No.

IN THE
Supreme Court of the United States

BANK MELLI IRAN
NEW YORK REPRESENTATIVE OFFICE,
Petitioner,
v.
SUSAN WEINSTEIN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. That principle is also reflected in numerous treaties that require the United States to recognize the juridical status of foreign entities. In the decision below, the Second Circuit held that a judgment-creditor of Iran could execute against assets of an Iranian bank that is juridically separate from the Iranian government, even though the bank was not a party to the judgment and has no relation to the events underlying it. The court reached that conclusion by construing a parenthetical reference in the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, to override *Bancec*. The court then applied its interpretation retroactively to the already final pre-TRIA judgment in this case. The questions presented are:

1. Whether the TRIA overrides this Court's holding in *Bancec* and applicable treaty provisions by authorizing creditors of a foreign sovereign to execute against assets of the sovereign's juridically distinct instrumentalities.

2. Whether Congress violated *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), by retroactively revising the parties bound by a judgment that was already final when the statute was enacted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bank Melli Iran (identified in the captions throughout this case as "Bank Melli Iran New York Representative Office") was a respondent in the district court and appellant in the court of appeals.

Respondents Susan Weinstein, Individually, as Co-Administrator of the Estate of Ira William Weinstein, and as Natural Guardian of Plaintiff David Weinstein; Jeffrey A. Miller, as Co-Administrator of the Estate of Ira William Weinstein; Joseph Weinstein; David Weinstein; and Jennifer Weinstein Hazi were plaintiffs in the district court and appellees in the court of appeals.

Bank of New York was a plaintiff in the district court.

The Islamic Republic of Iran, the Iranian Ministry of Information and Security, Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani were defendants in the district court.

Bank Saderat Iran, New York Representative Office and Bank Sepah Iran, New York Representative Office were respondents in the district court.

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Bank Melli Iran respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-23a) is published at 609 F.3d 43 (2d Cir. 2010). The district court's opinion (App., *infra*, 24a-37a) is published at 624 F. Supp. 2d 272 (E.D.N.Y. 2009).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 15, 2010, App., *infra*, 1a-23a, and denied rehearing on September 20, 2010, *id.* at 38a-39a. On December 8, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 18, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* (2006); the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, tit. II, 116 Stat. 2322, 2337; the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338; and the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; are set forth in the Appendix (App., *infra*, 40a-80a).

PRELIMINARY STATEMENT

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Despite *Bancec*'s settled rule, the Second Circuit in this case allowed a judgment-creditor of Iran to execute against assets of an Iranian bank that was not a party to the judgment and has no relation to the events underlying it. The court reached that result by construing a parenthetical reference in a 2002 amendment to the Foreign Sovereign Immunities Act to override *Bancec*.

That decision warrants review. *Bancec*'s holding reflects fundamental principles of international law and express provisions of numerous treaties. Courts should not lightly presume that Congress intends a radical departure from the Nation's obligations. The Second Circuit's decision, moreover, conflicts with decisions of the Eleventh and Ninth Circuits construing predecessor statutes.

The Second Circuit compounded its error by applying its interpretation retroactively to expand a judgment that was already final on direct review when the amendment

was enacted. This Court held in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), that Congress may not revise final judgments. But the Second Circuit held *Plaut* inapplicable because, in its view, altering the *parties against whom a judgment may be enforced* does not amount to revising the judgment itself. That novel distinction is a serious inroad on *Plaut* and warrants review in its own right. At a minimum, given the important foreign-relations issues at stake and the Executive Branch's prior stated concerns, the Court should invite the Solicitor General to express the views of the United States on both questions presented.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive" theory of immunity that recognized limited exceptions. See *id.* at 486-487. Two decades later, Congress enacted the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602 *et seq.*), to codify those exceptions.

The FSIA preserves the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. A "foreign state" for those purposes includes any "agency or instrumentality of a foreign state," *i.e.*, any "separate legal person, corporate or otherwise," that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

Id. § 1603(a)-(b). Section 1605 then lists the carefully circumscribed exceptions to immunity. *Id.* § 1605.

The FSIA also addresses the immunity of sovereign property from attachment or execution to satisfy a judgment. Generally, "property in the United States of a foreign state [or agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Section 1610 lists narrow exceptions, which differ depending on whether property is owned by a sovereign or an instrumentality. *Id.* § 1610(a)-(b).

B. This Court's Decision in *Bancec*

Shortly after the FSIA's enactment, this Court decided *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). That case concerned whether a bank owned by the Cuban government was necessarily liable for claims against Cuba itself. The Court answered that question in the negative: "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

The Court explained that the FSIA does not govern the question. That statute, it held, "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." 462 U.S. at 620. Instead, such matters depend on substantive principles "common to both international law and federal common law." *Id.* at 622-623.

Those principles, the Court held, require that separate juridical status be respected. "Increasingly during this century," the Court noted, "governments throughout the world have established separately constituted legal entities to perform a variety of tasks." 462 U.S. at 624.

"Freely ignoring the separate status of [those] instrumentalities" would "frustrate[ ]" the "efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Id.* at 626. "Due respect for the actions taken by foreign sovereigns and for principles of comity between nations" mandate that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

Invoking "internationally recognized equitable principles," the Court recognized two narrow exceptions. 462 U.S. at 628-634. First, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"—*i.e.*, where the sovereign and instrumentality are *alter egos*—"one may be held liable for the actions of the other." *Id.* at 629. Second, an instrumentality's status may be disregarded where the corporate form is abused to "'work fraud or injustice.'" *Id.* at 629-630. Otherwise, the "separate juridical status of a government instrumentality" may not be "disregarded." *Id.* at 633.

Although *Bancec* did not discuss the point, juridical status is also protected by express treaty provisions. The United States has negotiated several Friendship, Commerce, and Navigation treaties that require signatories to respect the "juridical status" of the other state's entities. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180-182 & nn.6-7, 185-186 & n.13 (1982); Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 379-381 (1956). Among them is the 1955 Treaty of Amity between the United States and Iran. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran,

Aug. 15, 1955, 8 U.S.T. 899; U.S. Dep't of State, *Treaties in Force* 130 (2010). Article III.1 of that Treaty requires "[c]ompanies constituted under the applicable laws" of either country to "have their juridical status recognized within the territories of the other." 8 U.S.T. at 902. Article IV.1 requires each country to "refrain from applying unreasonable or discriminatory measures that would impair" those entities' rights. *Id.* at 903.

C. The Terrorism Amendments to the FSIA

Historically, there was no exception to immunity for terrorism-related claims. In 1996, however, Congress apparently concluded that international terrorism could appropriately be addressed through private civil litigation against foreign governments, and created a novel exception for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241. That exception, formerly codified at 28 U.S.C. § 1605(a)(7),[1] exempts claims "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). The exception applies only if the Executive Branch designated the foreign government a "state sponsor of terrorism" prior to, or as a result of, the act at issue. *Id.* § 1605(a)(7)(A).

