintiffs, as they claim, easily could establish Bank Markazi's *ownership* of the Assets at Issue, why then did they find it necessary to engage in a sustained lobbying effort to persuade Congress to enact a new, tailor-made statute in § 8772?

As the plain wording of the two provisions makes clear, the answer is that § 8772, unlike TRIA § 201, contains no requirement of ownership. While TRIA § 201 requires Plaintiffs to demonstrate that the Assets at Issue are "assets of" Bank Markazi, Bank Markazi's undisputed "beneficial interest" in those assets constitutes a sufficient basis for turnover under § 8772. Congress's use of these two distinct terms in TRIA § 201 and § 8772 underscores that they are far from synonymous. Indeed, even where "Congress uses certain language in one part *of the [same] statute* and different language in another, the court assumes different meanings were intended." *Cruz-Miguel v. Holder*, 650 F.3d 189, 196 (2d Cir. 2011) (internal quotation and citation omitted, emphasis added).

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[2] As Plaintiffs acknowledge, a "beneficial owner" may be defined as "a person or entity that "has *most to all of the traditional property rights of the owner*, except for actual legal title to the property." *Pfizer Inc. v. Teva Pharm. USA, Inc.*, 803 F. Supp. 2d 409, 425 (E.D. Va. 2011) (emphasis added).

Second, Plaintiffs mischaracterize Bank Markazi's position as being "that the District Court *never ruled*" that Bank Markazi owned the Assets at Issue. Pls.' Br. at 45 (emphasis added). That is not what Bank Markazi said; the district court plainly *did* so rule. (SPA-47). Yet the district court's finding of ownership was not supported by any legal analysis of whether Bank Markazi's "interest" in the Assets at Issue rose to the level of ownership under applicable law—a point that stands unrebutted. *See* Bank Markazi Br. at 20-23.

Third, Plaintiffs' attempts to rely on Bank Markazi's purported "admissions" of ownership ignore the context in which those statements were made. All of the statements Plaintiffs cite date back to immediately after the Bank first appeared in the turnover action in the spring of 2011. *See* Pls.' Br. at 42-43. Not only were those statements made *before* Bank Markazi was granted access to the sealed, prior factual and legal submissions in the litigation (including Clearstream's submissions[3]), but the thrust of Bank Markazi's argument was that the Assets at Issue related to an investment by Bank Markazi—and therefore were not the property *of Iran*, the judgment debtor here. (A-Vol.V-1259) ("[Plaintiffs'] Restraining Notices are ineffective because the Restrained Securities are *prima facie* the property of a third party, Bank Markazi—not the property of

[3] *See* Bank Markazi Br. at 21 n.10.

the IRI [Islamic Republic of Iran] or MOIS [Iranian Ministry of Information and Security], the judgment debtors with respect to plaintiffs' underlying judgment."). Those statements plainly could not transform Bank Markazi into the owner of the Assets at Issue if it did not actually own those assets under applicable law. *See* Bank Markazi Br. at 20-22.

Fourth—and finally, Plaintiffs acknowledge that state law determines "the nature of any interests in or rights to property that an entity may have." Pls.' Br. at 34 (quoting *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010)). Yet they argue that some undefined federal law standard then "dictates" whether Bank Markazi's rights with respect to the Assets at Issue rise to the level of actual *ownership* under TRIA § 201. *See id.* Plaintiffs then proceed to discuss various non-authoritative "potential source[s]" of federal law (including an anti-money laundering manual, a statement of financial accounting concepts, and an I.R.S. publication) while ignoring the one *authoritative* source of law the D.C. Circuit recently applied *as a matter of federal common law* to determine ownership under TRIA § 201—namely the U.C.C. itself.

In an opinion issued only *after* Bank Markazi filed its opening brief and which Plaintiffs conspicuously fail to mention, the D.C. Circuit held in *Heiser* that Article 4A of the U.C.C. "is a proper federal rule of decision for applying the ownership requirement[] of [TRIA] § 201" with respect to the electronic funds

transfers (EFTs) at issue in that case. 735 F.3d at 940-41. As the court noted, "[t]he Uniform Commercial Code is often used as the basis of federal common-law rules." *Id.* at 940. Likewise here, Article 8 of the U.C.C. (and Luxembourg law, the law to which the U.C.C.'s choice of law provisions refer[4]) determines whether the Assets at Issue can be deemed "assets of" Bank Markazi—regardless of whether this Court opts to apply those provisions as a matter of state law, as some courts have,[5] or instead as a matter of federal common law.

B. At the Time They Were First Restrained, Bank Markazi Was Not the Owner of the Assets at Issue Under Article 8 of the U.C.C.

Plaintiffs' argument that Bank Markazi may be deemed "the sole beneficial owner" of the Assets under U.C.C. Article 8 (Pls.' Br. at 48) is incompatible with Article 8 of the U.C.C. Plaintiffs disregard that while Bank Markazi had a "pro rata property interest" in the security entitlements held by Clearstream under U.C.C. § 8-503(b), that "property interest is an interest *held in common by all entitlement holders* who have entitlements to a particular security or other financial asset." U.C.C. § 8-503 cmt. 1 (emphasis added). Thus, a security entitlement "is

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4 *See* U.C.C. § 8-110(b). Plaintiffs have not even attempted to rebut Bank Markazi's showing that it could not be deemed the owner of the Assets at Issue under Luxembourg law. Accordingly, Bank Markazi rests on its opening brief in this respect. *See* Bank Markazi Br. at 27-28.

5 *See Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 405 (S.D.N.Y. 2011).

not a claim to a specific identifiable thing," but instead is "a package of rights and interests," and "the incidents of this property interest are established by the rules of Article 8, *not by common law property concepts.*" U.C.C. § 8-503 cmt. 2 (emphasis added).

Here, Bank Markazi's rights under Article 8 existed exclusively against Clearstream—not Citibank. As the Official Comment to U.C.C. § 8-503 again makes clear: "[T]he entitlement holder can look only to [its] intermediary for performance of the obligations. The entitlement holder cannot assert rights directly against other persons, such as other intermediaries through whom the intermediary holds the positions[.]"). *Id.*

Plaintiffs' argument for turnover under TRIA § 201 thus ignores the basic principle that "a party seeking to enforce a judgment stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 83 (2d Cir. 2002) (internal quotation and citation omitted, alteration in original). In its recent decision in *Heiser*, the D.C. Circuit made clear that this "established principle that a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor" applies with full force to the ownership analysis under TRIA § 201. *Heiser*, 735 F.3d at 938 (internal quotation and citation omitted).

Finally, Plaintiffs seek to avoid Bank Markazi's showing that their restraints on the Assets at Issue (which then consisted of Clearstream's security entitlements vis-à-vis Citibank) in June 2008 were improper to begin with under U.C.C. Article 8 by claiming that the subsequent blocking of those assets nearly four years later should be deemed to have retroactively cured that defect. Yet contrary to Plaintiffs' assertions, *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009) does not support that proposition. *See* Pls.' Br. at 54. The Court in *Elahi* never addressed the issue of whether a plaintiff's improper restraint of property could be cured by subsequent blocking. Indeed, the Court found it unnecessary to decide whether the asset in question there—a federal court judgment confirming a foreign arbitral award—was even *blocked at all*. *See Elahi*, 556 U.S. at 379. Instead, the Court decided the case on the ground that the plaintiff had waived his right to attach the judgment in any event. *See id.*

C. Bank Markazi Did Not Become the Owner of the Resulting Cash That Would Have Been Credited to Clearstream's Omnibus Account Upon Redemption of the Underlying Securities.

Plaintiffs have failed to rebut Bank Markazi's showing that the Bank was not the owner of any cash credited to Clearstream's omnibus account with Citibank upon maturity of the underlying bonds to which Clearstream's security entitlements vis-à-vis Citibank related. *See* Bank Markazi Br. at 31-34. Indeed,

Plaintiffs do not contest that any cash credited to Clearstream's omnibus account with Citibank was *Clearstream's cash,* which it was free to use for any transaction on behalf of any of its customers. (A-Vol.V-1139-40,45,85).

Accordingly, any cash credited to Clearstream's omnibus account was fungible and in no sense belonged to any particular customer of Clearstream's. *See generally In re Lehman Bros. Holdings Inc.*, 502 B.R. 376, 381 (Bankr. S.D.N.Y. 2013) (debtor could not "assert[] bankruptcy claims based on [defendant]'s ongoing possession of debtor property" following defendant's exercise of a contractual right of setoff which "transformed [a] once-segregated cash collateral account into fungible cash that is now indistinguishable from the other cash held by [defendant] in its coffers"). The cases Plaintiffs rely on are inapposite because they did not involve such omnibus accounts that financial institutions use to execute transactions relating to an indefinite number of distinct customers. *See EM Ltd. v. Republic of Argentina,* No. 03 Civ. 2507(TPG), 2009 WL 2568433, at *3 (S.D.N.Y. Aug. 18, 2009), *aff'd,* 389 F. App'x 38 (2d Cir. 2010) (permitting judgment creditors of Argentina to attach Argentinian entities' "rights to receive distributions" directly from a trust account); *Weininger v. Castro*, 462 F. Supp. 2d 457, 494, 499 (S.D.N.Y. 2006) (allowing judgment creditors of Cuba to execute against bank accounts specifically "opened for the benefit of, or to hold payments to or for the account of, various Cuban agencies and instrumentalities").

D. The Conflict Between FSIA § 1611(b)(1) and TRIA § 201 Must Be Resolved in Favor of Protecting Assets Held in Connection with Core Central Banking Functions.

Plaintiffs have not even attempted to rebut Bank Markazi's showing that the record evidence unambiguously supports the Bank's consistent position throughout this litigation that the Assets at Issue were held in Clearstream's omnibus account with Citibank in connection with an investment by Bank Markazi of its currency reserves—a classic central banking function within the meaning of FSIA § 1611(b)(1) and *NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d 172 (2d Cir. 2011). *See* Bank Markazi Br. at 35-36.

The two additional district court cases Plaintiffs cite in opposition that addressed the conflict between FSIA § 1611(b)(1) and TRIA § 201 add nothing to the arguments Bank Markazi previously rebutted in its opening brief. Both *Levin v. Bank of New York Mellon*, No. 09 CV 5900(RPP), 2013 WL 5312502 (S.D.N.Y. Sep. 23, 2013), and *Gates v. Syrian Arab Republic,* No. 11 C 8715, 2013 WL 1337223 (N.D. Ill. Mar. 29, 2013), relied principally on the "notwithstanding" clause in TRIA § 201.[6] Yet neither court appears to have considered the legislative history of TRIA § 201 "suggest[ing] that Congress placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued

[6] Bank Markazi previously addressed the third case Plaintiffs cite, *Weininger*, 462 F. Supp. at 499. *See* Bank Markazi Br. at 37 n.19.

under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Elahi*, 556 U.S. at 386. Nor is Senator Harkin's floor statement dispositive of the meaning of that "notwithstanding" clause because "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). *See* Pls.' Br. at 41.

II. Turnover of the Assets at Issue Pursuant to § 8772 Contravenes the Treaty of Amity Between the United States and Iran.

A. The "Notwithstanding" Clause in § 8772 Does Not Abrogate the Treaty.

Plaintiffs fail to rebut Bank Markazi's showing that Congress's failure to reference the Treaty of Amity in connection with the "notwithstanding any other provision of law" clause in § 8772 is indicative of Congressional reluctance to abrogate the Treaty. *See* Bank Markazi Br. at 43-44. In particular, Plaintiffs avoid Bank Markazi's central argument that unlike the "notwithstanding" clause in TRIA § 201, the "notwithstanding" clause in § 8772 includes particularized language providing that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law*[.]" 22 U.S.C. § 8772(a)(1) (emphasis added). The conspicuous absence in § 8772 of any reference to the Treaty despite the statute's *explicit* abrogation of these other "provision[s] of law" distinguishes this case from *Weinstein*. *See generally Green v. City of New York*, 465 F.3d 65, 79

(2d Cir. 2006) ("[I]n searching for the meaning Congress intended, we consider the context in which a particular word occurs because a statutory term 'gathers meaning from the words around it.'") (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Nor have Plaintiffs rebutted Bank Markazi's showing that the language in *Weinstein* the district court relied on—commencing with "even assuming, *arguendo*"— is *dicta*. *See Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 53 (2d Cir. 2010); *Calderon-Cardona*, 867 F. Supp. 2d at 405 (characterizing the relevant passage in *Weinstein* as *dicta*); *Blakney v. Winters*, No. 04–CV–07912, 2008 WL 4874852, at *8 (N.D. Ill. Aug. 15, 2008) (where "court stated that is [sic] was 'assuming arguendo,' it clearly signaled that portion of its opinion was obiter dicta and the court was not addressing the merits of Petitioner's claim").

B. Turnover of the Assets at Issue to Plaintiffs Pursuant to § 8772 Is Not "Necessary to Protect [the] Essential Security Interests" of the United States Within the Meaning of Art. XX.1(d) of the Treaty.

Plaintiffs contend that § 8772 does not contravene the Treaty of Amity because the Treaty permits the United States to take measures "*necessary* to protect its *essential* security interests." Treaty Art. XX.1(d) (emphasis added). Yet the sole authority Plaintiffs cite for the proposition that turnover to them of the Assets at Issue is "necessary to protect [the] essential security interests" of the

United States, *Paradissiotis v. United States*, 304 F.3d 1271, 1274 (Fed. Cir. 2002), does not support Plaintiffs' argument.

The court in *Paradissiotis* stated that "actions taken for national security reasons *to freeze the assets of*, or *prohibit transactions by*, foreign entities" are generally deemed permissible. *Paradissiotis*, 304 F.3d at 1274 (emphasis added). Yet the *blocking* or freezing of the Assets at Issue under the Executive Order is not at issue in this appeal. Instead, the issue here is whether a statute exclusively targeting assets in which Bank Markazi had an interest *for turnover to Plaintiffs* is "necessary to protect [the] essential security interests" of the United States within the meaning of Article XX.1(d) of the Treaty. Plaintiffs cite no authority for that proposition.

On the contrary, the traditional purpose of blocking regimes was to "permit the President to maintain [the blocked] assets at his disposal" for use "as a 'bargaining chip'" when "negotiating the resolution of a declared national emergency." *Dames & Moore v. Regan*, 453 U.S. 654, 656 (1981). Yet § 8772 prohibits the President from using the Assets at Issue for any such purpose by providing that those assets are subject to turnover "*whether or not* [they are] subsequently unblocked." § 8772(a)(1)(B) (emphasis added). As former President Clinton stated in connection with his waiver of FSIA § 1610(f)(1), an earlier provision providing for the distribution of blocked assets to judgment creditors,

such provisions affirmatively "*impede* the ability of the President to conduct foreign policy in the interest of national security." Presidential Determination No. 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000) (emphasis added).

III. § 8772 Constitutes an Invalid Legislative Act of Adjudication under Article III of the Constitution.

Plaintiffs have failed to rebut Bank Markazi's showing that § 8772 "usurp[s] the adjudicative function assigned to the federal courts under Article III." *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993). The statute's overtly stated and plainly intended purpose is to determine *all* of the issues in this litigation in Plaintiffs' favor. *See* Bank Markazi Br. at 50-52. That the statute nominally required the district court to make two formal "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs is of no practical (or legal) significance because Congress carefully crafted the required "determinations" to guarantee its desired result. *See* Bank Markazi Br. at 53-54.

Indeed, Plaintiffs tacitly admit that that they can conceive of no plausible scenario in which they would not have prevailed in the court below given the plain wording of § 8772 (assuming the statute were deemed to be Constitutional and to override the Treaty of Amity, as the district court erroneously found). Instead, their principal argument derives from the unremarkable proposition that "if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment." Pls.' Br. at 11 (quoting *Nat'l*

Juvenile Law Center, Inc. v. Regnery, 738 F.2d 455, 465 (D.C. Cir. 1984)). Because Congress in § 8772 changed the law during the pendency of this case, Plaintiffs contend, no further inquiry into the constitutionality of the statute is required (or permitted).

Yet the truism that the legislative branch may change existing law as it deems fit within Constitutional bounds, and that new legislation routinely impacts pending cases, plainly is not dispositive of the issue presented here. Instead, the controlling Constitutional principle is that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *Klein*, 80 U.S. at 146. Plaintiffs do not contest this rule, yet they claim that "[u]nlike *Klein*, this case involves no Congressional dictate that the courts reach a particular conclusion." Pls.' Br. at 15.

At least implicitly, Plaintiffs thus acknowledge that Congress could not have Constitutionally required the district court in this case to find that "Iran" (defined to include Bank Markazi) "holds equitable title to, or a beneficial interest in" the Assets at Issue. Indeed, such a provision would be akin to the following, hypothetical statute the Solicitor General used to illustrate the pertinent Constitutional issue in *Robertson*: "If Congress . . . enacted legislation providing that, 'In the case of George Jones v. Secretary of Health & Human Services, the court shall find that George Jones owns a yacht,' a serious Article III problem

would be presented because Congress, by specifying a factual finding from the evidentiary record in a particular case, would be invading the court's adjudicative function." Brief for Petitioners at 36 n.35, *Robertson v. Seattle Audubon Soc'y*, No. 90-1596 (U.S. Aug. 27, 1991), 1991 WL 521288.

Yet in § 8772, Congress achieved precisely the same result—effectively compelling the district court to make a factual finding that "Iran" (defined to include Bank Markazi) holds "equitable title to, or the beneficial interest in" the Assets at Issue—by commanding it to exclude from consideration any interest of Clearstream, the only *other* party that vigorously (and for years) had asserted an interest in those assets.[7] *See* 22 U.S.C. § 8772(a)(2) (requiring the court to determine whether "a person *other than* Iran holds . . . equitable title to, or a beneficial interest in, the [Assets at Issue] (*excluding a custodial interest of a foreign securities intermediary* . . . that holds the assets abroad for the benefit of Iran)") (emphasis added).

Under *Klein*, the fact that Congress in § 8772 opted to "prescribe rules of decision" *indirectly*—through careful wording of the required "determinations" such that there could be only one possible outcome—rather than *directly* prescribing such rules of decision is a distinction without a difference. What

[7] *See* Clearstream's Consol. Mem. (A-Vol.VI-1568,78); Clearstream's Supp. Mem. (A-XXI-6011).

matters, instead, is that Congress in § 8772 compelled the district court's ultimate determination of the factual and legal issues in this case in Plaintiffs' favor. That the district court may have had to go through the motions of "judicial fact-finding and legal interpretation" (Pls.' Br. at 16) cannot cure the statute's Constitutional infirmity because Congress preordained the result. *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371, 389, 405 (1980) (statute providing for *de novo* review by the Court of Claims of an existing judgment was constitutional under *Klein* where "Congress made no effort . . . to control the Court of Claims' ultimate decision of [the underlying] claim"); *accord. Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (statute deeming compliance with two new provisions equivalent to compliance with five provisions under prior law was constitutional where it contained "nothing . . . that purported to direct any particular findings of fact *or applications of law, old or new, to fact*") (emphasis added);[8] *Axel Johnson*, 6 F.3d at 82 (statute that merely "changed [a] rule of law by establishing a different

[8] The *Robertson* Court expressly declined on procedural grounds to address whether "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 a particular case. *Id.* at 441. In *Robertson*, this issue was raised only in an *amicus* brief but "was neither raised below nor squarely addressed by the Court of Appeals, nor was it advanced . . . in this Court." *Id.*

limitations period for certain [securities fraud] cases" did not violate separation of powers).

Finally, Plaintiffs contend that the title of § 8772(a)(2), "Court determination required," somehow "underscores the important fact-finding role that Congress reserved for the courts." Pls.' Br. at 12. Yet "the title of a statute and the heading of a section" are merely "'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). Here, no "doubt" or ambiguity exists concerning the meaning of § 8772. Instead, the statutory text makes clear that any token "fact-finding role" Congress "reserved for the courts" in § 8772 is confined to a just a few carefully-circumscribed questions in order "to ensure that" the courts would arrive at Congress's desired result—the turnover of the Assets at Issue to Plaintiffs.

IV. The Retroactive Application of § 8772 to Award Turnover of the Assets at Issue Violates the Fifth Amendment's Takings Clause.

Plaintiffs' argument that *Weinstein* "defeats" Bank Markazi's showing that the application of § 8772 to award turnover of the Assets at Issue to Plaintiffs effects a taking ignores the significant retroactivity concerns present in this case that did not exist in *Weinstein*. *See* Pls.' Br. at 24-25. The Supreme Court has emphasized that "retroactive statutes raise particular concerns," including with respect to the Takings Clause. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266

(1994). Indeed, the legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* This concern is heightened in the case of § 8772 and TRIA § 201, which—as Plaintiffs acknowledge—are designed not only to facilitate attachment and execution by judgment creditors, but also to *punish* the targeted entities. *See* Pls.' Br. at 26-27 (arguing that "*punishing* terrorist entities" constitutes a valid public purpose under TRIA § 201) (emphasis added) (citing *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012)).[9]

As demonstrated in Bank Markazi's opening brief, Plaintiffs' restraint of the Assets at Issue here was improper to begin with. *See* Bank Markazi Br. at 25-26, 56-57. Yet despite Clearstream's efforts to lift the restraints, litigation in the district court dragged on for over three and a half years before the Assets at Issue eventually were blocked in February 2012.[10] Once blocked, Plaintiffs successfully

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[9] This element of punishment distinguishes turnover pursuant to § 8772 and TRIA § 201 from an ordinary award of compensatory damages, which typically would not be deemed punitive in nature. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

[10] Plaintiffs' attempt to fault Bank Markazi for not *independently* moving to vacate the restraints is meritless. *See* Pls.' Br. at 31. Plaintiffs did not commence their turnover action against Bank Markazi until June 2010. (A-Vol.V-1214-15). When it first appeared in the turnover action in the spring of 2011, Bank Markazi indicated its understanding that Clearstream's

lobbied Congress to enact new legislation retroactively legalizing their restraints and compelling distribution of the Assets at Issue to them.

Unlike this case, the facts in *Weinstein* implicated no such retroactivity concerns. In *Weinstein*, judgment creditors of Iran sought to attach certain real property of Bank Melli (a state-owned Iranian bank) in 2007, *after* Bank Melli's assets were blocked in 2005. *See Weinstein*, 609 F.3d at 46-47.[11] The *Weinstein* Court specifically relied on the fact that Bank Melli "had clear notice from the TRIA, *enacted five years earlier*, that such actions could result in the designation and blocking of its assets under the TRIA, which could in turn subject them to attachment." *Id.* at 54 (emphasis added). Yet here, Bank Markazi plainly lacked any comparable notice in 2008 that § 8772—a statute enacted *more than four years later* in August 2012—would provide a basis for turnover of the Assets at Issue to Plaintiffs after those assets were blocked in February 2012.