In the years since, scores of suits have been filed. Typically, the sovereign does not appear, and plaintiffs are awarded default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional

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[1] As explained below, p. 9, *infra*, the exception was amended and recodified in 2008 at 28 U.S.C. § 1605A. Except for references to that provision and to 28 U.S.C. § 1610(g), citations to the FSIA throughout the petition are to the prior version applicable in this case.

Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67 & app. A, at 69-74 (Aug. 8, 2008) (listing judgments). More than $14 billion in judgments is now outstanding. *Id.* at 74. Plaintiffs, however, have faced difficulty collecting, and Congress has responded by repeatedly amending the FSIA's exceptions to immunity from attachment and execution—often over the Executive Branch's strong objections. See *id.* at 5-68.

The 1996 amendments created new exceptions. A foreign state's property "used for a commercial activity in the United States" is not immune from execution if "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7) [*i.e.*, the terrorism exception], regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). A similar exception applies to "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." *Id.* § 1610(b)(2).

In 1998, Congress added another exception for assets the Executive Branch had blocked (*i.e.*, frozen) or otherwise regulated under economic-sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998). That amendment added Section 1610(f) to the FSIA, which provides:

> Notwithstanding any other provision of law, * * * any property with respect to which financial transactions are prohibited or regulated pursuant to [various statutes] 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. § 1610(f)(1)(A). The statute, however, authorized the President to waive its provisions "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately issued a blanket waiver, stating that the statute "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2000, Congress provided for payment of certain judgments out of taxpayer and other funds. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541. That amendment also repealed the provision authorizing the President to waive Section 1610(f). *Id.* § 2002(f)(2), 114 Stat. at 1543. Following Executive Branch opposition, however, a new waiver provision was added to the bill, *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)), which the President again promptly invoked, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

In 2002, Congress responded to those presidential waivers by enacting the provision applicable here, Section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note). That statute sought to "build[] upon and extend[] the principles in section 1610(f)(1)" and to "eliminate[] the effect of any [prior] Presidential waiver." H.R. Conf. Rep. No. 107-779, at 27 (2002). To that end, it provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section

> 1605(a)(7) of title 28, United States 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.

Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. The TRIA includes only limited presidential waiver authority for certain diplomatic and consular property, which must be exercised on an asset-by-asset basis. *Id.* § 201(b), 116 Stat. at 2337.

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. That amendment revised Section 1605(a)(7)'s terrorism exception and recodified it as Section 1605A. See 28 U.S.C. § 1605A. It also added Section 1610(g), which provides that "property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of" five specific factors some courts had associated with *Bancec*. *Id.* § 1610(g)(1). The provision clarifies, however, that it does not "supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment." *Id.* § 1610(g)(3).

II. PROCEEDINGS BELOW

A. The Underlying Suit Against Iran

This case concerns an attempt to seize the assets of petitioner Bank Melli Iran to satisfy a 2002 judgment against the Iranian government. Founded in 1928, Bank Melli is Iran's largest financial institution. See Bank Melli Iran, *2007 Annual Report* 13, http://www.bmi.ir/Fa/uploadedFiles/FinanceReportFiles/2009_12_21/222__03e11da898pdf; Bank Melli Iran, *Concise History of Bank Melli Iran*, http://www.bmi.ir/En/BMIHistory.aspx?smnuid=10011. With more than 43,000 employees at 3,300 branches, the bank "handles a larger share of project and trade financing" than any other Iranian bank, as well as a "considerable share of private sector deposits." *Annual Report*, *supra*, at 13. Bank Melli also provides "foreign exchange payment services to industrialists and entrepreneurs" and operates several foreign branches. *Id.* at 14, 46-48. Although Bank Melli's stock is currently wholly owned by the Iranian government, the bank is separately incorporated, with its own share capital and board of directors. See *id.* at 5, 42.

The allegations that produced the judgment in this case have nothing to do with Bank Melli. Rather, plaintiffs are relatives and administrators of the estate of Ira Weinstein, an American killed in Jerusalem in a 1996 Hamas suicide bombing. App., *infra*, 2a. Plaintiffs sued Iran, its Ministry of Information and Security, and three officials in the District Court for the District of Columbia, claiming they had provided support to Hamas. See *Weinstein* v. *Islamic Republic of Iran*, 184 F. Supp. 2d 13, 15, 19 (D.D.C. 2002). Plaintiffs invoked the FSIA's terrorism exception, Iran having been designated a state sponsor in 1984. *Id.* at 20.

None of the defendants entered an appearance. 184 F. Supp. 2d at 16. Consequently, on February 6, 2002, after finding that plaintiffs had made out a *prima facie* case, the district court entered a default judgment for $33 million in compensatory damages and, against the Ministry, $150 million in punitive damages. *Id.* at 16, 22-26. That judgment became final one month later when the time to appeal expired. Fed. R. App. P. 4(a)(1)(A).

B. Proceedings in the District Court

1. In October 2002, plaintiffs registered their judgment in the Eastern District of New York. App., *infra*, 3a. When Congress enacted the TRIA the next month, plaintiffs sought to satisfy the judgment by attaching accounts at the Bank of New York held by three Iranian banks, including Bank Melli. See *Weinstein* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 63, 63-65 (E.D.N.Y. 2004). The United States submitted a statement of interest. It noted a question as to "whether the *Bancec* doctrine still applies under [the] TRIA" so as to preclude Bank Melli's assets from being used to satisfy the judgment. Dist. Ct. Dkt. #19, at 27 (Mar. 7, 2003). But it advised that there was no need to resolve that issue because the accounts were not "blocked assets" subject to attachment under the TRIA. *Id.* at 15-27. The district court agreed, 299 F. Supp. 2d at 74-76, and plaintiffs' appeal was dismissed for default, No. 04-1205-cv (2d Cir. Feb. 4, 2005).

2. Several years later, as part of the U.S. government's ongoing campaign of economic sanctions against Iran, the Treasury Department's Office of Foreign Assets Control ("OFAC") froze the assets of more than two dozen Iranian individuals and entities, including Bank Melli. See U.S. Dep't of Treasury, *Recent OFAC Actions* (Oct. 25, 2007), http://www.treasury.gov/resource-center/

sanctions/OFAC-Enforcement/Pages/20071025.aspx. OFAC accused Bank Melli, essentially, of providing routine banking services such as "opening letters of credit and maintaining accounts" to entities suspected of involvement in Iran's nuclear and missile industries. See U.S. Dep't of Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism* (Oct. 25, 2007), http://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx. OFAC also claimed that the bank had engaged in "deceptive banking practices" by not having its name listed on certain transactions. *Ibid.* OFAC did not accuse Bank Melli of participating in terrorist acts, providing support to Hamas, or having any other connection to the bombing that killed Mr. Weinstein.

Bank Melli publicly denounced OFAC's accusations. It stated that it had "continuously given the transparency of its operations priority" and had "always remained stringently compliant with the regulatory requirements in [Iran] as well as in foreign countries where it has become widely known and respected worldwide as a law abiding financial institution." *Announcement by Bank Melli Iran*, http://www.bmi.ir/Fa/DynamicPage.aspx?id=20. It noted that it had never "previously been the target of allegations remotely similar to those recently announced by the U.S. Treasury," which had "fail[ed] [to] cite or provide any evidence." *Ibid.*

3. Following OFAC's action, one of the Weinstein plaintiffs, Jennifer Weinstein Hazi, again sought to satisfy the 2002 default judgment, this time by attaching and selling real property Bank Melli owned in Forest Hills, Queens, New York. App., *infra*, 3a, 24a-25a. Hazi moved to appoint a receiver, while Bank Melli moved to dismiss. *Ibid.* Bank Melli argued, among other things, that it was

not a party to the underlying judgment against Iran and that, as a juridically distinct entity, it could not be held liable for Iranian debts under *Bancec* and the Treaty of Amity. *Id.* at 27a-28a. The United States advised the court that it would "continue to monitor the litigation" but declined to "make a submission at th[at] time." Dist. Ct. Dkt. #64, at 1 (Mar. 13, 2008).

The district court rejected Bank Melli's arguments. App., *infra*, 24a-37a. "[T]he plain language and legislative history of TRIA § 201(a)," it held, "demonstrate a clear expression to make agencies and instrumentalities substantively liable for the debts of their related foreign governments, overriding the *Bancec* presumption of independent status." *Id.* at 30a. To the extent the Treaty of Amity applied, the statute "'trump[ed]'" that Treaty too. *Id.* at 29a. Accordingly, the court granted Hazi's motion and denied Bank Melli's, but stayed proceedings pending appeal. *Id.* at 37a.

C. The Court of Appeals' Decision

The Second Circuit affirmed. App., *infra*, 1a-23a.

1. The court of appeals held that Bank Melli was liable for the judgment against Iran notwithstanding *Bancec* and the Treaty of Amity. The court conceded that "Bank Melli was not itself a defendant in the underlying action." App., *infra*, 6a. But it rejected Bank Melli's argument that the TRIA does not authorize jurisdiction "when the instrumentality was not itself a party to the underlying tort action that gave rise to judgment." *Id.* at 7a. Rather, in the court of appeals' view, "the TRIA * * * overr[o]de the Supreme Court's reading in [*Bancec*] that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.'" *Id.* at 12a (quoting 462 U.S. at 627).

The court of appeals thought its interpretation compelled by the TRIA's "plain language." App., *infra*, 8a. Congress, in seeking to make blocked assets available to plaintiffs, had provided that "the blocked assets of th[e] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. Pointing to the statute's "parenthetical language," the court asserted that "parties whose blocked assets are subject to execution or attachment * * * include not only the terrorist party but also 'any agency or instrumentality of that terrorist party.'" App., *infra*, 8a. The court also claimed support from one senator's floor statement that the statute "'does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.'" *Id.* at 9a-10a (quoting 148 Cong. Rec. S11,528 (Nov. 19, 2002) (Sen. Harkin)). The court thus found it "clear beyond cavil" that the TRIA applies "even if the instrumentality is not itself named in the judgment." *Id.* at 10a.

The court of appeals acknowledged that the Treaty of Amity requires the United States to recognize the "'juridical status'" of Iranian entities. App., *infra*, 15a-16a (quoting 8 U.S.T. at 902). But it claimed that this provision was "designed, not to give separate juridical status to instrumentalities of the sovereign entity, but simply 'to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms.'" *Id.* at 16a. "[E]ven assuming, *arguendo*, that there were a conflict between the two," the court continued, "the TRIA would have to be read to abrogate that portion of the Treaty." *Id.* at 17a.

2. The Second Circuit also rejected Bank Melli's argument that, even if the TRIA abrogated *Bancec* and the Treaty of Amity, it should not be applied retroactively to hold Bank Melli liable for a judgment that was already final on direct review when the TRIA was enacted. The court acknowledged that the underlying judgment was entered in February 2002, almost a year before the TRIA was enacted. App., *infra*, 10a-11a. It also recognized that, under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Congress may not "require[ ] federal courts retroactively to reopen final money judgments." *Id.* at 11a.

The court of appeals ruled, however, that "no such revision of the 2002 judgment" occurred here. App., *infra*, 12a. "[T]he judgment itself," the court claimed, "is unaffected." *Ibid.* Rather, the TRIA simply "render[ed] a judgment more readily enforceable against a related third party." *Ibid.* The court noted that, "even under *Bancec*, the presumption [of separate status] could be overcome" in some circumstances—although it did not suggest such circumstances existed here. *Ibid.* Instead, the court held that retroactive application was permissible because "[t]he judgment itself was in no way tampered with, and separation of powers was thus in no way offended." *Ibid.*[2]

3. The court of appeals denied rehearing on September 20, 2010. App., *infra*, 38a-39a. On December 8, 2010,

[2] The court of appeals also rejected Bank Melli's claims that the TRIA's delegation of authority to the Executive Branch violated separation of powers; that execution would violate the 1980 Algiers Accords; and that execution would constitute a taking under the Fifth Amendment and the Treaty of Amity. App., *infra*, 12a-15a, 18a-22a.

Justice Ginsburg extended the time to file this petition to January 18, 2011.[3]

REASONS FOR GRANTING THE PETITION

The Second Circuit held below that Congress, through a parenthetical reference in an amendment to the Foreign Sovereign Immunities Act ("FSIA"), repudiated this Court's foundational holding in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), that juridically distinct instrumentalities ordinarily are not liable for their sovereign's debts. That decision warrants review. As *Bancec* explained, juridical status is a matter of considerable importance to the Nation's foreign relations. *Bancec*'s holding reflects bedrock principles of international law—and the express terms of numerous treaties. The Executive Branch, moreover, has repeatedly underscored the importance of adhering to those principles even in the context of relations as strained as those with Iran.

While the case's importance to foreign relations is reason enough to grant review, the decision below also conflicts with decisions of the Eleventh and Ninth Circuits. In *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), the Eleventh Circuit construed comparable language in the TRIA's predecessor *not* to supersede *Bancec*. The Ninth Circuit followed that decision in *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002).

The Second Circuit's decision to apply the TRIA to alter the scope of a judgment that was already final when

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[3] Although the district court has authorized the receiver to sell the Forest Hills property, Dist. Ct. Dkt. #108 (Nov. 22, 2010), the disposition of any proceeds has been stayed pending this Court's review, Dist. Ct. Dkt. unnumbered entry after #109 (Jan. 3, 2011).

the statute was enacted also merits review. The court of appeals held that, even though *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), prohibits Congress from revising final judgments, Congress is free to revise the *parties against whom* a judgment may be enforced. That is a substantial and unfounded inroad on *Plaut*. Given the weighty separation-of-powers principles at stake, the Court should grant review on that issue too.