Plaintiffs gloss over this critical distinction between this case and *Weinstein* and ignore the absence of any "set formula" for determining when a particular

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motion to vacate the restraints "[wa]s now fully briefed and await[ed] a decision" by the court below. (A-Vol.V-1229). Under those circumstances, a further motion by Bank Markazi would have been wholly duplicative of Clearstream's existing motion.

[11] The district court in *Weinstein* previously had rejected the judgment creditors' attempt to attach other assets of Bank Melli *before* they were blocked. *See Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 76 (E.D.N.Y. 2004).

statute effects a taking in violation of the Takings Clause. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citation omitted). On the contrary, a Takings Clause analysis requires "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

For at least two reasons, the *Penn Central* factors[12] militate against the retroactive legalization of Plaintiffs' restraints here. *First,* the two Federal Circuit cases Plaintiffs cite in opposition do not support their argument that "the character of the government action" at issue here is "unassailable." Pls.' Br. at 26 (citation omitted). *Paradissiotis*, 304 F.3d at 1272, and *Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988), both addressed the *freezing or blocking* of assets under applicable U.S. sanctions—not the *turnover* of assets to judgment creditors. Hence, those cases provide no support for the application of § 8772 to award the Assets at Issue to Plaintiffs here. *See* discussion in Section II.B, *supra*, in connection with the Treaty of Amity.

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12 The *Penn Central* factors are: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 225 (quotations omitted) (citing *Penn Central Transportation Co.*, 438 U.S. at 124).

Second, Plaintiffs do not (and cannot) contest Bank Markazi's showing that the relevant point in time to determine the Bank's "investment-backed expectations" was when the Assets at Issue were first restrained in 2008—not after they were blocked in 2012.[13] *See* Bank Markazi Br. at 56-57. Yet Plaintiffs argue that Bank Markazi "could not reasonably expect in 2008 that Congress would permit Iran's central bank to benefit from American investments indefinitely" given the existing U.S. restrictions on the processing of payments at that time. Pls.' Br. at 28. Yet those existing restrictions were not remotely comparable to Plaintiffs' *execution* against the Assets at Issue that § 8772 authorized years later. Indeed, the turnover of assets in which a foreign central bank has an interest relating to an investment of its foreign currency reserves to judgment creditors of its parent state was (and is) without precedent, and Bank Markazi as of 2008 had *no reason* to expect or anticipate the enactment of such legislation. *See, e.g., Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan,* 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) ("If the funds at issue are used for central bank functions

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13 Instead, Plaintiffs' position is that Bank Markazi's expectations as of 2008 became irrelevant once the Assets at Issue were blocked years later in 2012. *See* Pls.' Br. at 31. That argument fails because it is premised on the same erroneous reading of *Elahi* previously rebutted above in connection with the requirement of ownership under TRIA § 201. *See* discussion *supra* at p. 10.

as these are normally understood, then they are immune from attachment, even if used for commercial purposes.").

V. Bank Markazi's Objection That the District Court Lacked Subject Matter Jurisdiction to Issue its Extraterritorial Injunction Could Never Be Waived, and Plaintiffs Lack Standing to Defend That Injunction Before This Court.

Plaintiffs' assertion that Bank Markazi should be deemed to have waived its objection to the district court's sweeping extraterritorial Injunction is quickly dispensed with because "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012) (an objection based on lack of subject matter jurisdiction "may be resurrected at any point in the litigation"). Indeed, Bank Markazi could raise this objection for the first time in this appeal even if it had never raised it *at all* in the court below. *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court."). This Court's review of whether the district court had subject matter jurisdiction to issue the Injunction is *de novo* (and not for "abuse of discretion" as Plaintiffs erroneously contend; *see* Pls.' Br. at 11). *E.g.*, *Velez v. Sanchez*, 693 F.3d 308, 314 (2d Cir. 2012) ("[W]e review questions of subject matter jurisdiction *de novo*.") (internal quotation and citation omitted).

Moreover, Plaintiffs lack Article III standing to contest Bank Markazi's showing that the district court had no authority to issue the Injunction purporting to

enjoin Bank Markazi from asserting its property rights against Clearstream in Luxembourg. The only party that might have had standing to do so—Clearstream—has chosen not to pursue an appeal. "To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).[14] Plaintiffs cannot meet this most elemental requirement of standing here.

Assuming *arguendo* that this Court were to affirm the district court's Partial Final Judgment in every respect *other than* the Injunction, Plaintiffs would suffer no injury whatsoever. Their only interest in this appeal concerns their ability to execute upon the Assets at Issue in New York. Bank Markazi's ability to assert its rights against Clearstream in Luxembourg, by contrast, is of no genuine concern to them. Indeed, the Injunction was included in paragraph 13 of the Partial Final Judgment solely at Clearstream's request (A-Vol.IV-1036,38,50) and *was not even part* of Plaintiffs' original proposed judgment (A-Vol.IV-975-76). As Clearstream's counsel indicated at the same hearing Plaintiffs cite in opposition,

[14] In *Lujan*, 504 U.S. 555, the Supreme Court laid out the "irreducible constitutional minimum of standing" as follows: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at 560-61.

"what this whole order [*i.e.*, the Partial Final Judgment] relates to" are "the assets that have been deposited by Citibank into the QSF [*i.e.*, the Qualified Settlement Fund]." S.D.N.Y. Dkt. # 466 at 21; *see also id.* at 23 (Clearstream's counsel stating that the "funds being deposited by Citibank [are] the funds that are at issue in this order"). Yet the Injunction *does not* pertain to those assets, but instead is directed at Bank Markazi's property rights vis-à-vis Clearstream *in Luxembourg*.

Even were the Court to consider them, Plaintiffs' remaining arguments fail for the following reasons. *First,* Plaintiffs do not contest (and thus concede) that no provision of the FSIA conferred subject matter jurisdiction on the district court to issue the Injunction purporting to enjoin Bank Markazi from asserting its property rights against Clearstream outside the United States. *See* Bank Markazi Br. at 58-59.

Second, Plaintiffs' argument that the incorporation of the U.C.C.'s definition of "financial asset" in § 8772(d)(2) somehow conferred subject matter jurisdiction to issue the Injunction ignores the important statutory proviso "*[a]s context requires.*" *See* U.C.C. § 8-102(a)(9)(ii) ("*As context requires,* the term ["financial asset"] means *either* the interest itself *or* the means by which a person's claim to it is evidenced, including . . . a security entitlement.") (emphasis added). Yet the only "context" in which § 8772 refers to Bank Markazi's security entitlements vis-à-vis Clearstream is *to distinguish them* from the Assets at Issue held in New York.

See 22 U.S.C. § 8772(a)(1)(C) (recognizing that the Assets at Issue are "equal in value to"—yet distinct from—the "financial asset[s] of Iran" (defined to include Bank Markazi) that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad*.") (emphasis added). Plainly, therefore, the statute does not treat the Assets at Issue and Bank Markazi's security entitlements vis-à-vis Clearstream as "one and the same" as Plaintiffs erroneously contend. *See* Pls.' Br. at 63.

Third, § 8772's purported "purpose of sanctioning Iran" (Pls.' Br. at 62) cannot create subject matter jurisdiction where none otherwise exists. "[C]ourts are not to infer a grant of jurisdiction absent a clear legislative mandate." *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983) (declining to construe a statute "as *sub silentio* conferring jurisdiction"). § 8772 contains no such "clear legislative mandate."

Fourth, it is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2873 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). No such intent appears in the text of § 8772. Consequently, where, as here, "a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

Fifth—and finally, Plaintiffs' argument that the district court had inherent authority to issue the Injunction as a means of protecting its discharge of Clearstream fails because the Injunction does not meet the requirement that "resolution of the case before the enjoining court [must be] *dispositive of* the action to be enjoined." *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (emphasis added). Plainly, the district court's award of the Assets at Issue to the Qualified Settlement Fund established for Plaintiffs' benefit is not "dispositive of" Bank Markazi's rights against Clearstream in Luxembourg. Moreover, this Court in *China Trade* cautioned that "an anti-foreign-suit injunction should be used sparingly and should be granted only with care and great restraint." *Id.* at 36 (internal citation and quotations omitted).

CONCLUSION

For the reasons set forth herein, the District Court's Partial Final Judgment should be reversed.

Dated: New York, New York
February 18, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI, AKA CENTRAL BANK OF IRAN, BANCA UBAE SPA, CLEARSTREAM BANKING, S.A., JP MORGAN CHASE BANK, N.A.,

Defendants-Appellees.

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PRELIMINARY STATEMENT

The decision appealed from should be affirmed because the assets sought by the plaintiffs-appellants are in Luxembourg, not New York. As a result, turnover is not an available remedy in the case, and the Foreign Sovereign Immunities Act does not allow for attachment of property of a sovereign, or an agency or instrumentality of a sovereign, located outside the United States.

This brief is submitted on behalf of defendant-appellee Bank Markazi ("Bank Markazi"), the Central Bank of Iran, in opposition to the appeal of plaintiffs-appellants (collectively, the "Petersons")[1] from the final judgment of the United States District Court for the Southern District of New York (Hon. Katherine B. Forrest) (the "District Court") entered on February 27, 2015 (the "Judgment"). (SPA 24.) As more fully set forth in the Opinion and Order of the District Court dated February 19, 2015 (the "Decision"), the Judgment, among other things, granted Bank Markazi's motion, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the Petersons' Amended Complaint dated April 25, 2014 (the "Amended Complaint") due to a lack of subject matter jurisdiction over Bank Markazi because the assets the Petersons seek to obtain are not located in the

[1] A complete list of the parties who comprise the Petersons is at CA 679-681 and CA 734-748. Citations to the Confidential Joint Appendix are to "(CA __.);" citations to the Joint Appendix are to "(JA __.);" citations to the Special Appendix are to "(SPA __.);" and citations to the Main Brief for Plaintiffs-Appellants dated June 1, 2015 are to "(Petersons' Br. __.)."

United States. *Peterson v. Islamic Republic of Iran*, No. 13 Civ. 9195, 2015 WL 731221, at *10 (S.D.N.Y. Feb. 20, 2015). (SPA 21-22.)

The Petersons hold unsatisfied default judgments against the Islamic Republic of Iran and the Iranian Ministry of Information and Security. (CA 670-71). Bank Markazi is not alleged to have been involved in any manner whatsoever in the alleged acts giving rise to the default judgments. The Petersons initiated the instant action in the District Court to try to obtain the turnover of certain assets (the "Luxembourg Assets"), claimed by the Petersons to be beneficially owned by Bank Markazi, to satisfy part of the default judgments. (CA 670-71.) The Petersons alleged that the Luxembourg Assets are held in Luxembourg by defendant-appellee Banca UBAE S.p.A. ("UBAE"), an Italian bank, for the benefit of Bank Markazi, at defendant-appellee Clearstream Banking S.A. ("Clearstream"), a Luxembourg bank. (CA 687, 711.)

Because the Luxembourg Assets are located in Luxembourg, any interest that Bank Markazi has in them is categorically immune from execution under U.S. law, and the Judgment dismissing the case below for lack of subject-matter jurisdiction over Bank Markazi should be affirmed in all respects.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court correctly ruled that it lacked subject matter jurisdiction over Bank Markazi, the Central Bank of Iran and an instrumentality of a sovereign state, where the assets the Petersons sought to obtain are located outside of the United States.

2. Whether the District Court correctly ruled that a settlement agreement between the Petersons and UBAE, which also included the "beneficiaries" of UBAE, released the claims asserted in the Amended Complaint against Bank Markazi, a beneficiary of UBAE.

STATEMENT OF THE CASE

This appeal marks the second time this Court has been called upon to review a decision by the District Court involving assets allegedly owned by Bank Markazi that the Petersons have sought in order to satisfy their default judgments. The two cases are, however, completely different.

A. *Peterson I*

The Petersons' first action was *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (KBF) (S.D.N.Y.) ("*Peterson I*"). There, the Petersons targeted assets allegedly held in an account at Citibank, N.A. in New York City that, under ordinary legal principles, would not have been attachable. However, the Petersons persuaded Congress to enact a statute to dictate a contrary result in that one case:

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).[2] Relying on that statute, the District Court granted the Petersons' turnover petition with respect to those assets. *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at *2, 23 (S.D.N.Y. Mar. 13, 2013), *aff'd*, 758 F.3d 185 (2d Cir. 2014).

After the Petersons reached settlements of *Peterson I* with Clearstream and UBAE, Bank Markazi appealed the District Court's decision to this Court, and this Court affirmed. *Peterson v. Islamic Republic of Iran*, 758 F. 3d 185 (2d Cir. 2014). The Court acknowledged Bank Markazi's arguments that the assets at issue were not "assets of" Bank Markazi, and that, even if they were, they were protected by central bank immunity. *Id*. at 189. The Court declined to reach those issues, however, explaining that "Congress has changed the law governing this case by enacting 22 U.S.C. § 8772" (*id.*), and it affirmed the District Court based solely on the application of that statute to the case. *Id*.

Bank Markazi then filed a petition for certiorari with the Supreme Court, *Peterson*, 758 F.3d 185 (2d Cir. 2014), *petition for cert. filed*, 83 U.S.L.W 3587 (U.S. Dec. 29, 2014) (No. 14-770), and the Supreme Court requested the Solicitor General to "file a brief in this case expressing the views of the United States."

[2] 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 (BSG) (GWG) . . . ." 22 U.S.C. § 8772(b).

Bank Markazi v. Peterson, 135 S. Ct. 1753 (2015). The Justice Department filed its invitation brief on August 19, 2015, and Bank Markazi's response is due by September 1, 2015.

Unlike *Peterson I*, however, the instant case involves *no assets in New York*, thus depriving the District Court of subject matter jurisdiction over this case, and 22 U.S.C. § 8772 has *no application* to this case.

B. ***Peterson II***

The Petersons commenced this case, *Peterson II*, in December 2013, seeking to obtain the turnover of assets different from those involved in *Peterson I*. (CA 3.) The Petersons allege that the assets involved in this case, *i.e.*, the Luxembourg Assets, are some $1.6 billion of "proceeds" of security entitlements owned by Bank Markazi. (CA 671.) These security entitlements arise out of the purchase by Clearstream – in Clearstream's own name – of certain bonds in Europe, using funds supplied by Bank Markazi and many others. (CA 1973, 1975; JA 129.)

The bonds were issued by foreign issuers such as the Kingdom of Sweden and the European Investment Bank. (CA 701, 752.) Each bond is represented by a single global note, and Clearstream's security entitlements in the bonds are held by Clearstream outside the United States ("Clearstream's Offshore Security Entitlements"). (CA 123, 818, 1973.) The investors in the bonds hold their interests in the bonds through a securities intermediary, *i.e.*, Clearstream in

Luxembourg. (CA 123, 818.) Bank Markazi held its own security entitlements to those bonds in a Clearstream securities account in the name of Bank Markazi (and beginning in January, 2008 in the name of UBAE) in Luxembourg. (CA 118, 1975.)

The bonds involved in this case were issued in U.S. dollar denominations and therefore required the payment of interest and principal to be processed through a bank in the United States. (CA 805, 818; JA 129) For example, the prospectus for one of the 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 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 . . . .

(CA 819.)

C. The JPMorgan Account

Clearstream acts as a securities intermediary in Luxembourg for its customers, but it does not act as a securities intermediary in the United States, nor does it have a bank branch in the United States. (CA 1973.) Clearstream therefore uses (and has for more than 25 years) a cash operating account (the

"JPMorgan Account") at defendant-appellee JPMorgan Chase Bank N.A. ("JPMorgan") in New York for the various types of U.S. dollar payments that are made to Clearstream. (CA 1863, 1973.) Included among such payments to Clearstream were the payments of principal and interest on Clearstream's Offshore Security Entitlements. (CA 1863, 1973.)

The JPMorgan Account is in the name of Clearstream. (CA 1973, 2537.) No security entitlements are held in that account, and no assets of any customer of Clearstream's are held, or have ever been held, in that account. (CA 1973, 2537-39.) Deposits made to the account are credited by JPMorgan to the account, and the obligations created by such credits to the account are booked as assets of Clearstream on Clearstream's balance sheet. (CA 1973). The account is used by Clearstream to pay Clearstream's then-current U.S. dollar obligations of whatever nature, and each business day some $7-9 billion dollars flows into and out of the JPMorgan Account, without any necessary relationship between the source of the deposits made to the account and the uses to which the deposits are put. (CA 1973).

When Clearstream receives a payment in the JPMorgan Account that relates to Clearstream's own security entitlements in Luxembourg, such as Clearstream's Offshore Security Entitlements, Clearstream credits the account(s) of any Clearstream customer(s) in Luxembourg holding a security entitlement(s) against

Clearstream relating to the corresponding security. (CA 1974, 1864.) No transfer of cash is made from the JPMorgan Account to any customer account at Clearstream in Luxembourg. (CA 1974, 1864.) Clearstream simply makes a simultaneous book entry on its records in Luxembourg. (CA 1974, 2375; JA 93.)

D. The Payments Made by the Issuers of the Bonds Are Not in the United States

Between March 2008 and October 2012, the issuers of the bonds here at issue made principal and interest payments on the bonds owned by Clearstream to Clearstream's JPMorgan Account. (CA 1864, 2540; JA 129.) Upon Clearstream's receipt in the JPMorgan Account of the various credits for those bond payments, Clearstream was obligated to, and did, credit the customer accounts in Luxembourg for the appropriate corresponding security entitlements held by Clearstream's customer(s) in Luxembourg. (CA 806, 820, 1974, 2375; JA 129.)

The Petersons allege that Bank Markazi held, in its security account at Clearstream in Luxembourg, security entitlements corresponding to some of Clearstream's Offshore Security Entitlements, and that Bank Markazi transferred such securities, or their proceeds, to a UBAE account at Clearstream in Luxembourg. (CA 679, 683-84, 812). The Petersons further allege that when payments were received in the JPMorgan Account in connection with Clearstream's Offshore Security Entitlements, JPMorgan was obligated to

Clearstream, Clearstream was obligated to UBAE, and UBAE was obligated to Bank Markazi. (CA 726). And the Petersons repeatedly acknowledge that Clearstream credited *all* such obligations to a blocked account *in Luxembourg*, in the name of UBAE, from which UBAE may not make any withdrawals:

> Beginning in June, 2008, Clearstream opened a sundry blocked account number 13675 [in Luxembourg; the "Sundry Account"] to which Clearstream diverted and credited payments of interest and redemptions on the bonds in the amounts and on the dates set forth in the schedule annexed hereto as Exhibit D. Since June, 2008, Clearstream has not credited any of these amounts to the UBAE/Markazi Account [in Luxembourg], and UBAE and Markazi have no access to the funds held in [the blocked, Sundry A]ccount number 13675.

(CA 686.)

As a result, and as shown below, the Petersons have repeatedly asserted that the assets at issue in this case are located *in Luxembourg*:

> • [T]he bonds constituting the [assets here at issue] have matured and Clearstream continues to hold a credit representing their cash proceeds frozen in [the Sundry Account *in Luxembourg*], having a balance of $[1.6 billion] as of May 31, 2013.

(CA 687 (emphasis added).)

> • By the time that [the Petersons] served their restraining notices and caused the First Execution to be served in June 2008, *the UBAE/Markazi Account* that [Iran, Bank Markazi, and UBAE] agreed to establish *at Clearstream held . . . the Remaining Assets* that [Iran, Bank Markazi, and UBAE] transferred into that account from Markazi's own Clearstream account in February 2008.

(CA 711 (emphasis added).)

- We didn't know at the time that they had . . . take[n] an asset that was here in the U.S. and *ship[ped] it abroad*."

(JA 103 (emphasis added).)

- But the reality is . . . they took this money and received it into this [JPMorgan A]ccount 60 times for $1.67 billion and *they sent it abroad*.

(JA 104 (emphasis added).)

- They took these 60 payments . . . and they *let them leave the jurisdiction.*

(JA 104-5 (emphasis added).)

- When the 60 payments for $1.68 billion came through the largest bank in the country . . . *[t]hey shipped it abroad.* (JA 110.) (Emphasis added.)

The District Court agreed that the Luxembourg Assets are *in Luxembourg*:

- Thereafter, Clearstream credited the 13675 account [*i.e.*, the Sundry Account, which is in Luxembourg] with proceeds relating to the Remaining Bonds—totaling $1,683,184,679.47 as of May 2013.

Peterson, 2015 WL 731221, at *3. (SPA 7.)

- [JPMorgan, "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*.

Id. at *6. (Emphasis added) (SPA 14.)

- 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*.

Id. at *9. (Emphasis added) (SPA 21.)

> • Bank Markazi . . . 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*.

Id. (Emphasis added) (SPA 21.)

E. The JPMorgan Account Holds No Assets Belonging to Bank Markazi

Clearstream's JPMorgan Account today holds no assets that are the property of Bank Markazi, even if one assumes (wrongly) that the bond proceeds credited to that account were owned by Bank Markazi. (CA 1975, 1865, 2540.) Those proceeds have long since left the JPMorgan Account and are no longer maintained at JPMorgan. (CA 1865, 2540.) Instead the credits for those proceeds reside in Luxembourg, as admitted by the Petersons in their above assertions.

That the payments made to the JPMorgan Account by the issuers of the bonds are no longer in that account is also demonstrated by the fact that the balance in that account started and ended most business days at or near $0 during the period in which the principal and interest payments comprising the bonds were made, and the account even had negative balances on various days during and after the end of that period. (CA 1973-74, 1865, 2540.) The proceeds of the bonds

were thus transferred out of the account, usually on or immediately after the days on which payments of the proceeds of the bonds were received. (CA 1865, 2540.) Those bond proceeds are all currently maintained by Clearstream in the blocked Sundry Account in Luxembourg. (CA 1976, 1865.)

In this regard, the District Court correctly found that:

> • [A]pproximately $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 in the same manner.

Peterson, 2015 WL 731221, at *2. (SPA 5.)

> • Since the Remaining Assets are *no longer in this district*, turnover is not an available remedy.

Id. at *4. (Emphasis added) (SPA 9.)

> • The JPM records are clear that whatever happened to the proceeds, *they are gone*.

Id. at *6. (Emphasis added) (SPA 14.)

> • JPM has proffered records which make it clear that it has no assets in which Bank Markazi has an interest. . . . Indeed, in their complaint, plaintiffs acknowledge this fact in all practical respects by referring to the fact that Clearstream credited the 13675 account [in Luxembourg] with the Remaining Assets.

Id. at 10. (SPA 22.)

> • As matters stand now, *there is simply nothing for JPM to turn over*.