I. THE SECOND CIRCUIT'S HOLDING THAT THE TRIA SUPERSEDES *BANCEC* AND THE TREATY OF AMITY WARRANTS REVIEW

In *Bancec*, this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627. By allowing creditors of Iran to enforce a judgment against a juridically distinct Iranian bank, the Second Circuit departed from that principle, needlessly drawing an Act of Congress into conflict with international law, treaty obligations, and this Court's precedents. The broad ramifications of that holding for the Nation's foreign relations are sufficient reason alone to grant the petition. But the decision also conflicts with decisions of two other circuits.

A. The Second Circuit's Decision Is a Matter of Substantial Importance to the Nation's Foreign Relations

1. As this Court has long made clear, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Similarly, "'[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). Those canons reflect the basic notion that judicial constructions that draw domestic law into conflict with international obligations are matters of grave concern.

Those same considerations justify this Court's intervention where lower courts fail to respect the canons. This Court has consistently recognized that a case's impact on the Nation's foreign relations is grounds for review. See, *e.g.*, *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002) (granting review because of the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (case "implicate[d] serious issues of foreign relations"); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964) (issues "bear importantly on the conduct of the country's foreign relations"); *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 (1961) ("important rights asserted in reliance upon federal treaty obligations"). The Second Circuit's conclusion that Congress repudiated *Bancec* implicates those weighty concerns.

As *Bancec* explained, the presumption of separate juridical status derives from "international law," "[d]ue respect for the actions taken by foreign sovereigns," and "comity between nations." 462 U.S. at 623, 626-627. "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign," which may cause others to "hesitate before extending credit." *Id.* at 626. "As a result, the efforts of sovereign nations to structure their governmental activities in a manner

deemed necessary to promote economic development and efficient administration would surely be frustrated." *Ibid.* The United States' own interests would suffer as well: "'If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.'" *Id.* at 628 (quoting H.R. Rep. No. 94-1487, at 29-30 (1976)).

Those principles are especially important where, as here, a treaty requires the United States to respect juridical status. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. III.1, Aug. 15, 1955, 8 U.S.T. 899, 902. Repudiation of the "solemn engagement[ ]" of a treaty is grave cause for alarm. See *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). As the court below noted, moreover, the Treaty of Amity's "juridical status" provision "is 'substantively identical' to a provision in a number of Friendship, Commerce, and Navigation ('FCN') treaties negotiated by the U.S." App., *infra*, 16a; see pp. 5-6, *supra*. The court's holding that such treaties are either irrelevant to, or superseded by, a statute that allegedly strips instrumentalities of their juridical status is thus a matter of serious concern to the Nation's relations with many countries. Cf. *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 182 n.7 (1982) (question concerning Friendship, Commerce, and Navigation treaty was "clearly of widespread importance" because "treaty provisions similar to that invoked by [petitioner] are in effect with many other countries").

2. The Executive Branch has repeatedly stressed the need to adhere to *Bancec*. For example, when Congress proposed in 1999 to amend Section 1610(f) to provide

that "all [blocked] assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state," H.R. 3485, 106th Cong. § 1(c) (Nov. 18, 1999) (adding 28 U.S.C. § 1610(f)(4)), the State, Treasury, and Defense Departments submitted a joint statement expressing grave concerns. See *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 48-54 (Apr. 13, 2000) ("Joint Statement"). The proposal, they warned, was "fundamentally flawed" and would "seriously damag[e] * * * important U.S. interests." *Id.* at 48.

The agencies explained that, by "direct[ing] courts to ignore the separate legal status of states and their agencies and instrumentalities," the proposal would "overturn[] Supreme Court precedent and basic principles of corporate law and international practice." Joint Statement 49. That would set a "dangerous precedent" for American instrumentalities. *Ibid.* Even though the bill was "limited * * * to terrorism-list states and their majority owned entities," the proposal could "create the perception that the United States is unreliable as a location for banking or investment." *Id.* at 53. Moreover, "if the United States were to 'pierce the corporate veil' in this manner, there could well be similar actions in foreign countries." *Ibid.* "U.S. citizens, corporations, the United States government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections such as those provided by the presumption of separate status [are] eroded." *Id.* at 54 (emphasis omitted). Finally, "disregarding separate legal personality * * * could possibly lead to substantial U.S. taxpayer liability for takings claims * * * before international [tribunals]." *Ibid.*;

see also *Terrorism: Victims' Access to Terrorist Assets: Hearing Before the S. Comm. on the Judiciary*, S. Hr'g No. 106-941, at 21-39 (Oct. 27, 1999) (Treasury Department expressing similar concerns).

Congress omitted the objectionable provision from the bill ultimately enacted in 2000. See Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (2000). But the Second Circuit has now construed an ambiguous parenthetical in the TRIA to do precisely what Congress refused to do in that earlier statute. The court's decision thus directly implicates all the Executive Branch's stated concerns.

3. The Executive Branch has also repeatedly expressed more general concerns about using blocked assets to pay private plaintiffs. When Congress initially tried to make those assets available, the President twice waived the provision, concluding that it "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). Using blocked assets to pay plaintiffs, he explained, would "effectively eliminate" an "important source of leverage" in negotiations with accused terrorist states; "seriously affect [the United States'] ability to enter into global claims settlements"; and threaten liability for U.S. taxpayers where assets were also subject to international arbitrations. 1998 Pub. Papers 1843, 1847 (Oct. 23, 1998).

The Executive Branch has voiced similar concerns ever since. In 2002, the State Department told Congress that "[t]he Administration opposes the use of blocked assets * * * to satisfy judgments." U.S. Dep't of State, *Letter to Congressional Leadership* (June 12, 2002), http://www.state.gov/s/l/38649.htm. Using such assets to pay plaintiffs, it explained, would "preclude their use to pressure regimes to improve their policies on terrorism, risk

taxpayer liability for third-party claims against the assets, eliminate their availability to satisfy current U.S. Government claims (currently more than $2 billion), and put at risk diplomatic property." *Ibid.* Reiterating that opposition later that year, the President urged that using blocked assets to pay judgments infringed on "the prerogatives of the President in the area of foreign affairs." 2002 Pub. Papers 1697, 1699 (Sept. 30, 2002).

The State Department has voiced similar concerns with specific reference to Iranian assets. "Virtually all of the Iranian blocked property that has been the subject of attachments," it noted, "is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it." *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, S. Hr'g No. 108-214, at 8 (July 17, 2003). "And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, it will no doubt be confronted with offsetting claims to cover judgments against the United States rendered in other national courts." *Ibid.* Using blocked assets to pay plaintiffs also "undermines the President's ability to use [them] in the broader interest of the nation" as a "powerful foreign policy tool." *Ibid.* Ultimately, "[u]sing blocked assets to pay claims and judgments will not deter terrorism, but will reduce the incentive that blocking property provides to end support for terrorism." *Ibid.*; cf. 43 Weekly Comp. Pres. Doc. 1641, 1642 (Dec. 28, 2007) (amendments would be "viewed with alarm by the international community and would invite reciprocal action").