Id. (Emphasis added)

F. Bank Markazi Had No Property Interest in Assets in the JPMorgan Account

Despite the Petersons' various assertions to the contrary, Bank Markazi did *not* contend in this action that it "owns the Bond Proceeds"[3] (Petersons' Br. at 16) or "beneficially owned the Bond Proceeds" (Petersons' Br. at 44). In fact, what Bank Markazi asserted below was that "only Clearstream has or had a property interest in the JPMorgan [A]ccount" (Mem. of Law in Supp. of Bank Markazi's Mot. to Dismiss the Am. Compl., dated August 29, 2014, at 4, *Peterson v. Islamic Republic of Iran*, No. 13 Civ. 9195) and "Bank Markazi is not the owner of the funds in Clearstream's account at JPMorgan." *Id.* at 12, n.9.

The Petersons' above assertions about Bank Markazi refer to statements made by and on behalf of the Bank in *Peterson I*, not this case, *Peterson II*. The assets at issue in *Peterson I* were alleged to be credits in an account of Clearstream's at Citibank in New York City that had been restrained as a result of a restraining notice served on Citibank. *See Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at *2 (S.D.N.Y. Mar. 13, 2013), *aff'd*, 758 F.3d 185 (2d Cir. 2014). Bank Markazi, in an early motion to dismiss *Peterson I* – based on the assets of an agency or instrumentality of a sovereign being immune

[3] The "Bond Proceeds" are defined by the Petersons as the $1.68 billion of interest and principal paid by the issuers of Clearstream's bonds in *Peterson II* to Clearstream's JPMorgan Account. (Petersons' Br. at 1, 10.)

from attachment – contended that the restrained assets in Clearstream's account at Citibank belonged to Bank Markazi.[4] This was an imprecise analysis of the legal relationships among the parties in *Peterson I* which was clarified in a latter memorandum Clearstream submitted in *Peterson I*. (Clearstream Banking, S.A.'s Consolidated Mem. of Law in Supp. of its Renewed Mot. to Vacate Restraints, *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (BSJ) (S.D.N. Y. Dec. 22, 2011), filed under seal.)

Clearstream demonstrated in *Peterson I* that Bank Markazi's rights in its security entitlements in Luxembourg simply do not extend to Clearstream's account with Citibank, and that the rights in Clearstream's account are Clearstream's, not Bank Markazi's. Bank Markazi's rights and entitlements are instead located, not in New York, but in Luxembourg where Bank Markazi's securities account with Clearstream is located. *Id.* at 6-7. Bank Markazi subsequently agreed with and adopted this more precise analysis in *Peterson I*, noting:

> Both under New York law (including Article 8 of the UCC) and Luxembourg law, no property interest *of Bank Markazi* exists in the United States. And Bank Markazi's property interest in Luxembourg is not attachable in any event under the FSIA, which contains no

[4] *See* Def. Bank Markazi's Mem. of Law in Supp. of its Mot. to Dismiss the Am. Compl. for Lack of Subject Matter Jurisdiction, at, *e.g.*, 1, *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, (BSJ) (S.D.N.Y. May 11, 2011), filed under seal; and an affidavit of Bank Markazi personnel submitted in *Peterson I*, included in an appendix to this appeal at CA 422-32.

> exception to immunity for the property of a sovereign party located outside the United States.

(Def. Bank Markazi's Mem. of Law in Supp. of its Mot. to Dismiss the Second Am. Compl., at 11-12, *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (BSJ) (S.D.N.Y. Mar. 15, 2012), filed under seal (emphasis in original).)

Resolution of the issue, however, is unnecessary on the Appeal because, as the Petersons acknowledge, and as the District Court found, the funds the Petersons seek in this case are not 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.

Peterson, 2015 WL 731221, at *9. (SPA 21.). The District Court thus lacked subject matter jurisdiction over Bank Markazi.

G. The District Court's Decision Below

By its Decision and Judgment, the District Court, among other things, granted Bank Markazi's motion to dismiss the Amended Complaint for two distinct reasons: (i) the court lacked jurisdiction over a lawsuit involving assets located abroad in which an agency or instrumentality of a sovereign is claimed to have an interest, and (ii) the Petersons released Bank Markazi from the causes of actions asserted by the Petersons pursuant to a settlement agreement (the "UBAE

Settlement Agreement") between UBAE and the Petersons. *Peterson*, 2015 WL 731221, at *10. (SPA 21.)

The District Court held, that because it was not disputed that Bank Markazi is the Central Bank of Iran, the "Court's subject-matter jurisdiction must be found within the FSIA," and "the FSIA does not allow for attachment of property outside the United States." *Id.* As noted, the District Court also made the factual determination that the Luxembourg Assets were located in Luxembourg:

> Bank Markazi . . . 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.

Id. The District Court then correctly held that it lacked subject matter jurisdiction over Bank Markazi and that it may "not entertain the instant claims against Bank Markazi." *Id.* at *10. (SPA 22.)

The District Court also held that the UBAE Settlement Agreement between the Petersons and UBAE released Bank Markazi from the claims asserted against Bank Markazi below. *Id.* at *10. (SPA 21.) Specifically, the District Court cited the UBAE Settlement which provides that the Petersons release:

> UBAE and all of its past, present, and future . . . beneficiaries . . . from any and all liability, 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. at *9. (SPA 19.) The District Court noted there "is no dispute" that Bank Markazi is 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.").)

Id. Therefore, the court held, "the release encompasses Bank Markazi to the same extent that it does UBAE." *Id.*

SUMMARY OF THE ARGUMENT

The Petersons seek to obtain the Luxembourg Assets in order to execute on default judgments they obtained against the Islamic Republic of Iran and the Iranian Ministry of Information and Security. The Petersons allege that the Luxembourg Assets are held by UBAE, an Italian bank, for the benefit of Bank Markazi, at Clearstream in Luxembourg. The Luxembourg Assets are thus not in New York – they are in Luxembourg – and they are therefore immune from execution under U.S. law.

Even if the Luxembourg Assets were located in the United States, in Clearstream's cash account at JPMorgan, and not in Luxembourg, they would still not be attachable. This is because the Luxembourg Assets would not be assets of Bank Markazi, they instead would belong to Clearstream.

In addition, Bank Markazi is the Central Bank of Iran and enjoys all of the benefits that the Foreign Sovereign Immunity Act grants to foreign sovereigns, and their agencies, instrumentalities, and central banks. As such, Bank Markazi is immune from suit in this matter.[5]

STANDARD OF REVIEW ON APPEAL

This Court reviews the dismissal of a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) *de novo* and any factual findings for clear error. *Scherman v. New York State Banking Dep't*, 443 F. App'x 600, 601 (2d Cir. 2011); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

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[5] As noted, *supra* at 16-17, the District Court also held that the UBAE Settlement Agreement released Bank Markazi from the claims asserted against it. *Peterson*, 2015 WL 731221, at *9. (SPA 19.) The Petersons dispute this determination, citing specific language of the UBAE Settlement Agreement. (Petersons' Br. at 23-24.)

The UBAE Settlement Agreement, and all documents that reference that agreement, were filed under seal in *Peterson II* and this Appeal, apparently pursuant to the terms of a confidentiality agreement between UBAE and the Petersons. As a result, all references to the UBAE Settlement Agreement and its related documents were redacted in the documents served on Bank Markazi, Clearstream and JPMorgan in *Peterson II* and this Appeal.

Despite good-faith efforts this summer, Bank Markazi has not been able to reach an agreement that would allow it or its counsel to have access to the UBAE Settlement Agreement and related documents. Accordingly, Bank Markazi is not able to comment on the Petersons' contention that the language of the UBAE Settlement Agreement precludes a release of Bank Markazi as announced by Judge Forrest below – other than to say that we strongly doubt Judge Forrest overlooked the language of the UBAE Settlement Agreement relied on by the Petersons.

A claim must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. Rule 12(b)(1) "when the district court lacks the statutory or constitutional power to adjudicate it." *E.g.*, *Makarova* v. *United States*, 201 F .3d 110, 113 (2d Cir. 2000). The Petersons bear the burden of establishing that subject matter jurisdiction exists in this action by a preponderance of the evidence. *Moser v. Pollin*, 294 F.3d 335, 339 (2d Cir. 2002). "When subject matter jurisdiction is challenged, [courts] are free to consider materials extrinsic to the complaint." *Id.*; *see also Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany*, 615 F.3d 97, 105 (2d Cir. 2010) ("Under the FSIA, in the context of a Rule 12(b)(1) motion based on factual insufficiency, a court may look beyond the pleadings, to the evidence properly before it, and assess the substance of the allegations to determine whether one of the exceptions to the FSIA's general exclusion of jurisdiction over foreign sovereigns applies." (internal quotation marks omitted)).

A factual finding constitutes clear error only "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (internal quotations omitted). Under the "clear error standard" this Court "may not reverse a finding even though convinced that had [it] been sitting as the trier of fact [it] would have weighed the

evidence differently." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (internal quotations omitted).

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE ACTION INVOLVING BANK MARKAZI

A. There is No FSIA Exception to Immunity for Property Located Abroad

Prior to enactment of the FSIA in 1976, the traditional view of courts in the United States was that the property of foreign states was absolutely immune from execution. *See, e.g., Stephens v. Nat'l Distillers and Chem. Corp.*, 69 F.3d 1226, 1233–34 (2d Cir. 1995). The FSIA preserves this immunity presumption, albeit with certain specific statutory exceptions. For example, 28 U.S.C. § 1609 provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." As this Court recently noted: "Generally, property of a foreign sovereign is immune from attachment [with certain exceptions]." *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 998 (2d Cir. 2014). In this way, the "FSIA does not create immunities, but rather creates exceptions to pre-existing immunities." *E.g., Fid. Partners, Inc. v. Phil. Exp. and Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1117 (S.D.N.Y. 1996).

The FSIA, however, "creates no exception to immunity for property outside the United States." *Fid. Partners*, 921 F. Supp. at 1118 (internal quotation marks and citation omitted). As a result, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts, and such property is "categorically immune from execution under the FSIA." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011); *EM Ltd.* v. *Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012) (noting that "a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries"); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("[T]he property that is subject to attachment and execution must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued." (emphasis in original)); *Bank of Tokyo-Mitsubishi, UFJ, Ltd. v. Peterson*, No. 12 Civ. 4038, 2012 WL 1963382, at *2 (S.D.N.Y. May 29, 2012) ("[A]ttachment and execution of property that is appurtenant to a foreign state and that is located outside the United States would violate the Foreign Sovereign Immunities Act."); *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715, 2010 WL 768874, at *4 (S.D.N.Y. Mar. 5, 2010) (finding foreign sovereign assets located abroad immune from attachment under the FSIA).

Here, the District Court correctly determined that, because Bank Markazi is the Central Bank of Iran, "the Court's subject matter jurisdiction must be found within the FSIA." *Peterson*, 2015 WL 731221, at *10. (SPA 21.) No such jurisdiction can be found, however, because the Luxembourg Assets are located outside the United States, in the blocked Sundry Account in Luxembourg, where they are immune from attachment. (CA 1975-76, 2376-77.) Accordingly, the District Court correctly held that it lacked subject matter jurisdiction over the action involving Bank Markazi. *Peterson*, 2015 WL 731221, at *10. (SPA 21.)

B. The Exception to Immunity in 28 U.S.C. § 1610 Applies Only to Sovereign Property Located in the United States

The Petersons' attempt (Petersons' Br. at 61-66) to base subject matter jurisdiction on 28 U.S.C. §§ 1610(a)(7) and 1610(g) is erroneous and must fail. Section 1610 permits "attachment arrest and execution" of certain sovereign property, but only certain sovereign property "in the United States." 28 U.S.C. § 1609; 28 U.S.C. § 1610. Unlike the factual setting of *Peterson I*, this case does not involve property "in the United States" nor does 22 U.S.C. § 8772 apply to the Luxembourg Assets. (*See, supra*, at 3-6.) Rather, the District Court repeatedly stated that the Luxembourg Assets are located outside the United States. For example, the District Court found that:

> Bank Markazi . . . 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.

Peterson, 2015 WL 731221, at *10. (SPA 21.) *See also, supra* at 10-12.

Section 1610(a) is specifically limited to sovereign property that is "in the United States," and it has been uniformly interpreted *not* to extend to any property outside the United States. *E.g., Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("[S]ection 1610(a) . . . authorizes execution against property of a foreign state located in the United States only if the property is used for a commercial activity in the United States." (internal quotations omitted)); *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715, 2010 WL 2925072, at *4 (S.D.N.Y. July 23, 2010) (holding that "the resolution of the basic issue of situs disposes of the matter" and thus because the assets were located abroad "they are immune from attachment and execution under the terms of the FSIA"); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) ("[U]nder 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." (internal quotation marks and alterations omitted)).[6]

[6] Similarly, Section 1610(b) – on which the Petersons' relied in their Amended Complaint (CA 674-75), although apparently not on this Appeal – is also expressly limited to property *in the United States*, and it creates no exception to immunity for property located elsewhere. *See Fid. Partners*, 921 F. Supp. at 1119

Nor does 28 U.S.C. 1610(g) provide the Petersons with any valid basis for subject matter jurisdiction in this case. Although that subsection is not explicitly limited to property located "in the United States," the subsection states that the sovereign property there involved is "subject to attachment . . . *as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added). The "section" referred to is Section 1610, which elsewhere requires that attachable sovereign property be "in the United States." Section 1610(g) thus incorporates that requirement.

There is no reasonable basis to conclude that Congress intended to depart from "the long-standing principle that a foreign state's assets outside the United States are absolutely immune from execution to satisfy judgments entered in United States courts . . . ." *Fid. Partners*, 921 F. Supp. at 1118. To conclude otherwise would be inconsistent with the presumption against extraterritorial effect of U.S. statutes, affirmed in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) and *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 259-61, 264-65 (2010).

(holding that 28 U.S.C. § 1610(b) does not extend to property located outside of the United States); *Elliott Assocs., L.P. v. Banco de la Nacion*, No. 96 Civ. 7916, 2000 WL 1449862, at *3 (S.D.N.Y. Sept. 29, 2000) ("Neither party disputes the fact that the FSIA's exception to immunity from attachment – whether for foreign states or their instrumentalities – extends at most to property located 'in the United States.'"); *accord Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750–51 (7th Cir. 2007); *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").

The presumption against extraterritorial effect applies with equal force to the FSIA. *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, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction. *See, e.g.*, *Small v. United States*, 544 U.S. 385, 388–89 (2005) (noting: 'the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application')))." The text of 28 U.S.C. § 1610(g) contains no such "hint" that it is intended to be applied extraterritorially.

Consistent with the narrow territorial scope indicated by the text and legislative history of 28 U.S.C. § 1610(g), courts dealing with 28 U.S.C. § 1610(g) have uniformly interpreted it to apply only to property located in the United States. *See Gates v. Syrian Arab Republic*, 755 F.3d 568, 573 (7th Cir. 2014) (28 U.S.C. § 1610(g) is "a special provision allowing attachment of assets *in the United States* belonging to foreign states and their agencies and instrumentalities to execute judgments based on acts of state-sponsored terrorism." (emphasis added)); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010) (Section 1610(g) lets "judgment creditors… reach any *U.S. property* in which Iran has any interest." (emphasis added)); *Heiser v. Bank of Tokyo Mitsubishi UFJ*, 919

F. Supp. 2d 411, 417 (S.D.N.Y. 2013) (28 U.S.C. § 1610(g) "expand[s] the category of foreign sovereign property that can be attached; judgment creditors can now reach *any U.S. property* in which Iran has any interest." (emphasis added) (internal quotation marks omitted)).

Because the Luxembourg Assets are not "in the United States," Section 1610 of the FSIA does not provide the District with subject matter jurisdiction in the action brought against Bank Markazi.

C. TRIA Did Not Confer Subject Matter Jurisdiction On the District Court for the Action Below

The Petersons also erroneously contend (Petersons' Br. at 35-61) that the District Court had subject matter jurisdiction under the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002), codified at 28 U.S.C. § 1610 Note ("TRIA").

Section 201(a) of TRIA provides in relevant part (emphasis added):

> 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 1605(a)(7) of title 28, United Stated Code, 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 or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA provides only a very limited exception to the immunity of a sovereign's property, *i.e.*, an exception for the "blocked assets of [a] terrorist party [or its agency or instrumentality]" in the United States. Here, however, the Luxembourg Assets are not the assets of Bank Markazi, they are not "blocked assets," they are not in the United States, and they are not in the possession or control of a "United States person" as that phrase is used in TRIA. As a result, TRIA is inapplicable herein.

TRIA is codified as a note to Section 1610 of the FSIA, which applies only to property "in the United States." 28 U.S.C. § 1609. TRIA does not waive the categorical immunity provided to foreign sovereign assets that are located abroad, especially assets of a foreign central bank. Nothing in TRIA or the FSIA suggests that either is intended to apply extraterritorially; therefore, they cannot be interpreted to do so. *Supra*, at 23-26.

i The Luxembourg Assets Were Never "Assets of" Bank Markazi

Most fundamentally, TRIA does not apply to this case because the amounts credited to Clearstream's account at JPMorgan were never the "assets of" Bank Markazi. The word "of" as used in TRIA requires that assets sought to be attached must be owned by the terrorist party or its agency or instrumentality. The Supreme Court has repeatedly observed that the "use of the word 'of' denotes ownership." *E.g., Bd. of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys.*,

Inc., 563 U.S. 776, 131 S.Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)). *See also Stanford*, 131 S. Ct. at 2196 (describing *Flores–Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States" (internal quotation marks omitted)).

Here, the credits in Clearstream's account at JPMorgan belong solely to Clearstream. Bank Markazi has no claim whatsoever to any asset held for Clearstream by JPMorgan. Because nothing in the JPMorgan Account was ever an asset of Bank Markazi's, TRIA cannot be used to attach anything in the Account. [7]

The Complaint alleges that the JPMorgan Account is "in the name of Clearstream" (CA 679), and it goes on to state:

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[7] This argument is equally applicable to 28 U.S.C. § 1610, which also requires that for property in the United States to be attachable it must be the property "of" a foreign state or its agency or instrumentality. 28 U.S.C. § 1610(a); 28 U.S.C. § 1610(b); 28 U.S.C. § 1610(g).

Recently, this Court, in *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014) stated that attachment under 28 U.S.C. § 1610(g) turns on, among other things, whether the blocked asset is the "property of" a foreign state or its agency instrumentality. 770 F.3d at 1000. The Court then reasoned that, in the context of a blocked electronic funds transfer ("EFT"), the only entity with a property interest in the EFT is the entity that immediately passed the EFT to the bank where it was blocked. *Id.* The Court held that unless the foreign state or its agency or instrumentality was the entity that immediately passed the EFT to the bank where it resides, the EFT was not the "property of" the foreign state or its agency or instrumentality. *Id.*

> In accordance with the terms of the bonds, electronic funds transfer payment instructions given by the issuers of the bonds or their agents named Clearstream as the payment beneficiary, *because Clearstream was the named holder of the notes or bonds on the books of the issuer and/or its agent making the payment. As required by the terms of the bonds, such U.S. dollar payment instructions named Clearstream 's correspondent bank in the United States, JP Morgan, as the payment beneficiary's bank.*

(CA 685 (emphasis added).)

This Court reasoned in *Calderon-Cardona*, with respect to 28 U.S.C. § 1610(g):

> In short, Congress provided that "property" of a foreign state [in the United States] is subject to execution, and absent any indication that Congress intended a special definition of the term, "property" interests are ordinarily those created and defined by state law.

770 F.3d at 1001. Applying that to this case, one must look to New York State banking law to determine who has "property" or "assets" in the JPMorgan Account. That issue is well-settled: "[A] bank account . . . consists of nothing more or less than a promise to pay, from the bank to the depositor." *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 21 (1995); *see also Bank of Marin v. England*, 385 U.S. 99, l0l (1966). JPMorgan's promise is to pay Clearstream and no one else. *See NML Capital, Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 192 (2d Cir. 2011) ("[T]he best, if not the only, way in which the possession of a chose in action – such as a bank account – can be shown, is by showing in whose name the account stands, for the person in

whose name the account stands has absolute control of it and that is all possession of a chose in action can mean." (citation omitted)) and ("[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." (internal quotations and corrections omitted)); *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 890 F. Supp. 322, 328 n.3 (S.D.N.Y. 1995), *aff'd*, 85 F.3d 44 (2d Cir. 1996) ("[A] bank account is presumed to be a general account, which means that title to the money belongs to the bank. In such circumstances, the depositor and the bank enter into a creditor-debtor relationship." (citations omitted)); *see also Allied Maritime. Inc. v. Descatrade SA*, No. 09 Civ. 3684, 2009 WL 4884160, at *3 (S.D.N.Y. Dec. 16, 2009) *aff'd*, 620 F.3d 70 (2d Cir. 2010) (finding that a bank only owes performance to the entity with which it has a contractual relationship).

See also Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897, 901 (2d Cir. 1987) ("It is well established under New York law that the relationship between a bank and its customer for whose account funds have been deposited is that of debtor and creditor, with all the legal implications that relationship connotes." (internal quotations omitted)); *In re Lehman Bros. Holdings Inc.*, 404 B.R. 752, 758 (Bankr. S.D.N.Y. 2009) (The deposit of cash into a bank account creates a debtor-creditor relationship between the bank (as debtor) and the

depositor (as creditor), at which time the depositor 'parts with title to the funds in exchange for a debt owed to him by the bank.'" (quoting *In re Bennett Funding Grp., Inc.*, 146 F.3d 136, 139 (2d Cir. 1998)).

Accordingly, there is no basis for the credits that were in the JPMorgan Account to be considered "assets of" of Bank Markazi. Rather, the account merely reflects an indebtedness of JPMorgan to Clearstream, and neither Bank Markazi nor any other entity that may have a claim against Clearstream has a claim to the assets while they remain in the Account. *E.g.*, *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 447 (2003) ("A positive balance in a bank account reflects a debt from the bank to the depositor' *and no one else*." (internal quotation marks and citation omitted) (emphasis added)).

The assets the Petersons seek to attach are not the "assets of" Bank Markazi, and TRIA is inapplicable to this case.

ii. The Credits in Clearstream's Account at JPMorgan Were Never "Blocked"

TRIA defines a "blocked asset" as "any asset seized or frozen by the United States" under section 5(b) of the Trading with the Enemy Act… or sections 202 and 203 of the International Emergency Economic Powers Act." TRIA, § 201(d)(2)(A). The Luxembourg Assets are not "blocked assets."

The Petersons rely on Executive Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) ("E.O. 13599") to contend that the Luxembourg Assets were "blocked assets." (CA 687-88, 691.) They are wrong in so contending.

E.O. 13599 "**blocks**" – but only as of February 5, 2012 – property and interests in property of the Government of Iran and any Iranian financial institutions that:

> (i) "are in the United States;"
>
> (2) "hereafter come within the United States;" or
>
> (3) "are or hereafter come within the possession or control of any United States person, including any foreign branch…."

E. O. 13599, §§ 1(a)-(b). Notably, however, all but approximately $104 million of the amounts the Petersons seek came into the JPMorgan Account *and left prior* to the issuance of E.O. 13599. (CA 809.) Thus, virtually all the Luxembourg Assets could never be considered to have been "blocked" due to being in the United States.

Nor is Clearstream a "United States person" as used in TRIA. Section 7(c) of E.O. 13599 defines a "United States person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." Clearly Clearstream is not, and the Petersons do not

allege otherwise, a United States citizen or permanent resident alien, or a company organized under the laws of the United States or any U.S. jurisdiction. On the contrary, the Complaint acknowledges that Clearstream is an international banking corporation organized under Luxembourg law with operational centers in Luxembourg, Germany, and Singapore. (CA 678.)

Clearstream's representative office in New York, which is not a branch, does not cause Clearstream to be a "United States person" under TRIA. In *Bank of Tokyo-Mitsubishi, UFJ, Ltd. v. Peterson*, No. 12 Civ. 4038, 2012 WL 1963382, at *2 (S.D.N.Y. May 29, 2012), certain *Peterson I* plaintiffs sought to restrain Iranian assets held outside of the United States by a Japanese bank, claiming that, under E.O. 13599, the presence of a branch in the United States was sufficient to make all branches worldwide "United States persons." 2012 WL 1963382, at *1. The court firmly rejected the claim, holding that "[t]he Japanese branches of a Japanese bank are not United States persons regardless of the existence of a New York branch of the bank." *Id.; cf United States* v. *Chalmers,* 474 F. Supp. 2d 555, 565 (S.D.N.Y. 2007) (where statute specifically limited application to "United States persons," term excluded foreign corporations (citing *Crosby* v. *Nat'l Foreign Trade Council,* 530 U.S. 363, 379 (2000))).

As a result, the Luxembourg Assets are not "blocked" assets under TRIA.

D. UCC Article 8 is Inapplicable to this Case

The Petersons claim that Clearstream operates as a securities intermediary in New York and that UCC Article 8 therefore applies to this case. (Petersons' Br. at 37-47.) They are wrong, and the District Court correctly did not credit the argument. *Peterson*, 2015 WL 731221, at *10. (SPA 22.)

The Petersons' argument ignores the fact that even if any assets in Clearstream's account at JPMorgan could have been deemed to belong to Bank Markazi, those assets are long gone. *Supra*, at 8-12. The Petersons' contention also ignores the fact that the underlying bonds at issue were owned by Clearstream, not Bank Markazi – bought by Clearstream in its own name. (JA 129.) Proceeds of such bonds unquestionably belong to Clearstream, and no one else. *Supra* at 27-31. Additionally, Clearstream has clearly and repeatedly revealed that it acts as a securities intermediary only in Luxembourg, and not in New York. (*E.g.*, JA 69.) Finally, the Petersons do not allege that Clearstream's account at JPMorgan holds security entitlements; they allege the account holds only cash proceeds. (CA 679.)

Accordingly, as more fully discussed above, Clearstream and JPMorgan have a standard depositor/bank relationship, governed only by contract and banking law and banking regulations, not Article 8 of the New York Uniform Commercial Code.

E. The Luxembourg Assets Are Not Subject to Attachment Under the CPLR

Because Bank Markazi never had a claim to, or ownership interest in, any of the credits in the JPMorgan Account, the proceeds of the bonds Clearstream bought are not, and would not be, subject to execution or attachment even if they remained in Clearstream's operating account today. It is elemental that a judgment creditor may enforce its judgment only against property of the judgment debtor or, in this case, an instrumentality of the judgment debtor – that is, Iran or Markazi.

A legal claim that does not belong to the judgment debtor, or does not exist at all, cannot be turned over to a judgment creditor. *E.g., M.F. Hickey Co. v. Port of New York Auth.*, 23 A.D.2d 739, 739-40, 258 N.Y.S.2d 129, 130 (1st Dep't 1965) (stating that "[a] money judgment can only be enforced against a property right to the extent that the judgment debtor can assign or transfer it (CPLR 5201 [b])," and holding that "petitioner's right to enforce its judgment out of its debtor's right to payment from the Authority is limited by the Authority's contractual right to withhold payment."). Because Markazi, as an instrumentality of the judgment debtor, has no ownership of the funds in the JPMorgan Account, those funds cannot be subject to execution by the Petersons, as judgment creditors. *Id.*

N.Y. C.P.L.R. §§ 5225 and 5227, under which the Petersons seek to enforce their judgments against Iran, confirm that principle. C.P.L.R. § 5225(b) states that creditors may enforce a judgment only against property "in which the judgment debtor has an interest," and C.P.L.R. § 5227 permits a judgment creditor to bring a special proceeding only against a person "who it is shown is or will become indebted to the judgment debtor". Stated differently, "a party seeking to enforce a judgment 'stand[s] in the shoes of the judgment debtor'" and "cannot 'reach . . . assets in which the judgment debtor has no interest.'" *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 84 (2d Cir. 2002) (quoting *Bass v. Bass*, 140 A.D.2d 251, 253, 528 N.Y.S.2d 558, 561 (1st Dep't 1988)).

In short, although JPMorgan had a legal obligation to pay the amount of the Luxembourg Assets in the JPMorgan Account to Clearstream, and Clearstream had a legal obligation to pay a corresponding amount to Markazi or UBAE, JPMorgan neither has nor had an obligation to pay the funds directly to Markazi. Therefore, the Petersons never had a right to attach obligations that were due to Clearstream. *E.g.*, *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012) (vacating attachment orders as to funds held in certain bank accounts because party upon which attachment orders were served "had no interest in the funds contained in the accounts" and therefore orders "did not reach

any funds"); *cf. HBL Indus. v. Chase Manhattan Bank (Nat'l Ass'n)*, 45 B.R. 865, 868 (Bankr. S.D.N.Y. 1985) (holding that party had no "possessory interest" in funds in a special bank account where party had not been designated a special recipient of account funds).

F. Waiver of Immunity Under the Treaty of Amity Does Not Apply to this Case

The Petersons erroneously contend (Petersons Br. at 60-61) that Iran explicitly waived any central bank immunity Bank Markazi might otherwise be entitled to in this action.

The waiver of imunity contained in the Treaty of Amity, Economic Relations, and Consular Rights Between The United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899 (the "Treaty") applies solely to state-owned *business enterprises doing business in the United States*, not to Iran's agencies or instrumentalities arguably engaged in a "commercial activity" in the United States within the meaning of Section 1610 of the FSIA. Because Bank Markazi is not a business enterprise doing business in the U.S., the Treaty waiver does not apply to Bank Markazi.

Pursuant to Article XI.4 of the Treaty:

> No enterprise of either High Contracting 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 High Contracting Party … claim . . . immunity from suit, execution of judgment or other liability.

However, the Treaty waiver does not look at the nature of the *acts* of the instrumentality, as courts would do under the FSIA.[8] Instead, the Treaty waiver provision looks to the nature and function of the *entity* in question and applies only to "enterprises" engaged in "business activity," not to instrumentalities acting in a sovereign capacity (such as Bank Markazi), irrespective of the commercial nature of the acts they engage in while performing their sovereign functions. *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 357-58 (2d Cir. 1964) ("After World War II the United States began to restrict immunity by negotiating treaties obligating each contracting party to waive its sovereign immunity for *state-controlled enterprises engaged in business activities within the territory of the other party*. Fourteen such treaties were negotiated by our State Department in the decade 1948 to 1958.") (emphasis added).

The text of Article XI, Section 4 of the Treaty, refers to "commercial, industrial, shipping or other business activities." Thus, the Treaty reaches only "business activities," which can be commercial, industrial, or shipping. *United States v. Heicklen*, 858 F. Supp. 2d 256, 264-5 (S.D.N.Y. 2012) ("The canon of

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[8] *See NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 258 (2d Cir. 2012) ("To determine the nature of a sovereign's act, we ask whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." (internal quotations omitted)).

construction known as *noscitur a sociis* (or "it is known by its associates") instructs that the meaning of a word may be determined by the words surrounding it and that courts should avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress") (internal quotations omitted) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)). The text of the Treaty thus makes it clear that "commercial activity" does not refer to the nature of isolated transactions but to the nature of the instrumentality's "business activities."

Thus, the "commercial activity" provision in the Treaty differs from that in the FSIA and looks at the nature of the activity of the instrumentality in question, which must be a business enterprise, conducting *business activities* in the United States. [9] Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, Proc. Am. Soc. Int'l L. 89, 98-99 (1961).[10] ("Within the context of the Treaty, then, a state-controlled enterprise of one party is subject to denial of its claim to sovereign immunity *only if it is present by reason of its having an establishment within the other party's*

[9] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 5538652 (S.D.N.Y. Oct. 8, 2013), cited by the Petersons in support of their erroneous assertion that Bank Markazi engaged in a commercial activity for purposes of the Treaty are wholly in opposite as they do not in any way involve the Treaty.

[10] A copy of this publication is found at CA 2902.

territories." (emphasis added)); c*f. Gibbons v Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982). *See also Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 984 (N.D. Ill. 1980) ("Judicial opinions and comments of American treaty draftsmen interpreting identical waiver clauses in thirteen other Friendship, Commerce and Navigation Treaties have concluded that these clauses were designed to put American companies in an equal competitive position with foreign state-owned enterprises *expanding their operation into the United States*[.]" (emphasis added)); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 333 (9th Cir. 1984) ("[Plaintiffs] have not alleged liability on the part of any Iranian enterprise doing business in the United States. The Treaty of Amity therefore has no application to jurisdiction over their wrongful death action."); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 452 (D.C. Cir. 1990) (The "limited waiver" in the Treaty of Amity "extends only to enterprises 'doing business' in the United States[.]").

Accordingly, even if Bank Markazi's involvement in a U.S.-dollar-denominated bond could properly be deemed "commercial" in nature, the waiver of immunity under the Treaty would not apply because Bank Markazi did not conduct a business enterprise in the United States.

II. BANK MARKAZI HAS IMMUNITY FROM SUIT IN THE ACTION BELOW

Because the assets sought by Petersons are not in the United States, the Court may properly affirm the dismissal of Bank Markazi from the case on that basis alone. There is no subject matter jurisdiction over Bank Markazi under the Foreign Sovereign Immunities Act in a case involving the attachment of property located outside the United States in which a sovereign or its agency or instrumentality is claimed to have an interest.

Additionally, subject matter jurisdiction over Bank Markazi in the case below was also lacking as a result of Bank Markazi's immunity from suit under the FSIA.

In opposing Bank Markazi's motion to dismiss in the District Court, the Petersons stated they do not rely on 28 U.S.C. §§ 1605(a)(2), (5), and (7), and 28 U.S.C. § 1605A as subject matter jurisdictional grounds. (*See* Pls' Mem. of Law in Opp'n to Bank Markazi's Mot. to Dismiss the Am. Compl., at 11-12, n.9, *Peterson v. Islamic Republic of Iran*, No. 13 Civ. 9195 (KBF) (S.D.N.Y. Sept. 19, 2014), filed under seal.) Moreover, these bases are similarly not mentioned in the Petersons' principal brief on this Appeal. Indeed, the Petersons expressly acknowledge the distinction between suit immunity and immunity from attachment under the FSIA and argue that the instant action is one for attachment only and therefore suit immunity has no applicability herein. *Id*.

However, because the Petersons' Amended Complaint cites to 28 U.S.C. §§ 1605(a)(2) and (7), and 28 U.S.C. § 1605A as a basis for subject matter jurisdiction (CA 674), out of an abundance of caution we address the relevant issues here.

A. There is no Subject Matter Jurisdiction Under 28 U.S.C. § 1605(a)(7)/1605A

Pursuant to Section 1604 of the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of [the FSIA]," subject to existing treaty obligations. 28 U.S.C. § 1604. Here, the antiterrorism exceptions codified in former section 1605(a)(7) and new section 1605A of the FSIA are the primary basis alleged by the Petersons for supplying an exception to Bank Markazi's otherwise absolute immunity from this action. (CA 674-75.) However, the factual allegations in the Amended Complaint are facially deficient and cannot support subject matter jurisdiction under either of those provisions.

Former section 1605(a)(7) of the FSIA provided that a foreign sovereign was not immune from jurisdiction where a qualifying plaintiff sought money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act[.]" 28 U.S.C. § 1605(a)(7) (now repealed). The

pertinent wording of new section 1605A, the successor provision to former section 1605(a)(7), is virtually identical.[11]

Peterson II is not an action for money damages for liability for terrorist-related personal injuries. It is purportedly an action to collect on default judgments obtained by the Petersons in various actions in the United States District Court for the District of Columbia (the "Underlying Actions"). (CA 670-71.) The Amended Complaint does not seek to impose liability on Bank Markazi for the acts giving rise to the default judgments in the Underlying Actions as required by 28 U.S.C. § 1605(a)(7)/28 U.S.C. § 1605(A). In fact, Bank Markazi was never found to have had any involvement in the alleged activities that gave rise to the default judgments. *See, e.g., Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003). Accordingly, the Amended Complaint fails to allege a *prima facie* basis for subject matter jurisdiction in this turnover action for the Petersons' claims against Bank Markazi under former section 1605(a)(7) or new section 1605A of the FSIA.

B. There is no Subject Matter Jurisdiction Under 28 U.S.C. § 1605(a)(2)

On its face, the Amended Complaint provides no avenue for the commercial

[11] New section 1605A provides that a foreign state shall not be immune from jurisdiction where a qualifying plaintiff seeks money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act[.]" 28 U.S.C. § 1605A(a)(1).

activity exception pursuant to FSIA § 1605(a)(2) to confer jurisdiction over the Petersons' claims against Bank Markazi herein. Section 1605(a)(2) establishes a limited exception to immunity where a plaintiff's claim is "based upon" one of the following: (1) "a commercial activity carried on in the United States by the foreign state;" (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;" or (3) "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." 28 U.S.C. § 1605(a)(2).

Here, as more fully set forth below, the Petersons cannot establish jurisdiction over Bank Markazi under any of the three prongs of § 1605(a)(2). Bank Markazi did not engage in a commercial activity, the action is not based upon a commercial activity or an act in connection with a commercial activity, and any alleged commercial activity had no direct effect in the United States whatsoever.

i. The Petersons Do Not Allege Bank Markazi Engaged in a Commercial Activity For Purposes of 28 U.S.C. § 1605(a)(2)

The Petersons' only allegation in the Amended Complaint that Bank Markazi engaged in a commercial activity is that Bank Markazi allegedly fraudulently conveyed the Luxembourg Assets to UBAE in early 2008. (CA 708.) However, the "Second Circuit has made very clear that, for purposes of the FSIA, a

commercial activity must be one in which a private person can engage lawfully." *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y.) *aff'd*, 538 F.3d 71 (2d Cir. 2008) (finding money laundering not to be a commercial activity); *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) ("alleged kidnapping by a foreign state is not commercial activity under the FSIA because a private person cannot lawfully engage in that activity." (internal quotations omitted)).

Under New York state law, a person is prohibited from engaging in a fraudulent conveyance. *See, e.g.*, N.Y. Debt. & Cred. Law § 273-a, N.Y. Debt. & Cred. Law § 276, N.Y. Debt. & Cred. Law § 276-a. Therefore, a fraudulent conveyance, by definition, could not constitute a "commercial activity" under 28 U.S.C. § 1605(a)(2). Accordingly, Bank Markazi could not have engaged in a commercial activity under 28 U.S.C. § 1605(a)(2). Nor could an act performed in the United States in connection with a commercial activity of Bank Markazi have occurred.

ii. Any Alleged Commercial Activity Did Not Occur in the United States

The alleged fraudulent conveyance is also insufficient to support a FSIA § 1605(a)(2) immunity waiver because the alleged commercial activity and all acts related thereto occurred solely *outside* the United States. The alleged fraudulent

conveyance – the transfer of the Luxembourg Assets from Bank Markazi's account at Clearstream to UBAE's account at Clearstream – occurred outside of the United States. (CA 708.) Both Bank Markazi's and UBAE's accounts at Clearstream were located in Luxembourg.

iii. This Action is not Based Upon a Commercial Activity

"As a threshold step in assessing plaintiffs' reliance on the 'commercial activity' exception," the Court "must identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims." *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006). The Supreme Court has instructed that the "based upon" inquiry focuses on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

A "mere connection with, or relation to," to the alleged commercial activity in the United States is insufficient to satisfy the "based upon" requirement. *Nelson*, 507 U.S. at 358. The Petersons must demonstrate "a *significant nexus* . . . between the commercial activity in this country" on the one hand and their "cause[s] of action" on the other. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 155 (2d Cir. 2007) (emphasis and alteration in original) (internal citation omitted). Thus, unless the "gravamen" of the Petersons' complaint is based upon an alleged

commercial activity or an act performed in the United States in connection with a commercial activity, the sovereign's immunity cannot be lifted. *Id.* at 155-56.

Here, the gravamen of the Petersons' action, as described by the Petersons themselves, is to "enforce judgments for compensatory damages that they secured against" Iran and MOIS in connection with the 1983 terrorist bombing. (CA 670-71.) The action is not based on a commercial activity by Bank Markazi or an act performed in the United States in connection with a commercial activity of Bank Markazi. As such, 28 U.S.C. § 1605(a)(2) does nothing to lift Bank Markazi's immunity from suit in this action.

iv. There Was No Direct Effect in the United States Resulting From the Alleged Fraudulent Conveyance

Even assuming, arguendo, Bank Markazi engaged in the acts alleged to have constituted the fraudulent conveyance and that such acts constituted a commercial activity, those acts did not have a direct effect in the United States.

To qualify as "direct" within the meaning of the third prong of FSIA § 1605(a)(2), the effect in the United States of a foreign state's "act outside the territory of the United States" must satisfy two requirements. First, in order to be deemed "direct," the effect must "follow[] as an immediate consequence" of the foreign state's activity. *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010) (internal quotation and citations omitted). Second, "the [foreign state]'s

conduct that is alleged to have had a direct effect in the United States must be legally significant." *Guirlando,* 602 F.3d at 77. The key test is whether the plaintiff "has suffered *harm felt in the United States" as a result of* the foreign state's conduct. *Kensington,* 505 F.3d at 158 (emphasis added); *accord Guirlando,* 602 F.3d at 75 (the "'legally significant act' test" determines whether "the *direct impact* of a foreign state's foreign commercial activity was *felt 'in the United States.'*") (emphasis added).

Here, the alleged fraudulent conveyance of the Luxembourg Assets could not affect the Petersons in any way. As already noted, the Luxembourg Assets are located outside the United States and are immune from attachment. As such, the Petersons could never have attached those assets to satisfy the default judgment they obtained in the Underlying Actions and which they are seeking to enforce here. Therefore, not only did Bank Markazi's alleged transfer of the Luxembourg Assets not have a direct impact on the Petersons, it had no impact at all.[12]

[12] Moreover, only the "Peterson Judgment Creditors" (as defined in the Amended Complaint) obtained their judgment prior to the alleged fraudulent conveyance. (CA 679-81, 708.) The remaining judgment creditors had no claim to Luxembourg Assets at the time the alleged fraudulent conveyance occurred and could not have been impacted thereby. *Kensington,* 505 F.3d at 159 (finding no subject matter jurisdiction under 28 U.S.C. § 1605(a)(2), in part, because the plaintiff "does not explain how this scheme had the 'direct effect' of interfering with a judgment that did not yet exist.").

C. There is no Subject Matter Jurisdiction Under 28 U.S.C. § 1605(a)(5)

Section 1605(a)(5) of the FSIA, otherwise known as the "non-commercial tort exception,"[13] provides that a sovereign's general immunity from suit does not apply to a claim:

> in which money damages are sought against a foreign state *for personal injury or death, or damage to or loss of property*, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment…

28 U.S.C. §1605(a)(5) (emphasis added). As explained in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989), "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 149 (2d Cir. 2001) (Section 1605(a)(5) encompasses "*claims* for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state." (Sotomayor, concurring) (emphasis in original)).

This exception to sovereign immunity is wholly inapplicable to the instant action, as the Amended Complaint is devoid of any allegation of a non-commercial tort occurring in the United States. Indeed, the Petersons admitted as much when

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[13] *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989).

they stated that "the Complaint does not even mention §1605(a)(5)." (Pls' Mem. of Law in Opp'n to Bank Markazi's Mot. to Dismiss the Am. Compl., at 11-12, n.9, *Peterson v. Islamic Republic of Iran*, No. 13 Civ. 9195 (KBF) (S.D.N.Y. Sept. 19, 2014), filed under seal.)

D. The Petersons' Allegations of Alter Ego and Fraudulent Conveyance Do Not Confer Jurisdiction

Where, as here, the Amended Complaint fails to allege a viable basis for subject matter jurisdiction under one of the specific exceptions to immunity enumerated in the FSIA, an alter ego theory of liability cannot confer subject matter jurisdiction where none otherwise exists.

In *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100 (2d Cir. 2001), this Court held that "in this Circuit . . . a distinction for jurisdictional purposes exists between an action to collect a judgment . . . and an action to establish liability on the part of a third party[.]" *Epperson*, 242 F.3d at 104. As the Court further explained, the practical significance of this distinction is that an action to collect a judgment "does not require an independent jurisdictional basis," but an action to establish liability on the part of a third party "must have its own source of federal jurisdiction, so that *absent an independent basis for federal jurisdiction a new defendant may not be haled into federal court.*" *Id.* (emphasis added).

This requirement of an independent basis for federal jurisdiction applies to "claims of alter ego liability and veil-piercing," because such claims "raise an independent controversy with a new party in an effort to shift liability." *Id.*; *see also Peacock v. Thomas*, 516 U.S. 349, 357 (1996) ("We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment.").[14] It is thus clear that the alter ego doctrine cannot confer subject matter jurisdiction where, as here, the Petersons seek to hale the instrumentality of a foreign state into federal court on a theory that the instrumentality is liable as the alter ego of its parent sovereign for a judgment rendered against the sovereign.

Instead, subject matter jurisdiction over Bank Markazi in this action must be based on one of the specific exceptions to immunity enumerated in the FSIA. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."); see also *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 997 (2d Cir. 2014) ("[I]if a defendant is a foreign state within the meaning of FSIA, that defendant is not subject to the jurisdiction of the United States Courts unless one of the exceptions in the Act applies.").

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[14] *Accord, e.g., C.G. Holdings, Inc. v. Rum Jungle, Inc.*, 582 F. Supp. 2d 385, 388 (E.D.N.Y. 2008) ("[C]ourts in this circuit have found that enforcement of a judgment against a third party that is predicated on alter-ego and veil-piercing theories falls outside the ancillary jurisdiction of the court.").