By making the blocked assets of juridically distinct instrumentalities like Bank Melli available to satisfy judg-

ments against their sovereigns, the Second Circuit has greatly expanded the range of blocked assets subject to execution. The decision thus implicates all the Executive Branch's foregoing concerns as well.[4]

4. Those concerns remain vital today. The President has recently questioned the wisdom of "[m]any years of refusing to engage Iran" and proposed "offer[ing] Iran a pathway to a better future." *National Security Strategy* 26 (May 2010); see also *Remarks to the United Nations General Assembly*, 2010 Daily Comp. Pres. Doc. 786, at 2 (Sept. 23, 2010) ("The United States and the international community seek a resolution to our differences with Iran, and the door remains open to diplomacy should Iran choose to walk through it."). Other nations have already been removed from the list of state sponsors. See 69 Fed. Reg. 61,702 (Oct. 7, 2004) (Iraq); 71 Fed. Reg.

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[4] As noted above, p. 9, *supra*, Congress recently added another provision authorizing execution against instrumentality assets in some circumstances. See 28 U.S.C. § 1610(g). But that provision applies only to judgments entered under new Section 1605A; it does not affect the billions of dollars of judgments like this one entered under prior law. See *id.* § 1610(g)(1); cf. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 67 (D.D.C. 2009) (noting that many plaintiffs failed to re-file). Moreover, although Section 1610(g) bars courts from considering five specific factors bearing on juridical status, the existence of a treaty requiring the recognition of an instrumentality's juridical status is not among them. See 28 U.S.C. § 1610(g)(1); cf. *Bennett* v. *Islamic Republic of Iran*, 604 F. Supp. 2d 152, 162 (D.D.C. 2009) (construing provision not to abrogate treaty), aff'd, 618 F.3d 19 (D.C. Cir. 2010). Finally, Section 1610(g) includes an exemption for third parties that may encompass instrumentalities. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 57 (Aug. 8, 2008) (discussing 28 U.S.C. § 1610(g)(3)). The Second Circuit's construction of the TRIA is thus important even to judgments entered under Section 1605A.

39,696 (June 30, 2006) (Libya); 73 Fed. Reg. 63,540 (Oct. 11, 2008) (North Korea).

The decision below distorts the range of foreign policy options available to the President. By allowing plaintiffs to seize assets of Iranian banks and other instrumentalities in violation of international law, the decision essentially allows litigants to perpetuate a privately administered sanctions regime regardless of more nuanced approaches the President may wish to take. This Court is already familiar with the complications that arose from claims against Iraq following removal of that country's designation. See *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183 (2009). The consequences are no less serious here.

Those concerns are more than sufficient reason to grant the petition. At a minimum, given the foreign relations issues at stake and the Administration's statements emphasizing the issue's importance, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases involving Iran and other countries. See, *e.g.*, *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008); *Holy See* v. *Doe*, 130 S. Ct. 659 (2009); *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, 129 S. Ct. 1400 (2009); *Permanent Mission of India to United Nations* v. *City of New York*, 549 U.S. 807 (2006).

B. The Decision Below Conflicts with Decisions of the Eleventh and Ninth Circuits

Review is also warranted by the conflict among the circuits on this issue.

1. In *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), the Eleventh Circuit refused to allow execution against assets of a Cuban telephone company to satisfy a judgment

against Cuba. The plaintiffs there relied on the 1998 version of the blocked-assets provision, which contained virtually identical parenthetical language: "'Notwithstanding any other provision of law,'" it declared, "'any property with respect to which financial transactions are prohibited or regulated * * * 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).'" *Id.* at 1287 (quoting 28 U.S.C. § 1610(f)(1)(A)) (emphasis added).

Despite the express parenthetical "including any agency or instrumentality," the Eleventh Circuit held that this provision was "not a sufficient basis for overcoming the presumption of separate juridical status." 183 F.3d at 1286. Congress, it concluded, had not "overrid[den] the *Bancec* presumption of separate juridical status by making instrumentalities responsible for the debts of their related terrorist-sponsoring governments." *Id.* at 1287. Citing an earlier, failed proposal, the court observed that Congress "knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments." *Ibid.* But "[a]bsent such a clear expression, which does not appear in section 1610(f)(1)(A)," the court saw "no reason to interpret that section as contravening Congress' original understanding that the FSIA '[is] not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.'" *Id.* at 1287-1288 (quoting *Bancec*, 462 U.S. at 620).

2. The Ninth Circuit followed *Alejandre* in *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002). The plaintiff there sought to collect a judgment against

Iran from an Iranian bank. He argued that the "amendments to Section 1605(a)(7) of the FSIA were intended to alter the application of *Bancec*'s presumption of separate juridical entity status for foreign instrumentalities." *Id.* at 1071 n.10. The Ninth Circuit sought the views of the United States. *Ibid.* Citing *Alejandre*, among other cases, the government responded that "the amendments to the FSIA did not alter the *Bancec* presumption." *Ibid.*; see U.S. Br. as *Amicus Curiae* in No. 00-56446, at 17-20 (9th Cir. filed Apr. 2002). The Ninth Circuit thus rejected the plaintiff's claim. 308 F.3d at 1071 n.10.

3. By contrast, the Second Circuit held here that the FSIA's blocked-assets provision *does* override *Bancec*'s presumption, finding it "clear beyond cavil" that the statute applies "even if the instrumentality is not itself named in the judgment." App., *infra*, 10a. In its view, the statute "overr[o]de the Supreme Court's reading in [*Bancec*] that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.'" *Id.* at 12a (quoting 462 U.S. at 627).

To be sure, the Second Circuit was construing the version of the blocked-assets provision enacted in 2002, while *Alejandre* and *Flatow* construed earlier provisions. But the slight textual differences do not justify contrary constructions. The language of the provisions is strikingly similar. Compare 28 U.S.C. § 1610(f)(1)(A) (quoted at pp. 7-8, *supra*) with Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002) (quoted at pp. 8-9, *supra*). Moreover, the textual features of the TRIA that the Second Circuit relied on—the parenthetical "including * * * any agency or instrumentality" and the prefatory clause "[n]otwithstanding any other provision of law," App., *infra*, 8a-9a—appear in both provisions.

The TRIA's legislative history confirms that the new provision was modeled on the earlier one construed in *Alejandre*. See H.R. Conf. Rep. No. 107-779, at 27 (2002). The amendment's essential purpose was simply to make blocked assets *of the judgment-debtor* available after the President repeatedly waived the prior provision—not to depart from fundamental principles of international law. See *ibid.*; *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 129 S. Ct. 1732, 1744 (2009); pp. 7-9, *supra*.

C. The Second Circuit's Decision Is Incorrect

Finally, the Second Circuit's decision is incorrect. The court needlessly construed an ambiguous statute to conflict with both the international-law principles recognized in *Bancec* and express treaty provisions.

1. Fundamental canons require statutes to be construed, whenever possible, not to contravene international law. See *Charming Betsy*, 6 U.S. at 118; *Hoffmann-La Roche*, 542 U.S. at 164. Nothing in the TRIA clearly indicates any intent to override *Bancec*'s holding that, consistent with international law, separate juridical status ordinarily must be respected.