In *Butler v. Sukhoi Co.*, 579 F.3d 1307 (11th Cir. 2009), the plaintiffs sought to enforce a default judgment they had obtained against a state-owned Russian company in a separate proceeding commenced against Russia and several other state-owned Russian corporations on the basis that those sovereign defendants were liable for the underlying judgment "as successors in interest to and/or alter-egos" of the judgment debtor. *See id.* at 1310. The Eleventh Circuit concluded that dismissal of the complaint was required where the claims against the sovereign defendants were based solely on an alter ego theory of liability and did not fall within one of the specific exceptions to immunity enumerated in the FSIA. *Id.* at 1313.

Accordingly, the Petersons' alter ego allegations cannot confer subject matter jurisdiction over the claims against Bank Markazi in the absence of any applicable exception to Bank Markazi's immunity from suit under the FSIA.[15]

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[15] Here, the Petersons alter ego theory also fails for the additional reason that Bank Markazi is not alleged to have played any role in the underlying events in 1983. *See Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1286-87 (11th Cir. 1999) (rejecting attempt to garnish debts owed to state-owned Cuban telecommunications company to satisfy a judgment under former section 1605(a)(7) of the FSIA against the Cuban Government and Cuban Air Force arising from the shooting down of two unarmed civilian aircraft over international waters where there was no evidence that the Cuban company was involved in the underlying "grave violation of international law"); *General Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 713 F. Supp. 2d 267, 283 (S.D.N.Y. 2010) (where the instrumentality of a foreign state is alleged to be an alter ego of its parent sovereign, the instrumentality's "lack of involvement in the underlying transaction militates against piercing the corporate veil").

Nor can the Petersons manufacture a basis for subject matter jurisdiction by alleging that Bank Markazi was an alter ego of Iran in relation to the purported fraudulent conveyance in early 2008. (*See, e.g.*, CA 722.) Under *Epperson*, ancillary jurisdiction exists where the judgment creditor asserts that the *judgment debtor itself* fraudulently conveyed its own assets to a third party, and where the judgment creditor therefore does not "seek to hold [third parties] liable for the existing judgment against [the judgment debtor] as alter egos of [the judgment debtor] or to pierce the corporate veil of [the judgment debtor]." *Epperson*, 242 F.3d at 107.[16]

Here, however, the Petersons' fraudulent conveyance claims are directed at Bank Markazi. The Amended Complaint alleges that "Markazi has also engaged in fraudulent conveyances in violation of New York Debtor and Creditor Law Sections 273-a and 276, thereby requiring that any veil of separation between Markazi and [] Iran be pierced." (CA 720.) The alleged fraudulent conveyance consisted of the transfer of "the Remaining Assets[] from Markazi's Clearstream account to the UBAE/Markazi Account at Clearstream." (CA 708.) The Petersons expressly allege that "[a]t all times, Markazi retained the beneficial ownership of

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[16] Under those circumstances, "[c]ourts have permitted judgment creditors to pursue, under the ancillary enforcement jurisdiction of the court, the *assets of the judgment debtor* even though the assets are found in the hands of a third party." *Epperson*, 242 F.3d at 106 (emphasis added).

the bonds transferred to the UBAE/Markazi Account and to the proceeds thereof." (CA 709.) As established by their own allegations, what the Petersons seek to do here is precisely what *Epperson* prohibits them from doing, *i.e.* to "raise an independent controversy with a new party in an effort to shift liability." *Epperson*, 242 F.3d at 106.

A plaintiff may, of course, assert a claim that an alleged alter ego of the judgment debtor engaged in a fraudulent conveyance where there is another, independent basis for subject matter jurisdiction, such as diversity of citizenship in a case not arising under the FSIA. *Cf. JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. and Trade Servs., Inc.*, 295 F. Supp. 2d 366, 370 (S.D.N.Y. 2003) (subject matter jurisdiction existed on diversity grounds). Here, however, because this turnover action involves an agent or instrumentality of a debtor foreign state, subject matter jurisdiction either exists under one of the statutory exceptions to immunity enumerated in the FSIA related to Bank Markazi – or not at all.

Because there are no applicable exceptions to Bank Markazi's immunity from suit in this action, the Petersons' Amended Complaint must be dismissed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's dismissal of the Petersons' Amended Complaint

Dated: New York, New York
August 31, 2015

Respectfully Submitted,

Jaffe & Asher LLP

By: /s/ Donald F. Luke
Donald F. Luke

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Attorneys for Appellee Bank Markazi

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: New York, New York
August 31, 2015

Respectfully Submitted,

Jaffe & Asher LLP

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Info:

Treaty Article IV-2/ International law phrase acceptable.

Article VI-2/ US law allows taxpayer personal exemption each dependent. Same privilege extended all resident aliens and residents Canada and Mexico. Latter takes account many residents Canada Mexico cross border daily work in US. Test is residence, not nationality. Other nonresidents entitled only one personal exemption regardless number dependents. Because thorough technical exploration basis double tax treaty necessary commitment connection present negotiation to negotiate such treaty unhelpful. US prepared however review with Iran possibility such treaty at appropriate time.

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Annex 236

Addis Ababa, April 14, 1966.

No. 624

Excellency:

I have the honor to refer to Your Excellency's note No. 9435/62/49/58 dated April 13, 1966 concerning the specific standards of protection and security required by Articles VI(2) and VIII(2) of the Treaty of Amity and Economic Relations concluded between the United States of America and Ethiopia on September 7, 1951. In response to Your Excellency's inquiry, my Government has authorized me to transmit the following views.

The United States Government concurs with the Imperial Ethiopian Government that the purpose of the negotiators of the Treaty in the case of the opening sentences of Articles VI(2) and VIII(2) was simply to reaffirm the rules of international law with respect to

His Excellency

Ato Ketema Yifru,

Minister of Foreign Affairs,

Imperial Ethiopian Government,

Addis Ababa.

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protection and security for aliens and their property. The United States Government does not construe the two provisions to require a party to the Treaty to provide a greater degree of protection to nationals of the other party and their property than is required by generally accepted principles of international law.

Accept, Excellency, the renewed assurances of my highest consideration.

C&R 2

POL 2

No. 14-770

In the Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
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QUESTION PRESENTED

The Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. 8701 *et seq.*, identifies certain "financial assets" in which the Central Bank of Iran has a security entitlement and that were the subject of post-judgment enforcement proceedings in the United States District Court for the Southern District of New York at the time the provision was enacted. 22 U.S.C. 8772(b). The statute makes those assets "subject to execution or attachment in aid of execution in order to satisfy" certain terrorism-related judgments against the Islamic State of Iran, provided that the assets are (1) "held in the United States for a foreign securities intermediary doing business in the United States," (2) blocked assets, and (3) "equal in value to a financial asset" held abroad by the financial securities intermediary on behalf of the Central Bank of Iran. 22 U.S.C. 8772(a)(1). The question presented is:

Whether 22 U.S.C. 8772 violates the separation of powers.

amends existing law, this case presents no occasion to resolve any confusion about *Klein*'s outer bounds.

B. Any International Ramifications Of The Court Of Appeals' Decision Do Not Warrant This Court's Review

Petitioner argues (Pet. 25-31) that review is warranted because the court of appeals' decision has "important international ramifications." Pet. 25 (capitalization altered). The Second Circuit's decision does not have the consequences petitioner attributes to it.

1. Petitioner argues (Pet. 25-27) that Section 8772 violates Article IV.1 of the Treaty of Amity between the United States and Iran, which requires the parties to "accord fair and equitable treatment" to each other's "nationals and companies." Treaty of Amity art. IV.1. Petitioner also argues in passing (Pet. 26 n.3) that the statute violates Article III.1 of the Treaty of Amity, which requires each state to "recognize[]" the "juridical status" of "[c]ompanies" of the other state. Treaty of Amity art. III.1. Contrary to petitioner's argument, the Treaty is not implicated here because petitioner is not a "national" or "compan[y]" within the meaning of the Treaty.

Petitioner is not a "national" of Iran as that term is used in the Treaty. The context makes clear that the term includes only natural persons. For instance, Article II.2(a) grants a "national[]" the right to travel and reside at a place of the national's choice; Article II.4 grants nationals the right to "humane treatment" when taken "in[to] custody"; and Article II.1 governs the right of nationals to "enter and remain in the territories" of the parties. Those provisions make sense only if they are understood to refer exclusively to natural persons.

Nor is petitioner a "compan[y]" within the meaning of the Treaty. The term "companies" is defined as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Treaty of Amity art. III.1. That definition—which does not include any reference to government agencies and instrumentalities—is not naturally read to include entities like petitioner. The central bank of Iran is an agency of the state that carries out sovereign functions. See The Monetary and Banking Law of July 9, 1972 (Iran), Arts. 10-11, www.cbi.ir/page/2234.aspx (petitioner is responsible for, among other things, issuing currency, formulating regulations pertaining to foreign exchange transactions, and stabilizing the national currency); Central Bank of the Islamic Republic of Iran, *General Information*, www.cbi.ir/page/General Information.aspx (last visited Aug. 18, 2015); see also Pet. 7 ("Like other central banks, [petitioner] holds foreign currency reserves to carry out monetary policies such as maintaining price stability."). Had the treaty parties intended provisions guaranteeing fair treatment to "companies" to apply as well to governmental agencies executing functions on behalf of the sovereign, they would have expressly so provided.

Other provisions of the Treaty of Amity confirm that the term "companies" does not include entities like petitioner. Article XI.4 refers to "government agencies and instrumentalities" as distinct from "corporations" and "associations." Treaty of Amity art. XI.4. And when the Treaty of Amity refers to entities controlled or owned by the sovereign or to sovereign agencies or instrumentalities, it does so expressly, referring to "enterprises owned or controlled by [the]

Government" or "government agencies and instrumentalities." *Id.* arts. XI.1, XI.4.

2. Petitioner's remaining arguments also lack merit.

Petitioner contends (Pet. 27-29) that Section 8772 "undermines" the President's ability to conduct foreign affairs because it limits his statutory authority to dispose of blocked assets. Petitioner does not argue that Section 8772 unconstitutionally impinges on any exclusive presidential power. Cf. *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083-2084 (2015). Instead, petitioner suggests that the President might prefer to dispose of the blocked assets in some way other than that required by Section 8772. Pet. 28-29. Such speculation does not militate in favor of this Court's review of the *Klein* question presented by the petition.

Finally, petitioner argues (Pet. 29-31) that the court of appeals' decision undermines confidence in U.S. financial markets and invites retaliation by foreign governments. But Section 8772 is a narrowly tailored provision that Congress enacted to permit execution on a terrorism judgment against the assets beneficially owned by the central bank of a state sponsor of terrorism—assets that were being held in the United States in violation of U.S. sanctions laws and regulations. See p. 2, *supra*. In the view of the United States, the law-abiding members of the international community should not find such legislation cause for alarm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

AUGUST 2015

BANK SEPAH INTERNATIONAL PLC

Iranian Focus - Global Vision

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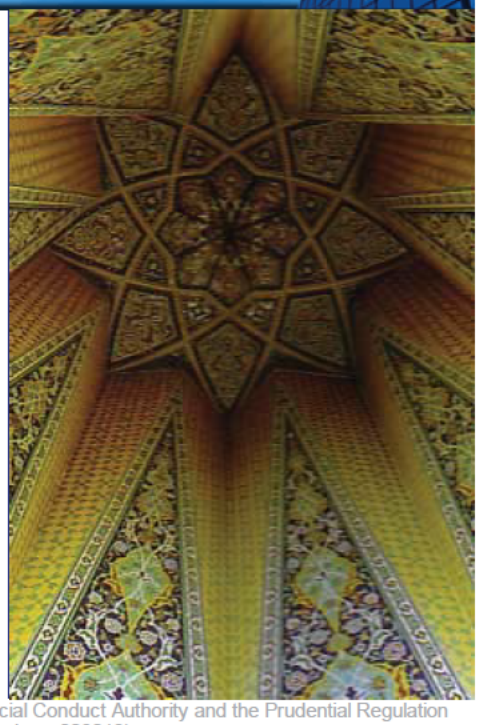
About Us

Based in the City of London, the world's leading financial centre, BSIP is a UK incorporated bank specialising in providing finance and services for international trade worldwide. The bank has particular expertise in the Iranian market and has been a major provider of finance for trade in this market for many years. BSIP prides itself on its staff's expertise and knowledge in this area and in its ability to provide both a first class service and first class advice to both the exporter and the importer all of which is supported by substantial investments in the latest banking systems and technology.

In addition to the wide range of trade related products and services offered by BSIP it is also able to supply comprehensive treasury services including offering competitive deposit rates and foreign exchange services which include transactions involving Iranian Rials.

BSIP is also active in the syndicated loans market and the forfaiting market.

As well as its comprehensive services to the corporate customer BSIP also caters for the needs of the private client and offers deposit services and counter services at its offices in Eastcheap, London.



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Important Announcements

Important Announcement in respect of Melli Bank plc Hong Kong Branch

The Hong Kong Monetary Authority has lifted of the restrictions which had been imposed on Melli Bank plc under section 52(1)(A) of the Hong Kong Banking Ordinance. Notes and further Guidance can be found here:

Important Announcement In relation To Sanctions

Melli Bank plc to resume its commercial banking operations

Melli Bank plc and its parent company Bank Melli Iran were removed from the list of sanctions on 16 January 2016 As a result, Melli Bank has been given regulatory go-ahead to resume its commercial banking operations in the UK and the EU. Notes and further Guidance can be found here:

Welcome to Melli Bank plc

Melli Bank plc is a UK incorporated bank, licensed and authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and Prudential Regulation Authority and conforms to all UK accounting standards and disclosure requirements. It is a wholly owned subsidiary of Bank Melli Iran, the largest bank in Iran which has had a presence in London since 1967. Melli Bank plc acquired the assets of the London branches of Bank Melli Iran upon commencement of its operations in January 2002.

Whilst retaining operational autonomy, flexibility and adaptability to respond to the rapidly changing customer demand and the challenges of a highly competitive and innovative banking market under direction of its independent Board, Melli Bank plc continues to benefit from the extensive infrastructure and widespread network of domestic and international branches owned by its parent in addition to access through its privileged position as a leading international bank in the economic and financial landscape of Iran.

As has been widely reported, the sanctions imposed upon Melli Bank plc were lifted on 16 January 2016. Consequently, Melli Bank plc is now taking the steps necessary to overcome the international challenges it faces to resume its banking operations so that it can once more offer a diversified portfolio of products and services to cater to the varying needs of its customers. The needs of the export business market are typically based around letters of credit and Melli Bank plc intends to provide all services in this regard i.e. advising, their confirmation, negotiation and payment and act as a reimbursing bank for other banks. Melli Bank plc will additionally be offering letter of credit and bill discounting services as well as issuing bonds and guarantees.

Melli Bank plc opened its first overseas branch in Hong Kong in April 2006 to cater to a client market in the Far East with strong trade links with the Iranian market. Melli Bank plc is currently in discussions with the Hong Kong monetary authorities to obtain permission for the resumption of its operations in Hong Kong.

The more complex needs of Melli Bank plc's large corporate clients will be met by arranging syndicated and bilateral loans and specialist financing such as capital asset financing by way of aviation and shipping loans.

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International Monetary Fund

IMF Members' Quotas and Voting Power, and IMF Board of Governors

Last Updated: April 10, 2017

The *Board of Governors*, the highest decision-making body of the IMF, consists of one governor and one alternate governor for each member country. The governor is appointed by the member country and is usually the minister of finance or the governor of the central bank. All powers of the IMF are vested in the Board of Governors. The Board of Governors may delegate to the Executive Board all except certain reserved powers. The Board of Governors normally meets once a year.

The table below shows quota and voting shares for IMF members. Following the entry into force of the Board Reform Amendment on January 26, 2016, members who have consented to their quota increases can pay their quota increases under the 14th General Review of Quotas. Quota and voting shares will change as members pay their quota increases. During this process, this table will be updated regularly (see here for more details on the Quota and Governance reforms agreed in 2010.)

A B C D E F G H I J K L M N O P Q R S T U V Y Z TOTALS

	QUOTA		VOTES	
Member	Millions of SDRs Percent of Total[1]	Governor *Alternate*	Percent of Total[1]	Number[2]
Afghanistan, Islamic Republic of	323.8 0.07	Khalilullah Sediq	0.09	4,702
		Wahid Nosher		
Albania[3]	139.3 0.03	Gent Sejko	0.06	2,857
		Erjon Luci		
Algeria[3]	1,959.9 0.41	Mohamed Loukal	0.42	21,063
		Ammar Hiouani		
Angola	740.1 0.16	Augusto de Sousa Archer Mangueira	0.18	8,865
		Valter Filipe Duarte da Silva		
Antigua and Barbuda[3]	20.0 0.004	Gaston Browne MP	0.03	1,664
		Whitfield Harris, Jr.		
Argentina[3]	3,187.3 0.67	Nicolas Dujovne	0.66	33,337
		Federico Sturzenegger		
Armenia[3]	128.8 0.03	Vardan Aramyan	0.05	2,752
		Arthur Javadyan		

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Member	QUOTA		VOTES	
	Millions of SDRs	Governor *Alternate*		
	Percent of Total[1]		Percent of Total[1]	Number[2]
Iceland[3]	321.8	Már Guðmundsson		
	0.07		0.09	4,682
			Gudmundur Arnason	
India[3]	13,114.4	Arun Jaitley		
	2.76		2.64	132,608
			Urjit R. Patel	
Indonesia[3]	4,648.4	Agus D.W. Martowardojo		
	0.98		0.95	47,948
			Sri Mulyani Indrawati	
Iran, Islamic Republic of[3]	3,567.1	Valiollah Seif		
	0.75		0.74	37,135
			Gholamali Kamyab	
Iraq	1,663.8	Ali Muhsin Ismail		
	0.35		0.36	18,102
			Hussein Jaber Abdulhameed AL-Khaqani	
Ireland[3]	3,449.9	Michael Noonan		
	0.73		0.71	35,963
			Philip R. Lane	
Israel[3]	1,920.9	Karnit Flug		
	0.40		0.41	20,673
			Shai Babad	
Italy[3]	15,070.0	Pier Carlo Padoan		
	3.17		3.02	152,164
			Ignazio Visco	

Member	QUOTA		VOTES	
	Millions of SDRs	Governor *Alternate*		
	Percent of Total[1]		Percent of Total[1]	Number[2]
Jamaica[3]	382.9	Audley Shaw		
	0.08		0.11	5,293
			Brian Wynter	
Japan[3]	30,820.5	Taro Aso		
	6.48		6.16	309,669
			Haruhiko Kuroda	
Jordan[3]	343.1	Omar Malhas		
	0.07		0.10	4,895
			Ziad Fariz	

Member	QUOTA		VOTES
	Millions	Governor	

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Seyed Mahmoud Ahmadi, Secretary General (/page/4325.aspx)
Gholamali Kamyab, Vice Governor (Foreign Exchange Affairs) (/page/6322.aspx)
Bahman Mesgarha, Vice Governor (Administrative & Training Affairs) (/page/6738.aspx)
Peyman Ghorbani, Vice Governor (Economic Affairs) (/page/11988.aspx)
Farshad Heidari, Vice Governor (Banking supervision Affairs) (/page/15297.aspx)
Ali Kermanshah, Vice Governor (IT Technology) (/page/15304.aspx)
Hosein Noghrekar Shirazi, Vice Governor (Parliament & Legal Affairs) (/page/15305.aspx)

Executive Board and Vice Governors

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Governor (Member of executive board)

Valiollah Seif (/page/4249.aspx)

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Deputy Governor (Member of executive board)

Akbar Komijani (/page/1971.aspx)

Secretary General (Member of executive board)

Seyed Mahmoud Ahmadi

(/page/6322.aspx)

Vice Governor (Foreign Exchange Affairs) (Member of executive board)

Gholamali Kamyab (/page/6322.aspx)

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Vice Governor (Administrative & Training Affairs) (Member of executive board)

Bahman Mesgarha (/page/6738.aspx)

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Vice Governor (Economic Affairs) (Member of executive board)

Peyman Ghorbani (/page/11988.aspx)

Vice Governor (Parliament & Legal Affairs)

Hosein Noghrekar Shirazi

Vice Governor (IT Technology)

Ali Kermanshah

Vice Governor (Banking supervision Affairs)

Farshad Heidari

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Annex 242

Organization

The Central Bank of the Islamic Republic of Iran is composed of the following organs:

I- The General Assembly;
II- The Monetary and Credit Council;
III- The Executive Board;
IV- The Note Reserve Control Board;
V- The Supervisory Board.

I - The General Assembly

The General Assembly of the Central Bank of the Islamic Republic of Iran is composed of:

- The President (as chairman of the assembly)
- Minister of Economic Affairs and Finance
- Head of the State Management and Planning Organization
- Minister of MIMT(Minister of Industry,Mine and Trade)
- One more minister to be selected by the Council of Ministers

Governor of the Central Bank of the Islamic Republic of Iran is nominated by the President, confirmed by the general assembly of the Central Bank of the Islamic Republic of Iran, and appointed by the President.

Deputy Governor of the Central Bank of the Islamic Republic of Iran is nominated by the President and appointed by the President upon confirmation by the general assembly of the Central Bank of the Islamic Republic of Iran.

The General Assembly shall have the following functions:

- To consider and approve the Balance Sheet of Central Bank of the Islamic Republic of Iran.
- To consider reports submitted by the Supervisory Board and decide upon the points raised therein.
- To consider and approve the recommended appropriation of the net profit.
- To elect the members of the Supervisory Board upon the recommendation of the Minister of Finance.
- To fulfil other functions entrusted to it under the provisions of this Act.

II - The Monetary and Credit Council

The Monetary and Credit Council shall be composed of:

- Minister of Economic Affairs and Finance
- Governor of the Central Bank of the Islamic Republic of Iran
- Head os State Management and Planning Organization
- Two ministers elected by the Council of Ministers
- Minister of Commerce
- Two monetary and banking experts to be nominated by the governor of the Central Bank of the Islamic Republic of Iran and confirmed by the President
- Attorney-general or his deputy
- President of the Chamber of Commerce, Industries and Mines
- President of the Chamber of Cooperative
- Represidentives of the Economic Affairs and Plan and Budget and Account Commissions of the Islamic Consulative Assembly (one from each) as the overseers, to be chosen by the parliament

In order to be in a position to consider and decide on the general policy of Central Bank of the Islamic Republic of Iran and to supervise the monetary and banking affairs of the country, the Monetary and Credit Council shall:

- Examine and approve the organization, budget, employment code and internal regulations of Central Bank of the Islamic Republic of Iran
- Examine and comment on the Balance Sheet of Central Bank of the Islamic Republic of Iran in preparation for the discussions at the General Assembly
- Review and approve the regulations drawn up under the provisions of this Act
- Comment upon the banking, monetary and credit issues of the country as well as bills concerning loans, credit guarantees, and on any other issues referred to the Council by the Government
- Give consultative views and advice to the Government on banking, monetary and credit issues which, in the Council's opinion, may bear upon the economic conditions and especially the credit policy of the country
- Comment on any other issues referred to it within the framework of this Act by the Governor of Central Bank of the Islamic Republic of Iran.

III - The Executive Board

The Executive Board of the Bank shall consist of a Governor, a Deputy Governor, a Secretary General, and three Vice Governors each with powers and responsibilities as specified in Monetary and Banking Law of Iran (MBLI).

- The Governor of Central Bank of the Islamic Republic of Iran, as the Bank's highest executive and administrative authority, shall be responsible for all the affairs of the Bank excluding such responsibilities as have been entrusted to the other organs of the Bank under the provisions of The Monetary and Banking Law of Iran (MBLI). The Governor of Central Bank of the Islamic Republic of Iran shall be responsible for the proper conduct of the Bank's affairs and the implementation of MBLI and the regulations relating thereto. The Governor of Central Bank of the Islamic Republic of Iran shall represent the Bank before all official bodies, local and foreign, with the right of attorney. The Governor of Central Bank of the Islamic Republic of Iran shall be appointed to office by Royal decree for a term of five years upon the recommendation of the Minister of Finance and the approval of the Council of Ministers and shall be eligible for reappointment.
- The Deputy Governor of the Bank shall be appointed to office by Royal Decree for a term of five years upon the recommendation of the Governor of Central Bank of the Islamic Republic of Iran, the agreement of the Minister of Finance and the approval of the Council of Ministers, and shall be eligible for reappointment. The scope of authority of the Deputy Governor of Central Bank of the Islamic Republic of Iran shall be determined by the Governor and in the case of the Governor's absence, resignation, hiatus or death, the Deputy Governor shall wield all the powers of the Governor.
- The Secretary General of the Bank shall be appointed to office upon the recommendation of the Governor of Central Bank of the Islamic Republic of Iran and the approval of the General Assembly and shall also be responsible for the Monetary and Credit Council Secretariat. The Secretary General of the Bank shall send the minutes of the Monetary and Credit Council meetings to the Ministers of Finance and Economy for their information.
- The Vice Governors of the Bank shall be appointed by the Governor of Central Bank of the Islamic Republic of Iran who shall also determine their duties.

IV - The Note Reserve Control Board

The Note Reserve Control Board shall be composed of:

- Two Majlis Deputies nominated by the Majlis
- The Governor of Central Bank of the Islamic Republic of Iran
- The Prosecutor General
- The Treasurer General
- The Head of the Government Auditing Tribunal
- The Chairman of the Supervisory Board

The Note Reserve Control Board shall be responsible for supervising the proper execution of the provisions of Article 5 of MBLI through taking delivery of and safeguarding newly-printed bank notes, keeping records of the assets referred to in Article 5, maintaining inventories for the Crown Jewels and formulating regulations pertaining to their exhibition and controlling their transfer in and out of the Bank vaults, and finally supervising the destruction of the notes withdrawn from circulation.

V - The Supervisory Board

The Supervisory Board shall be composed of a Chairman and four members selected from amongst qualified auditors or persons well versed in accountancy or banking with not less than 10 years of experience, appointed for two years on the recommendation of the Minister of Finance and the approval of the General Assembly and eligible for reappointment.

The duties of the Supervisory Board shall be as follows:

- To audit the annual Balance Sheet of Central Bank of the Islamic Republic of Iran and to prepare a report thereon for the Annual General Assembly
- To audit the detailed lists of assets and liabilities of the Bank and to audit and certify for publication the summary of its accounts
- To inspect the operations of the Bank in order to ensure that they conform with legal requirements

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Clean Hands in the Court

By Stephen M. Schwebel

In oral argument at the phase of provisional measures in the cases brought on April 29, 1999 by Yugoslavia against ten Members of NATO concerning *Legality of the Use of Force*, a number of the respondents argued that the injunctions sought by Yugoslavia should not in any event be granted because Yugoslavia did not come to Court with "clean hands." The Court rejected Yugoslavia's requests for the indication of provisional measures in all ten cases; eight of those cases remain on the docket of the Court for subsequent consideration. Having rejected Yugoslavia's requests on grounds of lack of *prima facie* jurisdiction, the Court did not find it necessary to address the argument about Yugoslavia's lack of clean hands.

In the circumstances, it would not be appropriate for me to express a view on the applicability of the doctrine of clean hands to the cases concerning *Legality of the Use of Force*. It is, however, of high interest that that doctrine was invoked by leading Powers that were the object of Yugoslavia's Applications. Is the doctrine of clean hands one that is supported in international law?

In my view, it is. I relied on that doctrine, and recalled the equitable considerations of law on which it is based, in passages of my dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports, as follows.*[1]

> "240. As against Nicaragua, however, a further factor comes into play, in addition to those specified above. Nicaragua stands in violation of that most pertinent obligation which the Court set forth in the *Corfu Channel* case, namely, its 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. Since Nicaragua has violated and continues to violate that cardinal obligation, and commenced its violation of that obligation years before the mining and maintained that violation during the period of the mining and thereafter, Nicaragua cannot be

[1] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 ICJ 380–81, 392–94 (dissenting opinion of Judge Schwebel).

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heard to complain, as against it, of the mining of its ports. As Judge Hudson concluded in his individual opinion in the case of *Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70,* p 77:

> 'It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party . . . a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.'

* * * *

X. Nicaragua's Unclean Hands Require the Court in any Event to Reject its Claims

268. Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.

269. As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the 'clean hands' doctrine in the *Diversion of Water from the Meuse* case. The basis for its so doing was affirmed by Judge Anzilotti 'in a famous statement which has never been objected to: "The principle . . . *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized that it must be applied in international relations . . ."' Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures,* 1984, pp. 16–17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in reciting maxims of equity which exercised 'great influence in the creative period of the development of Anglo-American law', 'Equality is equity', and 'He who seeks equity must do equity'. A Court of equity 'refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (citing Halsbury's *Laws of England,* 2nd ed., 1934, p. 87). Judge Hudson noted that, 'A very similar principle was received into Roman law . . . The *exception*

non adimpleti contractus . . . " He shows that it is the basis of Articles of the German Civil Code, and is indeed a 'a general principle' of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue a like activity—an enjoinder which should have been found instructive for the current case. He held that, 'The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so.' (*Loc. cit.*, pp. 77–78. And see the Court's holding, at p. 25) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

270. The 'clean hands' doctrine finds direct support not only in the *Diversion of Water from the Meuse* case but a measure of support in the holding of the Court in the *Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A , No. 5,* page 50, where the Court held that: 'M. Mavrommatis was bound to perform the acts which he actually did perform *in order to preserve his contracts from lapsing as they would otherwise have done.'* (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti's conclusion in the *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53,* page 95, that 'an unlawful act cannot serve as the basis of an action at law'. In their dissenting opinions to the Judgment in *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* pages 53–55, 62–63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 9,* p. 31, when it held that 'one party cannot avail himself of the fact that the other has not fulfilled some obligation . . . if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question . . . ') The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng, 'is generally upheld by international tribunals' (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* 1958, p. 155). Cheng cites, among other cases, the Clark Claim, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking: 'Can he be allowed, so far as the United States are concerned, to profit by his own wrong? . . . A party who asks for redress must present himself with clean hands . . . ' (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party,* 1898, Vol. III, at pp. 2738, 2739). Again, in the *Pelletier* case, 1885, the United States Secretary of State 'peremptorily and immediately' dropped pursuit

of a claim of one Pelletier against Haiti—though it had been sustained in an arbitral award—on the ground of Pelletier's wrongdoing:

> '*Ex turpi causa non oritur:* by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied.' (*Foreign Relations of the United States,* 1887, p. 607)

The Secretary of State further quoted Lord Mansfield as holding that: 'The principle of public policy is this: *ex dolo malo non oritur actio.*' (at p. 607)

271. More recently, Sir Gerald Fitzmaurice—then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court—recorded the application in the international sphere of the common law maxims: 'He who seeks equity must do equity' and 'He who comes to equity for relief must come with clean hands,' and concluded:

'Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.' ('The General Principles of International Law', *92 Collected Courses,* Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the authority of the Court to apply a 'clean hands' doctrine, see Oscar Schachter, 'International Law in the Hostage Crisis,' *American Hostages in Iran,* 1985, p. 344)

272. Nicaragua is precisely such a State which is guilty of illegal conduct. Its conduct accordingly should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality—'in short were provoked by it.'"

In *Military and Paramilitary Measures in and against Nicaragua*—at the stage of provisional measures as well as the merits—the Court gave no weight to considerations of clean hands. This was understandable, because—less understandably—it found the hands of Nicaragua to be clean. It accepted as true misrepresentations of essential facts by the then Government of Nicaragua. To what should be its enduring embar-

rassment, the Court's reliance on Nicaragua's misrepresentations, incautious at the time, subsequently was shown to have been misplaced. It has been proven that Nicaragua, in attesting that it was not supporting the insurgency in El Salvador materially, deceived the Court.[2] In the ten cases brought by Yugoslavia against Members of NATO, the Court, having found a lack of *prima facie* jurisdiction, did not have to consider whether, if there were such jurisdiction, it should exercise its discretion to order or not to order provisional measures. Had the Court found *prima facie* jurisdiction, the Court would have had to consider exercising its discretion not to order interim measures of protection for, among other reasons, one of the Respondents' arguments: considerations of clean hands. And if, nevertheless, the Court had decided to issue Orders of provisional measures, arguably those measures would have had to have been framed so as to give effect to the equitable considerations that are at the heart of the general principles of law that the doctrine of clean hands embodies.

[2] *See Letter from the Secretary-General to the President of the Security Council*, U. N. Doc. S/25901 (1993); *Note by the President of the Security Council,* U.N. Doc. S/5929 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL),* U.N. Doc. S/26005 (1993); *Letter from the Charges d'affaires a.i. of the Permanent Mission of Nicaragua to the United States Addressed to the Secretary-General,* U. N. Doc. S/26008 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL),* U.N. Doc. S/26371 (1993); *Further Report of the Secretary-General on the United Nations Observer Mission in El Salvador (ONUSAL),* U.N. Doc. S/26790 (1993); *Statement of the President of the Security Council,* Resolutions and Decisions of the Security Council (June 11, 1993); *Statement of the President of the Security Council,* Resolutions and Decisions of the Security Council (July 12, 1993); Shabtai Rosenne, *The World Court: What It Is and How It Works* 141–43, 152–53 (1995); Stephen M. Schwebel, *The Roles of the Security Council and the International Court of Justice in Shaping the Application of International Humanitarian Law,* 27 N.Y.U. J. INT'L L. & POL. 740–41 (1995).

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Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text: English]
[11 March, 25 March, 12 April, 11 May, 17 May, 24 May, 1 June and 14 June 1966]

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Introduction

1. In the two parts of its seventeenth session [1] the Commission re-examined in the light of the comments of Governments:

(*a*) the articles on the conclusion, entry into force and registration of treaties prepared at its fourteenth session [2] and included in part I of its draft articles on the law of treaties;

(*b*) the articles on invalidity and termination of treaties prepared at its fifteenth session [3] and included in part II of its draft articles on the law of treaties.

The Commission provisionally adopted revised texts of forty-four articles. It deleted five articles, namely articles 5, 10, 14, 27 and 38 (in some cases incorporating their substance in another article). It transferred article 48 to part I, renumbering it article 3(*bis*). It formed three new articles by separating provisions from existing articles, namely, article 0 (from article 2), article 4(*bis*) (from article 32, paragraph 1), and article 30(*bis*) (from article 53, paragraph 4); and, in deleting article 38, it retained one of its provisions as article 39(*bis*). It added one new article, article 29(*bis*).

2. In re-examining the articles contained in part I, the Commission postponed its decision:

(*a*) on certain points in article 1 concerning the use of terms in the draft articles and on the inclusion in that article of a provision regarding the characterization or classification of international agreements under internal law;

(*b*) on articles 8 and 9 (participation in a treaty) and 13 (accession).

3. In re-examining the articles contained in part II, the Commission postponed its decision:

(*a*) on article 40 (termination or suspension of the operation of a treaty by agreement); and

(*b*) on articles 49 (authority to denounce, terminate, etc.) and 50 (procedure under a right provided for in the treaty), instructing the Drafting Committee to present revised texts at the next session.

At the same time it instructed the Drafting Committee to consider what, if any, elements of article 38, paragraphs 2 and 3(*a*) [4] should be retained and transferred to article 50.

4. The above questions still remaining undecided in parts I and II will necessarily have to be taken up again by the Commission at its forthcoming session when the

[1] *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009) and *Ibid., Twenty-first Session, Supplement No. 9* (A/6309/Rev.1).

[2] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 161-186.

[3] *Ibid., 1963*, vol. II, pp. 189-217.

[4] This article has been deleted, paragraph 3(*c*) being transferred to a new article, article 39(*bis*).

of States is not infrequently to set up a special legal régime between the States concerned and sometimes a régime which derogates from the existing customary law. Accordingly, to say that the emergence of a new rule of customary law, binding on the parties as a general rule, is necessarily to modify the particular relations which they have set up between them may defeat their intention. Here the Commission is confronted with a problem of the priority of legal norms, similar to that dealt with in article 63 in regard to successive treaties covering the same subject matter, but in the different context of the relation between a treaty and a customary norm. If the problem is to be dealt with at all in the draft articles, the Special Rapporteur feels that the rules may have to be more closely worked out than they are in sub-paragraph (*c*) and transferred to the section on the application of treaties. At the very least, it would be necessary to make the end of the sub-paragraph read: "and binding upon all the parties in their mutual relations".

14. In any event, the Special Rapporteur feels that article 68, as at present constructed, is out of place in the section on "modification" of treaties. Articles 65-67 concern the alteration of the operation of treaties by acts of the parties done in relation to the treaty. Those articles may therefore properly be regarded as relating to the modification of treaties. The same is true of sub-paragraph (*b*) of the present article, since it concerns the subsequent practice of the parties in the application of the treaty. But sub-paragraphs (*a*) and (*c*) concern the impact on a treaty of acts done outside and not in relation to it.

15. In the light of the foregoing observations, the Special Rapporteur thinks that the Commission should reconsider the whole article; and pending that reconsideration his own suggestions are necessarily of a very tentative character. A possible solution, he feels, may be: (1) to remove sub-paragraph (*a*) and regard it as covered by article 63; (2) to omit sub-paragraph (*c*) and re-examine how the question of the inter-temporal law should be dealt with in article 69, paragraph 1; and (3) to retain only sub-paragraph (*b*) in the present article. In that case, it may perhaps be desirable to expand the rule regarding subsequent practice slightly in order to take account of the problem of "*inter se*" modification of multilateral treaties, so that the article might read on the following lines:

Modification of a treaty by subsequent practice

The operation of a treaty may be modified by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. In the case of a multilateral treaty, the rules set out in article 67, paragraph 1, apply to an alteration or extension of its provisions as between certain of the parties alone.

Article 69.—General rule of interpretation
Article 70.—Further means of interpretation
Article 71.—Terms having a special meaning

Comments of Governments

Cyprus. While reserving the right to make detailed comments later, the Government of Cyprus expresses the view that it might have been preferable to attach more weight to the principle contained in the maxim *ut res magis valeat quam pereat* by its express mention.

Czechoslovakia. The Czechoslovak Government considers that the principle that the text must be the starting point of interpretation should receive express mention in the text; and it therefore proposes that article 69, paragraph 1, should be revised so as to read as follows:

"A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term."

Finland. The Government of Finland considers the rules concerning the interpretation of treaties to be both useful and appropriate.

Hungary. Noting that the commentary to article 69 explains the textual approach adopted by the Commission, the Hungarian Government observes that the text does not even mention the intention of the contracting parties. In its view, it is desirable to draft the article more flexibly and to give expression in it to the notion that it is the intention of the parties which is sought and that their intention is presumed to be that which appears from the text.

Mentioning that article 70 refers to preparatory work merely as a further means of interpretation, the Hungarian Government expresses the view that this is out of harmony with article 69, paragraph 3, under which "subsequent practice" is stated to be a primary means of interpretation. In its view preparatory work done prior to the conclusion of a treaty is of the same importance as subsequent practice for determining the intention.

Israel. While reserving its freedom of decision when the question comes before political organs, the Government of Israel expresses the view that the draft articles should contain provisions concerning interpretation on the lines of those formulated by the Commission. It also feels that those provisions should appear early in the draft articles. On the substance, it endorses the general philosophy of the Commission's treatment of the subject as expressed in paragraph (9) of the commentary; i.e. the textual approach to interpretation.

Paragraph 2 of article 69 it considers not to be part of any general rule of interpretation but in reality a definition which, in some respects, completes that of a "treaty" in article 1 and is applicable throughout the draft articles. In its view, the removal of paragraph 2 from article 69 would make the general rule of interpretation clearer; and it suggests the transfer of the definition in that paragraph to article 1. At the same time, it suggests that the expression "drawn up" in paragraph 2 may be ambiguous since it is capable of meaning a draft instrument, whereas the intention is clearly to refer to the final text.

If paragraph 2 is removed from article 69 in the manner already indicated, the Government of Israel suggests that the elements comprised in paragraph 3 could be moved into paragraph 1 to form sub-paragraphs (*c*) and (*d*) of that paragraph. In this connexion it states that the word "also" in paragraph 3 may cause confusion. Noting that paragraph (13) of the commentary refers to

paragraph 3 as specifying "further authentic elements of interpretation", while article 70 is entitled "further means of interpretation", it expresses the opinion that the appropriate point of departure for the process of interpretation is to be found in each one of the four elements of paragraphs 1 and 3 of article 69. All these, it suggests, stand on an equal footing.

The Government of Israel thinks that the expression "ordinary meaning to be given to each term" in paragraph 1 of article 69 may become a source of confusion to the extent that it seems to leave open the question of changes in linguistic usage subsequent to the establishment of the treaty text. It cites in this connexion a dictum of the International Court on the *United States Nationals in Morocco* case interpreting the word "dispute" by reference to the linguistic usage at the time of the conclusion of the treaty. [91]

In addition, it warns against formulating the rule as a whole in such a way as would lead to "excessive molecularization of the treaty". Here it refers to a dictum of the International Court in the *Maritime Safety Committee* caze regarding the meaning of the word "elected", in which it emphasized that the meaning of a word cannot be determined in isolation by reference to its usual or common meaning and that a word "obtains its meaning from the context in which it is used". [92] It suggests that, leaving aside the question of the time factor previously mentioned, this point could be met by revising the opening words of article 69 so as to make them read:

> "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning given to the language used in its context."

In that event, the reference to the "context of the treaty" in sub-paragraph (*a*) would be deleted. At the same time it suggests that the order of sub-paragraphs (*a*) and (*b*) should be reversed.

In sub-paragraph (*b*) the Government of Israel suggests that the text needs adjustment so as to make it clear that the rules of general international law there referred to are the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone.

In addition, the Government of Israel considers that, in view of the proliferation of multilingual versions of treaties, comparison between two or more authentic versions ought to be mentioned in article 69, since in its view, such comparison is normal practice in interpretation. It observes that article 73 deals only with the specific problem of what happens when the comparison discloses a difference; but that comparison is of a greater importance, for it frequently assists in determining the meaning of the text and the intention of the parties to the treaty. To that extent, in its opinion, comparison forms part of any general rule of interpretation in the case of multilingual treaties.

The Government of Israel further states that if article 69 is reconstructed on the lines which it proposes, including the transfer of paragraph 2 to article 1, it may be unnecessary and, indeed, confusing to refer specifically to the preparatory work of the treaty in article 70.

Finally, it suggests that article 71 should either be combined with article 69 or placed immediately after it.

Netherlands. The Netherlands Government comments that, where a treaty refers or appears to refer to concepts of international law, observance of the rule in paragraph 1(*b*) of article 69 would mean that efforts must be made to discover the intention of the parties by considering the meaning of these concepts elsewhere in international law and independently of the treaty to be interpreted. In its view, it is essential that the intention of the parties should be ascertained from the treaty itself under paragraph 1(*a*), and any attempt to discover that intention from international law in general is of secondary importance. It thinks the rules in sub-paragraphs (*a*) and (*b*) not to be of equal value and that sub-paragraph (*b*) should not be applied until sub-paragraph (*c*) has proved ineffective. Nor does it agree with the reference in sub-paragraph (*b*) to "law in force at the time of the conclusion of the treaty". Although this may be the correct criterion in some cases, it is of the opinion that in others legal terms will have to be interpreted according to the law in force either at the time the dispute arises or at the time of interpretation. For example, in interpreting the terms "territorial sea" or "open sea", regard must, it considers, be had to changing legal views. The Netherlands Government favours the total deletion of sub-paragraph 1(*b*) rather than merely the words "in force at the time of its conclusion". It would be quite enough, it considers, to leave the question of the time element to be determined on the basis of "good faith". It proposes that paragraph 1 should be revised so as to make it read:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term in the context of the treaty and in the light of its objects and purposes".

The Netherlands Government also considers that paragraph 3(*b*) of article 69, by requiring the "understanding of all the parties", may rule out or greatly restrict the possible influence of what is conventional within an international organization. Even if the word "all" is deleted, the clause would still, it thinks, place an undesirable curb on the interpretation procedure and make it unnecessarily rigid. It suggests that all the words from "which clearly" to "its interpretation" should be deleted from paragraph 3(*b*). It proposes that the sub-paragraph should read simply as follows:

> "Any subsequent practice in the application of the treaty...".

Turkey. The Turkish Government approves of the effort of the Commission to codify the rules for the interpretation of treaties, and is in general accord with the principles adopted by the Commission as the basis of the rules formulated in the articles.

United Kingdom. The United Kingdom Government supports the Commission's view that the text of a treaty must be presumzd to be the authentic expression of the intentions of the parties. It further expresses its support for the Commission's proposal in paragraph 1(*b*). It

[91] *I.C.J. Reports 1952*, p. 182.

[92] *Ibid., 1960*, p. 158.

also considers the concept of the "context" of a treaty to be a useful one, not only with regard to interpretation but also with regard to such expressions as "unless the treaty otherwise provides" and "unless it appears from the treaty", found in other articles. At the same time it suggests that in paragraph 2 of article 69 the words "including its preamble and annexes" should be omitted from the definition of the "context of the treaty".