The TRIA provides that "the blocked assets of th[e] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. By its terms, that provision does not state that a separate instrumentality's assets may be used to satisfy judgments against the sovereign. Rather, it simply indicates that there are circumstances in which the *sovereign's* blocked assets "includ[e]" assets of instrumentalities. "To 'include' is to 'contain' or 'comprise as part of a whole,'" *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001); "including" is not a "word

of enlargement," *Montello Salt Co.* v. *Utah*, 221 U.S. 452, 466 (1911). Thus, a reasonable—indeed, the most natural—interpretation of the parenthetical is merely that an instrumentality's assets are not immune when they are "includ[ed]" in the sovereign's assets—for example, because the two are *alter egos*. See *Bancec*, 462 U.S. at 628-630. Had Congress wanted to authorize execution against instrumentality assets regardless of *Bancec*, it would have phrased the statute more broadly to cover assets of a terrorist party "and," or "as well as," instrumentality assets. Instead, Congress used language of inclusion that merely acknowledges *Bancec* and its customary exceptions. The Second Circuit effectively read the statute to reach "blocked assets of any agency or instrumentality *regardless of Bancec*." But the more reasonable interpretation is that it reaches "blocked assets of any agency or instrumentality *where permitted by Bancec*."

Congress, moreover, modeled this provision on an earlier provision of the FSIA. See H.R. Conf. Rep. No. 107-779, at 27. That statute addresses immunity, not attribution of liability between sovereigns and their instrumentalities. See *Bancec*, 462 U.S. at 619-621; *Alejandre*, 183 F.3d at 1287-1288; *Flatow*, 308 F.3d at 1071 n.10. Given that history, it is particularly unlikely that Congress intended an oblique parenthetical to effect a radical departure from international-law principles of substantive liability. As this Court has explained, Congress does not usually "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The suggestion that Congress repudiated this Court's precedent and flouted international law by means of an ambiguous parenthetical flies in the face of that principle.

The Second Circuit claimed support from a single floor statement by Senator Harkin. App., *infra*, 9a-10a. But

"remarks of a single legislator, even the sponsor, are not controlling." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). "There is no basis either in law or in reality for th[e] naive belief" that "what is said by a single person in a floor debate * * * represents the view of Congress as a whole." *Zedner* v. *United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in judgment). Here, moreover, there is every reason to doubt Senator Harkin's views: That same floor statement is unambiguously contrary to the statute in other respects. See *Weinstein* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 63, 71-76 (E.D.N.Y. 2004) (rejecting Senator Harkin's claim that "the term 'blocked asset' includes any asset 'regulated' by the Treasury Department" because "the seemingly clear statutory text does not reasonably allow that broader interpretation"); U.S. Statement of Interest, Dist. Ct. Dkt. #19, at 21-23 (Mar. 7, 2003) (same). Senator Harkin's assertion notwithstanding, the statute's text is at worst ambiguous with respect to juridical status. The *Charming Betsy* canon requires that ambiguity to be resolved in a manner consistent with—not in contravention of—*Bancec* and international law.

2. The Treaty of Amity—which requires the United States and Iran to respect the juridical status of each other's entities—reinforces that conclusion. The Second Circuit claimed that the Treaty was "designed, not to give separate juridical status to instrumentalities of the sovereign entity, but simply 'to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms.'" App., *infra*, 16a. But the Treaty unambiguously requires the United States to uphold the "juridical status" of Iranian "[c]ompanies," a term it defines broadly and without dis-

tinction between public and private entities. See Art. III.1, 8 U.S.T. at 902 ("corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit"). *Bancec* itself relied heavily on private corporate law. See 462 U.S. at 623-630. The Second Circuit's decision, moreover, does *not* permit Iranian companies to conduct business "'on a comparable basis with domestic firms.'" App., *infra*, 16a. Instead, it singles out Iranian instrumentalities for discriminatory, automatic veil-piercing to which neither U.S. instrumentalities, nor those of most other countries, are subject. See, *e.g.*, *Fed. Hous. Admin.* v. *Burr*, 309 U.S. 242, 250-251 (1940).

The Second Circuit's alternative holding that the TRIA "abrogate[s]" the Treaty (App., *infra*, 17a) defies the canon that statutes must not be construed to abrogate treaties "'unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines*, 466 U.S. at 252. The court's interpretation of the TRIA is not the only reasonable one; the statute is at worst ambiguous. Under this Court's precedent, that ambiguity must be resolved in favor of upholding solemn treaty obligations.

II. The Second Circuit's Retroactive Application Of Its Construction Also Warrants Review

Even if the TRIA could be read to override *Bancec*, the Second Circuit's holding that the statute can be applied retroactively to expand an already final judgment to reach additional entities creates a new and dangerous exception to *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Second Circuit's decision on that issue also merits review.

A. The Decision Below Conflicts with *Plaut*

In *Plaut*, this Court held that "[t]he Constitution's separation of legislative and judicial powers denies [Congress] the authority * * * to reopen final judgments entered before [a statute's] enactment." 514 U.S. at 240. "Article III," the Court explained, "establishes a 'judicial department' with the 'province and duty * * * to say what the law is' in particular cases and controversies." *Id.* at 218 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). That provision "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." *Id.* at 218-219. "By retroactively commanding the federal courts to reopen final judgments, Congress * * * violate[s] this fundamental principle." *Id.* at 219.

The Second Circuit's decision cannot be reconciled with *Plaut*. The court acknowledged that the judgment here became final almost a year before the TRIA's enactment. App., *infra*, 10a-11a. But it refused to apply *Plaut* on the ground that Congress had merely revised the *parties against whom* that judgment may be enforced. The TRIA "render[ed] [the] judgment more readily enforceable against a related third party," but "[t]he judgment itself was in no way tampered with, and separation of powers was thus in no way offended." *Id.* at 12a.

That attempt to avoid *Plaut* does not withstand scrutiny. The identity of the parties bound is a fundamental attribute of any judgment. Judgments name the parties against whom they are entered. See Fed. R. Civ. P. Forms 70, 71. They do so because "'[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 884 (2008); see also *Restatement (Second) of Judgments* §§ 17, 34 (1982). Ar-

guing that one does not "revise" a judgment by changing the parties liable to pay it is like arguing that one does not amend a complaint by changing the defendants. That clearly is not the law. Cf. Fed. R. Civ. P. 15(c)(1)(C); *Delay* v. *Gordon*, 475 F.3d 1039, 1045-1046 (9th Cir. 2007).