United States. While expressing the view that articles 69-71 appear to serve a useful purpose, the United States Government suggests that there may be a question whether their provisions should be stated as guidelines rather than as rules; and also a question whether additional means of interpretation should be enumerated. It further assumes that the order in which the means of interpretation are given has no significance in determining the relative weight to be given to them. At the same time, it questions the apparent primacy given to the ordinary meaning even when an agreement between the parties requires that some terms be given a special or technical meaning. It suggests that this possible conflict could be avoided by listing in paragraph 1 six rules of interpretation *seriatim:* (*a*) ordinary meaning: (*b*) context; (*c*) objects and purposes; (*d*) rules of international law; (*e*) agreement regarding interpretation; (*f*) subsequent practice in interpretation. Paragraph 3 of article 69 would then be eliminated. As to paragraph 2, it feels that if "context" is to be defined, the definition should be improved; for example, by clarifying whether it includes (*a*) a unilateral document and (*b*) a document on which several but not all of the parties to a multilateral instrument have agreed.

The United States Government considers that, *mutatis mutandis*, the Commission's formulation of the six rules is, in general, satisfactory. It feels, however, that in paragraph 1(*b*) of article 69, the reference to "general international law" may add an element of confusion and that the word "general" should be deleted. Again, in paragraph 3(*b*), it suggests that the reference to "the understanding of all the parties" may be open to the construction that some affirmative action is required of each and every party. In its view, a course of action by one party not objected to by others may be a substantial guide to interpretation.

Article 70 it thinks may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. It observes that, if a provision seems clear on its face but a dispute has arisen with respect to its meaning, recourse to other means of interpretation should not be dependent on the conditions specified in (*a*) and (*b*) of the article. It suggests that recourse to further means of interpretation should be permissible if the rules set forth in article 69 are not sufficient to establish the correct interpretation.

In article 71 it suggests that the word "conclusively" is unnecessary and may be a source of confusion.

Finally, the United States Government remarks that further study should be given to the relationship of the articles on interpretation with other articles which have "interpretive overtones", e.g. articles 43 (supervening impossibility of performance), 44 (fundamental change of circumstances) and 68 (modification by a subsequent treaty, subsequent practice or customary law).

Yugoslavia. The Yugoslav Government considers that the articles on interpretation require to be made more complete. First, it suggests the desirability of a special provision for the purpose of excluding the possibility of depriving a treaty of its true force and effect by means of a procedure of interpretation. Secondly, it remarks that States acceding to a multilateral treaty ordinarily have in view only the text itself and not its *travaux préparatoires*; and that this point ought also to be covered. It endorses the Commission's proposal that recourse may be had to the *travaux préparatoires* only in the circumstances envisaged in article 70. Indeed, it thinks that the point might be formulated in sharper form, namely, that when the text of a treaty is clear and unambiguous it is inadmissible to refer to the provisional understandings arrived at in the course of the negotiations. In these cases, it considers that the parties are entitled in good faith to refer only to the agreement definitively adopted.

In addition, the Yugoslav Government considers it necessary to envisage the case of an international instrument produced by several States having different legal systems and concepts in which the interpretation of the agreement must conform to the legal concepts of all the contracting parties.

Greek delegation. The Greek delegation does not accept that priorities should be established among the various means of interpreting a treaty. In its view, since a treaty is an expression of the common intention of the parties the only basic rule of interpretation is to ascertain that intention by every possible means in every possible way. It remarks that the Permanent Court in its Advisory Opinion on the Interpretation of the Convention concerning Employment of Women during the Night,[93] although it relied upon "the natural meaning of the words", discovered that meaning by studying the *travaux préparatoires* of the convention. In article 69 it would prefer to see the expression "word" used rather than "term". Even so, it does not think that "words" always have an ordinary meaning and the intention of the parties is the only thing that matters. Paragraph 1(*b*), by referring to the rules of general international law in force at the time of a treaty's conclusion, has the effect, it emphasizes, of excluding so-called evolutionary interpretation. By way of example, it instances the term "exchange control" in the Articles of Agreement[94] of the International Monetary Fund.[95]

Kenyan delegation. The Kenyan delegation considers that articles 69-71 represent a reasonable compromise of conflicting views. At the same time, it underlines that, as the essence of any treaty is the intention of the parties, the goal of any method of interpretation must be to use all intrinsic and external aids to find out what that intention really was.[96]

[93] *P.C.I.J.*, Series A/B, No. 50, 1932.

[94] United Nations, *Treaty Series*, vol. 2, No. 20, Art. VIII.

[95] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 42.

[96] *Ibid.*, 850th meeting, para. 40.

Syrian delegation. The Syrian delegation says of article 69, paragraph 1(*b*) that it stipulates advisedly that a treaty is to be interpreted "in the light of the general rules of international law in force at the time of its conclusion"; and it adds that it is only in that context that the wish of the parties can be validly interpreted.[97]

Thai delegation. The Thai delegation considers that in article 69 the first rule of interpretation should be that the terms of the treaty, if clear and precise, are the only guide to the intention of the parties. Citing Vattel, it says that the text should be subject to interpretation only if it is ambiguous. As to paragraph 3(*b*), it is of the opinion that, although subsequent practice may provide evidence of facts, it is not conclusive, and cannot be automatically applied but must be invoked by a party. The probative value of subsequent practice, it maintains, depends on all the surrounding circumstances and must be weighed with all other relevant evidence. In its view, subsequent practice may afford aid in the interpretation of ambiguous provisions, but may not be used to frustrate the natural meaning of the words or to extend the scope of the original terms.[98]

Observations and proposals of the Special Rapporteur

1. It appears from the comments of Governments that in principle they endorse the attempt of the Commission to isolate and codify the general principles which constitute general rules for the interpretation of treaties. The United States Government, it is true, while it considers articles 69-71 to serve a useful purpose, and makes suggestions for their improvement, raises a query as to whether their provisions should be stated as "guidelines" rather than as rules. The Special Rapporteur understands this query primarily as a *caveat* against formulating the general principles for the interpretation of treaties in such a manner as to give them a rigidity which might deprive the process of interpretation of the degree of flexibility necessary to it. The Commission was fully conscious in 1964 of the undesirability—if not impossibility—of confining the process of interpretation within rigid rules, and the provisions of articles 69-71 when read together, as they must be, do not appear to constitute a code of rules incompatible with the required degree of flexibility. No doubt the formulation of those provisions and their interrelation with each other can and will be improved by the Commission in the light of the comments of Governments. But if satisfactory texts can be found, it seems desirable than any "principles" found by the Commission to be "rules" should, so far as seems advisable, be formulated as such. In a sense, all "rules" of interpretation have the character of "guidelines" since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted. But in the international community, where the role of treaty interpretation is so important and where recourse to adjudication depends on the will of the parties, there may be particular value in codifying as rules such basic principles of interpretation as are found to be generally accepted as law.

2. Governments appear also to endorse, in general, the Commission's view that the elucidation of the meaning of the text should be the starting point of interpretation rather than an investigation *ab initio* into the intentions of the parties. One Government (Czechoslovakia) has indeed suggested that this concept should receive express mention in article 69 in the form of a presumption: "A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted, etc." On the other hand, another Government (Hungary) would prefer expression to be given to the notion that it is the intention of the parties which is sought in interpretation and that "their intention is presumed to be that which appears from the text". Whichever way the presumption is framed, its introduction into the article would seem to have disadvantages. The presumption suggested by the Czechoslovak Government is closely in line with the concept of interpretation expressed in the article. But the statement of the presumption may tend to raise the question how far the presumption is rebuttable and what precisely is the relation between the presumption and other elements of interpretation mentioned in articles 69-71. In other words, it may slightly tend to increase the rigidity of the rule formulated in the articles. The presumption suggested by the Hungarian Government, while open to the same objection, tends to present the intention of the parties rather than the text as the starting point of interpretation and thus to diverge somewhat from the Commission's approach to the rules of interpretation. (See also this Government's suggestion that preparatory work should be given the same importance as subsequent practice for determining the intention of the parties.)

3. Two Governments (United States and Israel) make proposals for the rearrangement of the provisions of articles 69 and 71 which, if their explanations of the proposals are different, would give a somewhat similar result. The United States Government first expresses the opinion that the order in which the means of interpretation are stated ought not to have any significance in determining their relative weight. It then queries what it calls the "apparent primacy given to the ordinary meaning even when an agreement between the parties requires that some terms be given a special or technical meaning". The validity of this objection may be open to doubt since, if the intention of the parties to give a special or technical meaning to terms is clear, that intention will certainly prevail under the combined effect of the rules stated in article 69, paragraphs 1 and 3(*a*), and article 71. But if that intention is not clear, the onus put by article 71 upon the State alleging the special or technical meaning to establish the intention to set aside the ordinary meaning would seem to be justified, whether the intention is said to be expressed in the treaty itself or in "an agreement regarding the interpretation of the treaty". Nevertheless, the general point made regarding the relation between the various rules set out in article 69 remains. This point, the United States Government suggests, should be met by listing *seriatim* in article 69, paragraph 1, the following six rules of interpretation: (*a*) ordinary meaning; (*b*) context; (*c*) objects and purposes; (*d*) rules of international law;

[97] *Ibid.*, 845th meeting, para. 9.

[98] *Ibid.*, 850th meeting, para. 17.

(*e*) agreement regarding interpretation; and (*f*) subsequent practice in interpretation. Paragraph 3 would then, as a separate paragraph, disappear. Under the United States scheme, article 71, dealing with terms intended to have a special meaning, would, it seems, remain where it is as a distinct article.

The Government of Israel, also proposes that the two matters covered in paragraph 3 of article 69—agreement regarding interpretation and subsequent practice—should be moved up into paragraph 1. At the same time it underlines that, in its view, "the appropriate point of departure for the process of interpretation is to be found in each one of the four elements of paragraphs 1 and 3"; and it considers each of these elements to stand on an equal footing. If "ordinary meaning" is added from the opening phrase of article 69 and the elements of "context" and "objects and purposes" combined in paragraph 1(*a*) are separated, the four elements of the Israel proposal become the six elements of the United States proposal. The two proposals differ, however, in that the United States Government suggests that "ordinary meaning" should be removed from its governing position in the opening phrase and placed alongside the other elements, whereas the Government of Israel assumes that the "ordinary meaning" will retain its position in the opening phrase. The United States Government does not indicate very clearly how it relates the "ordinary meaning" to the "context", to "objects and purposes" or to "rules of international law".

The Government of Israel it should be added, proposes that article 71 (intention to give a special meaning) should either be moved up into article 69 or placed immediately after it.

4. Leaving aside the question of the "ordinary meaning", the Commission did not, it is believed, intend in 1964 to establish any positive hierarchy for the application of the means of interpretation mentioned in the four sub-paragraphs of paragraphs 1 and 3 of article 69. It headed the article "General rule of interpretation", in the singular, and it regarded the application of the means of interpretation set out in the article as a combined operation. All the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would then give the legally relevant interpretation. The problem is perhaps reminiscent of the so-called sources of international law listed in Article 38 of the Statute of the International Court. In the nature of things the various elements have to be arranged in some order, and considerations of logic lead the mind to find one arrangement more satisfying than another. Then, no matter how general or neutral the formulation, alert minds may see in the arrangement chosen a basis for deducing a hierarchical order for the application of the norms. Although he doubts whether the change affects the legal position very much, the Special Rapporteur suggests that it may be advisable to move the contents of paragraph 3 up into paragraph 1 in order to emphasize the unity of the process of interpretation under the "general rule" laid down in article 69 and to minimize the significance of the order in which the various elements make their appearance in the article. Paragraph 2, if retained, can then readily enough follow the enlarged paragraph 1.

5. The United States proposal to detach the "ordinary meaning" rule from the opening phrase and make it the first of six rules involves a point of presentation which may also be one of substance. In 1964 the Commission took the view that the "ordinary meaning" of terms cannot properly be determined without reference to their context and to the objects and purposes of the treaty and to any relevant rules of international law. Indeed, some members even thought article 71 to be unnecessary on the ground that, in its context, the technical or special meaning of terms will appear as their ordinary meaning. But, if paragraph 1 of article 69 is revised, as the United States Government suggests, so as to read:

> "The terms of a treaty shall be interpreted in good faith:
> (*a*) in accordance with their ordinary meaning;
> (*b*) in the context of the treaty;
> (*c*) in the light of the objects and purposes of the treaty etc.",

the article will seem to recognize that terms have an ordinary meaning which is independent of their context and of the objects and purposes of the treaty. This may be true as a matter of pure linguistics but it may be doubted whether it is true as a matter of interpretation. As the precedents cited in paragraph (10) of the commentary illustrate, the "ordinary meaning of terms" is always in international jurisprudence associated with the "context".

6. At the same time, it is necessary to consider the United States observation that, in the present text of article 69, there may be a certain appearance of conflict between the primacy given to the ordinary meaning and the rule in paragraph 3(*a*) concerning "an agreement between the parties regarding the interpretation of the treaty". This observation does not perhaps give full weight to the opening phrase of paragraph 3: "There shall also be taken into account, together with the context: (*a*) any agreement between the parties etc." These words were intended by the Commission to put such interpretative agreements on the same level as the "context" and to indicate that an interpretative agreement is to be taken into account as if it were part of the treaty. It seems that the force of these words may have been obscured by the intervention of the definition of "context" between paragraphs 1 and 3; but this would be remedied if the contents of paragraph 3 are moved up into paragraph 1.

7. The Government of Israel makes two criticisms of the expression "ordinary meaning to be given to each term", found at the beginning of article 69. First, it suggests that the expression may become a source of confusion by leaving open the question of changes in linguistic usage subsequent to the establishment of the treaty text; and it refers in this connexion to a dictum in the *United States Nationals in Morocco* case regarding the need to interpret the word "dispute" by reference to the meaning which it had at the time of the conclusion

of the treaty.[99] Attention was drawn to this point by Sir G. Fitzmaurice in an article where he referred to it as the "principle of contemporaneity" and by the Special Rapporteur in his third report.[100] The Commission regarded the point as simply an aspect of the inter-temporal law and did not seek to spell out a separate rule of "inter-temporal linguistics". This view is believed by the Special Rapporteur to be correct; and he shares the view of the Netherlands Government that at root the application of the inter-temporal law to interpretation is a matter of good faith. He also feels that the requirement that a treaty should be interpreted by reference to the linguistic usage current at the time of its conclusion is really one both of common sense and good faith, and is also implicit in the rule that the meaning of terms is to be determined by reference to the context of the treaty and to its objects and purposes. This is not to belie the practical importance of the inter-temporal law, but it may unduly complicate matters to introduce as a separate principle in the present article the concept of "inter-temporal" linguistics. Moreover, as the Special Rapporteur pointed out in his third report[101] the rule cannot be formulated in the simple form in which it is stated by Sir G. Fitzmaurice and by the Court in the *United States Nationals in Morocco* case; for the content of a word, e.g. "bay" or "territorial waters", may change with the evolution of the law if the parties used it in the treaty as a general concept and not as a word of fixed content. Indeed, one Government questioned the advisability even of dealing with the inter-temporal law in the present article (see paragraph 11 below).

8. The second criticism is that the words as formulated —"ordinary meaning to be given to each term"—may lead to "excessive molecularization of the treaty"; and in this connexion the Government of Israel refers to a dictum of the International Court that a "word obtains its meaning from the context in which it is used".[102] It proposes that the opening phrase of article 69 should be revised to read: "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning of the language used in its context" and that the word "context" should then be deleted from sub-paragraph (*a*). The Special Rapporteur doubts the force of this criticism, even although he may still prefer his original formulation "ordinary meaning to be given to each term in its context in the treaty and in the context of the treaty as a whole". The existing text relates the meaning of each term to "the context of the treaty" and to "its objects and purposes", which seems sufficient to discourage "excessive molecularization" of the treaty. And a simpler expedient to meet the point would seem to be to change "each term" to "its terms". Nor does the phrase "language used in its context" seem felicitous. Terms—"*termes*" in French—is the word whose use is hallowed in this connexion and it seems natural to employ it in article 69. True, it has the disadvantage of having two senses: "term" in the linguistic sense and "term" in the legal sense of "provision". But the two senses are concordant and the rule is meaningful and valid for both. Otherwise, it would seem preferable to adopt the Greek Government's suggestion and to speak of the "words" of the treaty.

9. Paragraph 1(*b*) has attracted comments from a number of governments. The United Kingdom and Syrian Governments express their support of the rule formulated in this sub-paragraph. The United States Government also supports the rule, merely suggesting that the word "general" should be deleted from the phrase "general international law", as it feels that this word may add an element of confusion. The Netherlands Government, on the other hand, takes exception to the sub-paragraph and advocates its total deletion. In its view, the sub-paragraph would require that, wherever a treaty appears to refer to a concept of international law, an effort should be made to determine the intention of the parties by considering the meaning of those concepts elsewhere in international law and independently of the treaty. It considers that the principle regarding context and objects and purposes in sub-paragraph (*a*) does not possess the same value as the principle regarding rules of international law in sub-paragraph (*b*); and that recourse should only be had to the latter when the application of sub-paragraph (*a*) has proved ineffective. The Government of Israel, on the other hand, suggests that sub-paragraph (*b*) should be placed before sub-paragraph (*a*) (which, in its view, should contain a reference to "objects and purposes"). This Government at the same time suggests that sub-paragraph (*b*) should be revised so as to make it clear that the expression "rules of general international law" denotes the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone. The Special Rapporteur thinks that it may be convenient if he examines the foregoing comments on paragraph 1(*b*) before turning to the other comments dealing with the question of the inter-temporal law.

10. The objection taken by the Netherlands Government to sub-paragraph (*b*) does not seem to the Special Rapporteur to carry conviction; for it involves interpreting the sub-paragraph in a manner which could hardly be justified as an interpretation in good faith. Certainly, it is a manner of interpreting the reference to rules of international law which has not occurred to any other Government and which did not occur to members of the Commission in 1964 or to members of the Institute of International Law in 1956 when they adopted the resolution on the interpretation of treaties mentioned in the Special Rapporteur's third report.[103] Paragraph 1 has to be read as a whole and, when this is done, it does little more than say that the terms of a treaty have to be interpreted in the light of the fact that it is an instrument concluded under the international legal order existing at the time of its conclusion.

Indeed, the Government of Israel's proposal for the reversal of the order of the sub-paragraphs goes in the

[99] *I.C.J. Reports 1952*, p. 189.

[100] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 55-57.

[101] *Ibid.*, pp. 9 and 10.

[102] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960*, p. 158.

[103] *Yearbook of the International Law Commission, 1964*, vol. II, p. 55.

opposite direction from that of the Netherlands Government, since it would, if anything, give more prominence to the rules of international law. No reason is given for this proposal, and the advantage of it is not apparent to the Special Rapporteur. On the contrary, he sees every reason for not separating the "context of the treaty" from the "objects and purposes" of the treaty, in the formulation of article 69. In his view, both are aspects of the "context of the treaty" and although, as already stated, he himself might have preferred a slightly different formulation of the element of "context", he does not favour this proposal of the Government of Israel. Nor does he find convincing its other suggestion that the text needs revision so as to make it clear that "the general rules of international law" cover the substantive rules of international law. Unless the Commission can rely on words being interpreted in good faith according to their ordinary meaning in their context, its drafts may have to become much more complicated than they now are. There remains the United States proposal for the deletion of the word "general". Its comment that this word may introduce an element of confusion is considered to be justified. Indeed, the Special Rapporteur doubts whether the Commission ever decided to include the word in the text. At its 770th meeting he introduced a final draft which spoke only of "the rules of international law". A proposal was made by one member of the Commission to introduce the word "general" into the text; and a discussion then ensued as to whether the phrase should be "rules" or "principles" of international law. But the record [104] does not indicate that any vote was taken on the proposal to include the word "general"; while the trend of the discussion was against it.

11. Three Governments question the adequacy of paragraph 1(*b*) in regard to the inter-temporal element. The Government of Israel, in its comments on article 68, sub-paragraph (*c*) (Modification of a treaty by the emergence of a new rule of customary law), proposes the transfer of the contents of that sub-paragraph to article 69. It considers that the question raised by the emergence of a new customary rule is primarily the impact of the new rule on the interpretation of the treaty under the second branch of the inter-temporal law mentioned by Judge Huber in the *Island of Palmas* case. The Netherlands Government, for its part, questions the words "in force at the time of the conclusion of the treaty" in paragraph 1(*b*) of article 69, observing that in some cases legal terms may have to be interpreted according to the law in force at the time of their interpretation. It suggests that the time element in interpretation should be left to "good faith". The Greek Government also questions the words "in force at the time of the conclusion of the treaty" as having the effect of excluding "evolutionary interpretation" of treaties.

12. The Special Rapporteur, in his comments on article 68, has suggested that the rule regarding the emergence of a new rule of customary law should be removed from article 68, since it does not seem to be a case of "modification of treaties" in the same sense as the cases dealt with in articles 65-67. He has also pointed out that the emergence of a new rule of customary law has two aspects: (1) its impact on the interpretation of terms and (2) its possible impact on the application of the treaty by setting up a customary legal norm, i.e. by raising a question of the relative priority of the treaty and the customary norm. The present arrangement under which the "interpretative" aspect is half dealt with in article 69 and the "application" aspect is incompletely covered in article 68 under the head of "modification", does not seem justifiable. The Commission, it is thought, has to decide, first, whether it is going to cover the inter-temporal element at all in the draft article and, secondly, if it is to do so, how the rules regarding its two aspects can be formulated in a manner to render them complete or at any rate not misleading.

13. Paragraph 1(*b*), as at present drafted, is incomplete in that it may be open to the interpretation that it negatives the possibility that a term may ever change its content with the evolution of international law. The choice before the Commission, it is thought, is either to spell out in article 69 the second branch of the inter-temporal law which recognizes that such a change may occur in certain cases, or else to adopt the point of view of the Netherlands Government that the temporal element in interpretation is implicit in interpretation in good faith. The second branch of the inter-temporal law, as the Special Rapporteur pointed out in his third report, [105] cannot be altogether divorced from the intention of the parties at the time of the conclusion of the treaty. Thus, in the *North Atlantic Coast Fisheries* arbitration [106] it was held that the word "bay" in the Treaty of Ghent of 1818 had been intended to denote a bay in the popular rather than legal sense. Even when a term, e.g. "bay", "territorial waters", "continental shelf", is used in its legal sense, a question may arise whether the parties had a particular concept of the term in mind and intended to fix their rights definitively in the treaty by reference to that concept, or whether they intended the term to be given whatever meaning it might from time to time possess under international law. Accordingly, if the second branch is incorporated in article 69, its formulation will require close attention. In 1964, the Commission did not show itself very receptive to the idea of dealing with both branches of the inter-temporal law in article 69. If the Commission remains of this mind, the Special Rapporteur suggests that the words "in force at the time of its conclusion" should be deleted, and that sub-paragraph (*b*) should refer simply to "the rules of international law", (or to the principles of international law) leaving the application of the inter-temporal law to be implied.