The Second Circuit's holding also defies *Plaut*'s rationale. *Plaut* was based on the principle that legislative revision of a judgment amounts to usurpation of a judicial function. See 514 U.S. at 218-225. But awarding relief *against particular parties* is no less a component of that function than any other. The court's disregard for *Plaut* is even more striking because the TRIA contains no hint of any intent to reach prior judgments. The provision's inapplicability thus should have been apparent even from more pedestrian non-retroactivity principles. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

B. The Issue Is Important

The separation-of-powers principle at stake is important. As *Plaut* noted, legislative revision of final judgments "offends a postulate of Article III" that is "deeply rooted in our law." 514 U.S. at 218. The power to alter the parties bound by a judgment is the power to create liability where there was none; the power to replace a judgment-proof debtor with a solvent one or vice versa. This Court routinely grants review, even absent a circuit conflict, where similarly important separation-of-powers principles are at stake. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). "[T]he doctrine of separation of powers is a structural safeguard * * * establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U.S. at 239 (emphasis omitted). Pre-

serving that safeguard requires vigilant intervention when lower courts stray from the Constitution's design.

In the terrorism-litigation context, moreover, Congress has a history of testing constitutional bounds. The 2008 amendments to the FSIA allowed plaintiffs who had already litigated to final judgment to re-file their claims under the new statute. See Pub. L. No. 110-181, § 1083(c)(2), 122 Stat. 3, 342 (2008). As many have noted, that provision raises serious *Plaut* issues. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 68-69 (D.D.C. 2009) (noting "a legitimate question of whether this enactment offends deeply entrenched constitutional principles" but ultimately upholding it); Elsea, *supra*, at 61 (provision "may be vulnerable to invalidation"). Similarly, after plaintiffs from the Iran hostage crisis sought to repudiate the Algiers Accords and sue Iran, Congress intervened by enacting a provision purporting to waive Iran's immunity in that one case—going so far as to identify the case by docket number in the U.S. Code. See 28 U.S.C. § 1605(a)(7)(A) (now codified at 28 U.S.C. § 1605A(a)(2)(B)); *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 237 n.5 (D.C. Cir. 2003) (noting *Plaut* issue). However much Congress may desire to accommodate plaintiffs in lawsuits against certain governments, its actions remain subject to constitutional limitations. The court of appeals' failure to enforce those limitations here warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2011

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 09-3034-CV

SUSAN WEINSTEIN, INDIVIDUALLY AS CO-ADMINISTRATOR OF THE ESTATE OF IRA WILLIAM WEINSTEIN, AND AS NATURAL GUARDIAN OF PLAINTIFF DAVID WEINSTEIN, JEFFREY A. MILLER, AS CO-ADMINISTRATOR OF THE ESTATE OF IRA WILLIAM WEINSTEIN, JOSEPH WEINSTEIN, JENNIFER WEINSTEIN HAZI & DAVID WEINSTEIN, JENNIFER WEINSTEIN HAZI,
Plaintiffs-Appellees,

BANK OF NEW YORK,
Plaintiff,

v.

ISLAMIC REPUBLIC OF IRAN, IRANIAN MINISTRY OF INFORMATION AND SECURITY, AYATOLLAH ALI HOSEINI KHAMENEI, ALI AKBAR HASHEMI-RAFSANJANI, ALI FALLAHIAN-KHUZESTANI,
Defendants,

BANK MELLI IRAN NEW YORK REPRESENTATIVE OFFICE,
Respondent-Appellant,

BANK SADERAT IRAN, NEW YORK REPRESENTATIVE OFFICE, BANK SEPAH IRAN, NEW YORK REPRESENTATIVE OFFICE,
Respondents.[1]

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[1] The clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

Appeal from the United States District Court
for the Eastern District of New York

Argued: Feb. 17, 2010
Decided: June 15, 2010

Before KEARSE and HALL, Circuit Judges, and RAKOFF, District Judge.**

RAKOFF, District Judge.

On February 25, 1996, Ira Weinstein, a United States citizen and resident of New York, was severely injured during a suicide bombing in Jerusalem organized by the terrorist organization Hamas. On April 13, 1996, Weinstein died from those injuries. *See Weinstein v. Islamic Rep. of Iran*, 184 F. Supp. 2d 13, 16-17 (D.D.C. 2002). On October 27, 2000, his widow, another administrator of his estate, and his children brought suit for wrongful death and other torts against the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security, and three Iranian officials, alleging that these defendants had provided substantial monetary support for Hamas's terrorist attacks. *See id.* at 21-22. After defendants failed to appear, the district court determined that the plaintiffs had established their "claim or right to relief by evidence satisfactory to the court," 28 U.S.C. § 1608(e), and entered default judgment for plaintiffs in the amount of approximately $183,200,000. *See id.* at 16, 22-26.

** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Plaintiffs registered the judgment in the U.S. District Court for the Eastern District of New York on October 8, 2002, and served an information subpoena on Bank of New York that eventually led to the identification of respondent Bank Melli Iran ("Bank Melli") as a possible instrumentality of the Iranian state. *See Weinstein v. Islamic Rep. of Iran*, 299 F. Supp. 2d 63, 64-65 (E.D.N.Y. 2004). The district court found it unnecessary to determine whether Bank Melli was an "agency or instrumentality" for purposes of the Terrorism Risk Insurance Act of 2002 ("TRIA") because the court determined that Bank Melli's accounts at the Bank of New York were unattachable. *Id.* at 74-76. However, on October 31, 2007, one of the plaintiff-judgment creditors, Jennifer Weinstein Hazi ("Hazi"), filed a motion in the Eastern District proceeding, seeking appointment of a receiver (pursuant to Rule 69 of the Federal Rules of Civil Procedure and Section 5228(a) of the New York Civil Practice Law and Rules), to sell real property owned by respondent Bank Melli in Forest Hills, Queens, which plaintiff sought to attach and sell in partial satisfaction of the judgment against the defendants. Hazi argued that the Forest Hills property was now subject to attachment pursuant to the TRIA, § 201(a), Pub. L. No. 107-297, 116 Stat. 2322, 2337, codified at 28 U.S.C. § 1610 note, because on October 25, 2007, Bank Melli had been designated by the United States Department of Treasury, Office of Foreign Assets Control ("OFAC") as a "proliferat[or] of weapons of mass destruction," and its assets had been frozen. *See* Executive Order 13,382, 70 Fed. Reg. 38,567 (June 28, 2005).[1]

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[1] Executive Order 13,382 was issued by the President pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702, and provided that all property and interests in prop-

On February 21, 2008, Bank Melli moved to dismiss the proceeding against it and to stay the appointment of a receiver pending resolution of its motion to dismiss. In its motion to dismiss, Bank Melli argued, *inter alia*, that attachment and sale of the Forest Hills property would violate the Treaty of Amity between the United States and Iran, that attachment and sale would constitute a taking not for a public purpose and without just compensation in violation of the Takings Clause of both the Fifth Amendment of the United States Constitution and Article IV.2 of the Treaty of Amity, and that the blocking of its assets violated the so-called "Algiers Accords" and thus attachment and sale would constitute a further violation of the Accords. On June 5, 2009, after receiving submissions from both Hazi and Bank Melli,[2] the district court (Wexler, *Judge*) denied Bank Melli's motion to dismiss and granted Hazi's motion to appoint a receiver, but stayed the proceedings pending this appeal.