14. Paragraph 2 of article 69 is commented on by three Governments. The United Kingdom Government considers the concept of the "context" of a treaty to be a useful one, both with regard to interpretation and to such expressions as "unless it appears from the treaty". It merely suggests that the words "including its preamble and annexes" should be omitted from the definition. The United States Government, on the other hand, perhaps

[104] *Ibid., 1964*, vol. I, pp. 316 and 317.

[105] *Ibid., 1964*, vol. II, pp. 9 and 10.

[106] *Reports of International Arbitral Awards*, vol. XI, p. 196.

indicates a doubt as to the value of the concept when it suggests that if "context" is to be defined, it should be improved by clarifying whether it includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed. The Government of Israel considers paragraph 2 not to be part of any general rule of interpretation but a definition which, in some respects, completes that of a "treaty" in article 1 and is applicable throughout the draft articles. Accordingly, it suggests the transfer of the definition to article 1. It also questions the expression "drawn up" as being open to the interpretation that it refers to a draft instrument.

15. The definition of what is comprised in the "context of the treaty", as the Commission pointed out in paragraph (12) of its commentary, is important not only for the general application of the rules of interpretation but also for indicating the scope of such expressions as "unless the treaty otherwise provides", "unless it appears from the treaty", etc. These expressions occur at various places throughout the draft articles, including articles on the conclusion of treaties which in any arrangement of the articles will precede those on interpretation. That being so, the Government of Israel's suggestion that the definition should be transferred to article 1 has a certain attraction. But the Government of Israel does not make clear whether it has in mind "context of the treaty" as the term to be defined in article 1, or a further clause "completing" the definition of what the term "treaty" means in the draft articles. In any case, neither of those solutions seem viable. Probably, only a further clause completing the definition of "treaty" by adding to it the elements in paragraph 2 of article 69 would be very helpful in article 1 in connexion with the later interpretation of expressions like "it appears from the treaty". But to expand the definition of "treaty" in that way, generally and not thereby for purposes of interpretation, might have unexpected consequences in the sections on "invalidity" and "termination" of treaties. On the other hand, to define "context of the treaty" in article 1 independently of the provisions of article 69 might not be very meaningful. Accordingly, the Special Rapporteur feels that the better course is to retain the definition of "context" in article 69, but, as already indicated above, to place it at the end of the article and move the contents of paragraph 3 into paragraph 1.

16. As to the substance of paragraph 2, the Special Rapporteur sees no objection to the proposal to delete the words "including the preamble and annexes" which were inserted in 1964 only *ex abundanti cautela*. The suggestion of the United States Government that it should be made clear whether the "context" includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. In the *Anglo-Iranian Oil Company* case[107] the International Court upheld the relevance of a purely unilateral declaration for the interpretation of a unilateral instrument. But it would seem clear on principle that a unilateral document cannot be regarded as part of the "context" for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a "unilateral" or a "group" document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent. The Government of Israel's point regarding the expression "drawn up" will no doubt be borne in mind by the Drafting Committee, which in 1964 did not find it easy to arrive at a combination of words in paragraph 2 that would be satisfactory from every point of view.

17. Paragraph 3(*b*) (subsequent practice) is commented on by three Governments. The Netherlands Government considers that to require the "understanding of all the parties" may restrict unduly the influence of what is "conventional" (customary usage?) within an international organization. But even the deletion of the word "all" would, in its view, still be too restrictive; and it proposes that the sub-paragraph should read: "Any subsequent practice in the application of the treaty". The United States Government, though from a somewhat different point of view, also thinks that the word "all" is too strong, as being open to the construction that some affirmative action is required by each and every party. In its view, a course of action even by one party not objected to by others may be a substantial guide to interpretation. The Government of Thailand, on the other hand, questions the inclusion of "subsequent practice" in this paragraph. In its view, although evidence of intention, subsequent practice is never conclusive, has to be weighed against all other relevant evidence, and may afford aid only in the interpretation of ambiguous provisions.

18. The original proposals of the Special Rapporteur in his third report[108] mentioned subsequent practice among the "other evidence and indications of the intentions of the parties" additional to the context. But the Commission decided to differentiate subsequent practice establishing the common understanding of all the parties and to classify this as an authentic interpretation comparable to an interpretative agreement. At the same time, it said in paragraph (13) of the commentary that the practice of individual States in the application of a treaty may be taken into account under article 70 as one of the further means of interpretation there mentioned. But it did not refer to subsequent practice *eo nomine* in that article. The comments of the Netherlands Government suggest that this omission may have led it to read paragraph 3(*b*) as covering every application of subsequent

[107] *I.C.J. Reports 1952*, p. 105.

[108] *Yearbook of the International Law Commission, 1964*, vol. II, p. 52.

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practice. Clearly, to amount to an "authentic interpretation", the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally. As to the United States objection that the word "all" may be construed as requiring some affirmative action from each and every party, it is doubted whether the objection is wholly valid. The word "understanding" was chosen by the Commission instead of "agreement" expressly in order to indicate that the assent of a party to the interpretation may be inferred from its reaction or absence of reaction to the practice. But although the existing text of paragraph 3(*b*) may not be inexact, the Special Rapporteur feels that the rigorous terms in which the rule is formulated—"clearly establishes", "all the parties"—may perhaps go a little beyond the way in which its operation is viewed in practice. He suggests that the word "clearly", which is unnecessary, should be omitted and that the paragraph might be reworded on the following lines:

> any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

19. In article 70, the chief point which has attracted attention is the Commission's treatment of the question of "preparatory work" and, having regard to the controversial character of this question, the number of Governments which have made comments on it is comparatively small. The views of three Governments appear to diverge substantially from that of the Commission in regard to the place to be accorded to *travaux préparatoires* in the process of interpretation. The Hungarian Government considers that preparatory work ought to be given the same importance as subsequent practice, that is, should be classed as a primary means of interpretation. The United States Government, while not going quite as far as this, considers that article 70, as at present drafted, may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. Its view appears to be that, whenever a dispute has arisen regarding the meaning of a treaty, recourse to further means of interpretation should be admissible independently of whether the conditions specified in sub-paragraphs (*a*) and (*b*) are fulfilled; and that the only requirement to be met should be that application of the rules in article 69 have failed to establish the correct interpretation. The Greek Government, considering that the only basic rule of interpretation is to ascertain the intention of the parties by every possible means in every possible way, appears to take the position that recourse to preparatory work should in every case be automatically admissible in order to determine that intention. A fourth Government (Kenya), while stating that articles 69-71 represent a reasonable compromise of conflicting views, underlines that the goal of any method of interpretation must be to use all intrinsic and external aids to ascertain the intention of the parties. The Yugoslav Government, on the other hand, would prefer to see the conditions for recourse to *travaux préparatoires* stated in even stricter form, namely, that when the text is clear and unambiguous, recourse to them is inadmissible.

The Government of Israel, without taking a position on the question of substance, in effect proposes the deletion of the specific reference to preparatory work. It argues that, if the definition of "context" is transferred to article 1 (as it recommends) it may become "unnecessary and indeed confusing" to refer specifically to preparatory work in article 70.

20. The particular reason given by the Government of Israel for omitting any reference to preparatory work does not seem convincing. The "context of the treaty", as defined by the Commission, comprises not "drafts" and other preparatory material but separate operative documents formally related to the treaty. The Commission's definition of "context"—whether or not this may need amendment—does not dispose of the problem of *travaux préparatoires*: moreover, the formulation of such a definition seems to make it more, rather than less, necessary to refer specifically to *travaux préparatoires* in order to avoid any risk of its being supposed that the rule regarding the "context of the treaty" covers all aspects of *travaux préparatoires*. The expression "further means of interpretation" is, of course, wide enough to cover *travaux préparatoires*, but in 1964 the Commission considered it desirable on general grounds to indicate specifically the rule laid down for *travaux préparatoires* in the draft articles.

So far as concerns the substance of the question and the formulation of the rule in article 70, the Special Rapporteur does not feel that he should make any new proposal in the present report on the basis of the above-mentioned comments of Governments. The content and drafting of article 70 received close consideration in the Commission in 1964, when some differences of opinion appeared among members regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation. Some members felt that in practice *travaux préparatoires* play a somewhat more significant role in interpretation than might perhaps appear from a strict reading of certain pronouncements of the International Court. The Commission itself said in paragraph (15) of its commentary that "it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extensive means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 69 has disclosed no clear or reasonable meaning". Accordingly, the rule which it formulated was carefully balanced so as to allow recourse to *travaux préparatoires* in order to "verify or confirm the meaning resulting from the application of article 69", but only to allow it for the purpose of determining the meaning in cases where interpretation according to article 69 leaves the meaning ambiguous or obscure, or gives a meaning which is manifestly absurd or unreasonable. This formulation seemed to the Commission to be about as near as it is possible to get to reconciling the principle of the primacy of the text, frequently laid down by the Court and adopted by the Commission, with the frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear. Moreover, the rule formulated in article 70 is inherently

flexible, since the question whether the text can be said to be "clear" is in some degree subjective. But this does not detract from the importance of stating the rule in order to furnish the necessary directive for interpretation in good faith on the basis of the text and the *travaux préparatoires*; and without such a rule, the cardinal principle of the primacy of the text might be undermined.

The Commission will wish to re-examine its position in regard to the whole problem of *travaux préparatoires* at its eighteenth session and in doing so will certainly give every attention to the comments of Governments. But the Special Rapporteur, as already stated, does not think that these comments should lead him to propose changes in the text to the Commission. He does not, for example, feel that the modification suggested by the United States—that recourse to preparatory work for the purpose of determining the meaning should be admitted whenever application of article 69 has failed to establish the correct interpretation—would be an improvement on the rule proposed by the Commission. To make recourse to *travaux préparatoires* dependent on a determination whether the rules in article 69 have given a "correct interpretation" seems to the Special Rapporteur rather to beg the question to be solved.

21. The special question of recourse to *travaux préparatoires* in the case of multilateral treaties is raised by the Yugoslav Government. In its opinion, States acceding to a multilateral treaty ordinarily have in view only the text itself and not the *travaux préparatoires*; and it proposes that the point should be covered in the article. The Commission examined this question in 1964 and decided that it should not include any special provision regarding the use of *travaux préparatoires* in the case of multilateral treaties. The considerations on which this decision was based are set out in paragraph (17) of its commentary and need not be repeated here. In view of the Commission's previous examination of the point, the Special Rapporteur does not feel that he should do more than draw its attention to the proposal of the Yugoslav Government.

22. Article 71 has been the subject of two comments. The United States Government proposes the deletion of the word "conclusively", which it considers to be unnecessary and a possible source of confusion. The Special Rapporteur feels that this comment is well-founded and that the word should be omitted.

The Government of Israel suggests that the article should either be combined with article 69, or placed immediately after it. The rule regarding terms used with a special meaning contained in article 71 at present seems somewhat detached from the "general rule"; and its relation to the various elements in article 69 and to "further means of interpretation" (article 70) is left somewhat in the air. If it is not easy to indicate very precisely the relation between article 71 and articles 69 and 70, the Special Rapporteur believes that it will be an improvement if the rule in article 71 is moved up into article 69 as a new paragraph 2. The establishment of a "special meaning" is not one of the purposes for which article 70 admits recourse to *travaux préparatoires*; and unless the "special meaning" rule is made part of article 69, means of interpretation necessary to establish a special meaning may appear to be excluded.

23. The Government of Israel further proposes that, having regard to the proliferation of multilingual versions of treaties, comparison between two or more versions ought to be included in article 69 as an additional principal means of interpretation; for such comparison is, in its view, normal practice in interpretation. However plausible this proposal may be when stated in these simple terms, it is not one which the Special Rapporteur feels that the Commission should adopt without very careful consideration of its implications. The legal relation between authentic texts (versions) of a treaty in different languages is a question of some delicacy, as appears from the Commission's examination of the matter in paragraphs (5) to (9) of its commentary on articles 72 and 73. The Special Rapporteur fears that the insertion of "comparison of authentic versions" among the general elements of interpretation contained in article 69, so far from being a simple recognition of something done in practice, might have far-reaching implications by undermining the security of the individual texts. Each language has its own genius, and it is not always possible to express the same idea in identical phraseology or syntax in different languages. It is one thing to admit interaction between two versions when each has been interpreted in accordance with its own genius and a divergence has appeared between them or an ambiguity in one of them. But it is another thing to attribute legal value to a comparison for the purpose of determining the ordinary meaning of the terms in the context of the treaty; for this may encourage attempts to transplant concepts of one language into the interpretation of a text in another language with a resultant distortion of the meaning. Nor is it to be forgotten that today many important treaties have five authentic versions, or that plurilingual treaties not infrequently have provisions giving one version a certain measure of priority over the other. The Commission will, no doubt, wish to examine the Government of Israel's proposal in this connexion; pending that examination, the Special Rapporteur confines himself to the above preliminary observations.

24. Finally, the Special Rapporteur does not overlook the suggestion of the United States Government that further study should be given to the relationship of the articles on interpretation to other articles which have "interpretive overtones", e.g. articles 43, 44 and 68. Numerous articles, in fact, have such interpretative overtones. But, as the bearing of the articles concerning interpretation on those other articles is already very much in the mind of the Commission and of the Drafting Committee, it suffices for the Special Rapporteur to make this suggestion.

25. In the light of the foregoing observations and in order that the Commission may have before it a text showing the broad result of accepting certain of the suggestions of Governments for the reformulation of the three articles, the Special Rapporteur has prepared the following draft illustrating the effect of incorporating the contents of paragraph 3 of article 69 and of article 71 in paragraph 1 of article 69:

Article 69

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of:

(*a*) The context of the treaty and its objects and purposes;

(*b*) The rules of international law;

(*c*) Any agreement between the parties regarding the interpretation of the treaty;

(*d*) Any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

2. Nevertheless, a meaning other than its ordinary meaning shall be given to a term if it is established that the parties intended the term to have that special meaning.

3. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty any agreement or instrument related to the treaty which has either been made by the parties or has been made by some of them and assented to by the others as an instrument related to the treaty.

Article 70

Further means of interpretation

Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.

Article 71 (deleted and contents transferred to article 69 as new paragraph 2).

Article 72.—Treaties drawn up in two or more languages
Article 73.—Interpretation of treaties having two or more texts

Comments of Governments

Finland. The Government of Finland considers the rules in these articles to be both useful and appropriate.

Israel. The Government of Israel defers its general comments on these articles until the Secretariat's information regarding practice in the drafting of multilingual instruments is available. Meanwhile, it suggests that the word "versions" should be substituted for "texts" throughout article 73, in order to make it more consistent with article 72.

Netherlands. The Netherlands Government states that it has no comment to make on these articles.

United States. In article 72, the United States Government considers paragraph 1 to state a widely accepted rule. Paragraph 2(*b*), on the other hand, it feels to be of questionable utility. In its view, when negotiators have an opportunity to examine and react to a version which they personally authenticate, there is a basis for considering that they have accepted it as accurate. A provision that a version drawn up separately, and with respect to which the negotiators have no opportunity to make suggestions, shall also be authoritative, would introduce a new factor that should not, it maintains, be crystallized as a part of the law of treaties. If any such non-authenticated version is to have authenticity, it considers that it should be effected by the treaty to which that version applies or else by a supplementary agreement between the parties. In consequence, it proposes that sub-paragraph (*b*) regarding the established rules of an international organization should be deleted.

In article 73, the United States Government questions the use of the word "texts", while recognizing that the usage is becoming more frequent. It says that a treaty is more properly conceived of as a unit, consisting of one text; and that when the text is expressed in two or more different languages, the several versions are an integral part of and constitute a single text. The use of the word "texts" seems, in its view, to derogate from the unity of the treaty as a single document. It accordingly suggests that the title to article 73 should read:

"*Interpretation of treaties drawn up in two or more languages*".

It further suggests that paragraph 1 should be revised to read as follows:

> "Each of the language versions in which the text of a treaty is authenticated is equally authoritative, unless the treaty itself provides that, in the event of divergence, a particular language version shall prevail".

This formulation, it says, avoids the use of the word "different" when the emphasis should be upon similarity and equality. And for similar reasons it suggests that paragraph 2 should be reworded to read as follows:

> "2. The terms of a treaty are presumed to have the same meaning in each of the languages in which the text is authenticated. Except in the case referred to in paragraph 1, when a comparison between two or more language versions discloses a difference in the expressions of a term or concept and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the two or more language versions shall be adopted."

Kenyan delegation. In the view of the Kenyan delegation, paragraph 2(*b*) of article 72 is unnecessary and should be deleted.[109]

Romanian delegation. In comments covering articles 65, 66 and 72, the Romanian delegation also takes exception to paragraph 2(*b*) of article 72.[110]

Observations and proposals of the Special Rapporteur

1. At its sixteenth session, the Commission requested the Secretariat to furnish further information on the practice of the United Nations in drawing up the texts of multilingual instruments. This information is contained in the Secretariat memorandum "Preparation of Multilingual Treaties" which is printed in this volume of the *Yearbook*. The memorandum confirms the information already available to the Commission in the Secretariat memoranda "The Summary of the Practice of the Secre-

[109] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 850th meeting, para. 41.

[110] *Ibid.*, 842nd meeting, para. 16.

STANDARD DRAFT

TREATY OF FRIENDSHIP, COMMERCE

AND NAVIGATION

DRAFT

ARTICLE XXIV

Settlement of Disputes

Paragraph 1: Consultation

Paragraph 2: Compromissory Clause

General:

Article XXIV is intended to serve a twofold purpose. First, it establishes a general or "umbrella" requirement for consultation between the treaty partners on "any matter" affecting the operation of the treaty. This is the basic rule of consultation, and provisions for consultation on specific subjects such as exchange control matters (Article XII(6)) and the formation of customs unions and free trade areas are supplementary in nature and could be omitted as long as the basic rule remains in the treaty. Inclusion of Article XXIV(1) in the treaty reflects the precedents established by the General Agreement on Tariffs and Trade (61 Stat. (5) and (6); 4 Bevans 639), which makes extensive use of consultation. The wording of Article XXIV (1) is derived substantially from Article XXII of GATT.

The second purpose of Article XXIV is to provide a "compromissory clause" or rule for the settlement of disputes that would ensure a conclusive result and be legally binding on the parties to the treaty. This objective is attained by a formulation which, while flexible enough to permit other means of settlement, obligates the treaty partners to submit any dispute as to the "interpretation or application" of the treaty to the International Court of Justice if they are unable to adjust it by diplomacy or by agreement on some other method of dispute settlement such as submission to arbitration.

Inclusion of this form of compromissory clause in the treaty represented a significant development

in United States policy. It first appeared as Article XXVIII of the Treaty with Taiwan, adopted at a time when there was considerable reluctance in the United States to agree to any form of international adjudication likely to involve matters of domestic policy. This reluctance found direct expression in the so-called Connally Amendment (see 12 Whiteman Digest of International Law 1301), by which the United States declared its intention not to accept the compulsory jurisdiction of the International Court of Justice with respect to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States. Nevertheless, the Senate accepted the provisions of standard Article XXIV(2) without controversy even though they are not entirely in harmony with the Connally Amendment. In considerable part the Senate was influenced by considerations, clearly presented during the hearings on the Treaty with Taiwan, of the limited nature of the commitment. The inherent limitations were outlined in the following terms: "The compromissory clause ... is limited to questions of the interpretation or application of this treaty; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter - and in some cases almost identical language - has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the 'essential interests of the country in time of national emergency,' are specifically excepted from the purview of the treaty."

The standard compromissory clause gained wide acceptance, being omitted from only two treaties

negotiated after the war. The Treaty with Muscat and Oman contains no provision of the kind, because the Sultan of Muscat became strongly opposed to the principle of third party settlement of disputes as a result of the unsatisfactory conduct of the arbitration of his controversy with Saudi Arabia over control of the Buraimi Oasis. The Treaty with Thailand contains an arbitration provision (Article XIII(2)) in place of the standard compromissory clause, in large part because of Thai dissatisfaction with the decision of the International Court of Justice holding that it had jurisdiction in the dispute between Thailand and Cambodia over the Temple of Preah Vihear.

Article XXIV, Paragraph 1: Consultation

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make (1) with respect to any matter (2) affecting the operation of the present Treaty.

(1) Compare this wording with Article XXII of GATT.

(2) This wording makes the entire treaty subject to the consultation rule.

Article XXIV, Paragraph 2: Compromissory Clause

2. Any dispute between the Parties as to the interpretation or application (3) (4) of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, (5) (6) unless the Parties agree

to settlement by some other pacific means. (7) (8)

(3) The words "interpretation or application" are intended to exclude political controversies between the treaty partners and limit the scope of Article XXIV(2) to legal controversies of the kind that come within the competence of the International Court of Justice as a judicial body.

(4) Use of the words "interpretation or application" is established practice in many countries. To delete the term "application" would seriously impair the scope of Article XXIV(2) by curtailing the means of settling disputes under the treaty.

(5) The basic reasons given for strong insistence on the provision for ultimate resort to the International Court of Justice were: (1) the need for a binding assurance that there will be available to United States citizens and their property in a foreign country a forum where disputes affecting them may be settled in accordance with the principles of international law and free from political pressures; (2) the need arising from considerations of good relations generally for an orderly procedure for final and definitive settlement of treaty disputes lest they drag on indefinitely, worsening in the process; and (3) the desirability both of strengthening the rule of law and of supporting the United Nations and its organs by providing in this manner for acceptance of the Court's jurisdiction.

(6) Because of the limitative wording of Article XXIV(2), acceptance of adjudication by the International Court of Justice is a much narrower commitment than acceptance of compulsory jurisdiction under Article 36 of the Statute of the Court.

(7) Article XXIV(2) does not establish an absolute commitment to submit all treaty disputes to the International Court of Justice. The absolute commitment is to submit all treaty disputes to peaceful means of settlement. The provision

emphasizes settlement through diplomatic channels. It also visualizes possible recourse to such methods as arbitration, mediation, conciliation, and good offices. In practice, referral to the Court may be largely a matter of final resort.

(8) The experience with disputes arising out of treaties of this kind is that they are settled almost without exception through diplomatic channels or, in cases where differences or misunderstandings do not reach the level where diplomatic cognizance is required, by adjudication in domestic courts. No case involving a treaty containing Article XXIV(2) has been carried to the International Court of Justice or submitted to arbitration. In fact, the only case involving a treaty of this general type in which the United States has appeared before the Court concerned the Treaty of Peace of 1836 with Morocco (8 Stat. 484; 9 Bevans 1286), and this case did not relate to a dispute between the parties to that Treaty as such, but between the United States and France over action by the latter that impaired the favorable conditions for economic intercourse between the United States and Morocco which the Treaty was intended to ensure (Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America); Judgment of August 27, 1952, I.C.J. Reports 1952, p. 176). Considerations pertaining to the Treaty of 1955 with Iran were raised in the United States submission to the Court in the dispute with that country late in 1979 but were not central to the issues in that case.