DISCUSSION

A. JURISDICTION

On this appeal, Bank Melli argues for the first time that the district court lacked ancillary jurisdiction to entertain Hazi's motion to appoint a receiver. According to Bank Melli, Hazi's motion was not simply a proceeding to collect on a debtor's assets, but rather "an independent controversy with a new party in an effort to shift liabil-

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erty in the United States of persons and entities listed in the order or subsequently listed "are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." Exec. Order 13,382, 70 Fed. Reg. 38,567 (June 28, 2005). Bank Melli was added to the list on October 25, 2007.

[2] Although the district court also invited the United States to file its own submission to address the issues in the case, the Government declined to do so.

ity," *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001); *see also Peacock v. Thomas*, 516 U.S. 349, 357, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996), for which TRIA § 201(a) did not provide an independent source of jurisdiction. Although not raised below, subject matter jurisdiction may be raised at any point, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004); *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008), and so the Court must address this threshold matter.[3]

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, provides the exclusive basis for subject matter jurisdiction over all civil actions against foreign state defendants, and therefore for a court to exercise subject matter jurisdiction over a defendant the action must fall within one of the FSIA's exceptions to foreign sovereign immunity. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993); *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). In the underlying action that gave rise to the judgment on which plaintiff now seeks to collect, the district court exercised subject matter jurisdiction over Iran and the other defendants under 28 U.S.C. § 1605(a)(7), which abrogates immunity for those foreign states officially designated as state sponsors of terrorism by the Depart-

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[3] The district court did, however, cite for other purposes to a lower court decision that also considered the jurisdiction issue. *See Weininger v. Castro*, 462 F. Supp. 2d 457, 490 (S.D.N.Y. 2006) (holding that the TRIA "provides [an] independent basis of subject matter jurisdiction in this enforcement proceeding against these [foreign sovereign] entities").

ment of State where the foreign state commits a terrorist act or provides material support for the commission of a terrorist act and the act results in the death or personal injury of a United States citizen.[4] *See Weinstein*, 184 F. Supp. 2d at 20-21. When such an exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 1606; *see also Verlinden*, 461 U.S. at 488-89, 103 S. Ct. 1962.

Bank Melli was not itself a defendant in the underlying action. However, the FSIA has a separate section, Section 1609, that 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. 28 U.S.C. § 1609. Section 201(a) of the TRIA, codified as a note to Section 1610 of the FSIA, provides as follows:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7)], 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

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[4] In 2008, Congress repealed § 1605(a)(7) and created a new section specifically devoted to the terrorism exception to the jurisdictional immunity of a foreign state. *See* Pub. L. 110-181, Div. A, § 1803, Jan. 28, 2008, 122 Stat. 341 (repealing 28 U.S.C. § 1605(a)(7) and creating 28 U.S.C. § 1605A). To the extent relevant to this case, § 1605A provides for the same exceptions to foreign sovereign immunity as the repealed section.

> in the 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 § 201(a), 116 Stat. at 2337 (emphasis supplied).

The parties do not dispute that each of the elements of Section 201(a) is satisfied here. Iran has been designated a terrorist party pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405(j), beginning January 19, 1984, *see Weinstein*, 184 F. Supp. 2d at 20, and therefore is a "terrorist party" as defined by TRIA § 201(d)(4), 116 Stat. at 2340. The district court in the underlying action found jurisdiction under 28 U.S.C. § 1605(a)(7), and thus Iran was not immune from jurisdiction in the original proceeding. *See id.* at 20-21. Bank Melli's assets were "blocked" as of October 2007, designated as such pursuant to Executive Order 13,382 and 50 U.S.C. §§ 1701, 1702. Finally, Bank Melli concedes that it is an instrumentality of Iran.

Bank Melli contends, however, that the above-quoted language of the TRIA does not provide an independent basis for jurisdiction over an instrumentality of a sovereign state when the instrumentality was not itself a party to the underlying tort action that gave rise to judgment on which plaintiff now seeks to recover. Rather, Bank Melli argues, Section 201(a) of the TRIA simply provides an additional ground for abrogating immunity from attachment for a party that has been the subject of a valid judgment, but does not provide jurisdiction for a court to permit attachment against a party that was not itself the subject of the underlying judgment.

Although novel,[5] Bank Melli's argument is belied by the plain language of Section 201(a), as well as by its history and purpose. Section 201(a) clearly states that "in *every* case in which a person has obtained a judgment against a *terrorist party* . . . , 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 . . . ." TRIA § 201(a), 116 Stat. at 2337 (emphasis supplied). Under Bank Melli's interpretation, the parenthetical language in Section 201(a) of the TRIA that permits attachment of funds from agencies and instrumentalities would be rendered superfluous, since the agency or instrumentality would itself have been a "terrorist party" against which the underlying judgment had been obtained. *See, e.g.*, *Corley v. United States*, — U.S. —, —, 129 S. Ct. 1558, 1566, 173 L. Ed. 2d 443 (2009) ("'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)). Instead, however, the statute clearly differentiates between the party that is the subject of the underlying judgment itself, which can be any terrorist party (here, Iran), and parties whose blocked assets are subject to execution or attachment, which can include not only the terrorist party but also "any agency or instrumentality of that terrorist party." If this did not constitute an independent

[5] To date, no appellate court has addressed this issue, although several district courts have found that the TRIA grants subject matter jurisdiction for execution and attachment proceedings over parties against whom there exist underlying judgments. *See, e.g.*, *Weininger*, 462 F. Supp. 2d at 477-89; *Rubin v. Islamic Rep. of Iran*, 456 F. Supp. 2d 228 (D. Mass. 2006).

grant of jurisdiction over the agencies and instrumentalities, the parenthetical would be a nullity.

Although Bank Melli points out that Section 201(a) of the TRIA has been codified as a note to Section 1610 rather than in the sections of the FSIA more directly addressed to exceptions to jurisdictional immunity, the plain language of the statute cannot be overcome by its placement in the statutory scheme. *See Padilla v. Rumsfeld*, 352 F.3d 695, 721 (2d Cir. 2003) ("No accepted canon of statutory interpretation permits 'placement' to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history."), *rev'd on other grounds by Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004); *see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326, 2336, 171 L. Ed. 2d 203 (2008) (noting that a statutory provision's placement in a particular section "cannot substitute for the operative text of the statute"). This is even more clearly true in this case where the operative language begins with the phrase "[n]otwithstanding any other provision of law," thus making plain that the force of the section extends everywhere.

Any inquiry into the meaning of a statute generally "ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (other internal quotation marks omitted)); *see also Universal Church v. Geltzer*, 463 F.3d 218, 223 (2d Cir. 2006). But even if, contrary to fact, there were an ambiguity here, it would be resolved in plaintiff's favor by the legis-

lative history. According to Senator Harkin, one of TRIA's sponsors:

> The purpose of title II is to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties. . . . Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state. Thus, for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.

148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin). Senator Harkin further stated that TRIA "establishes once and for all, that such judgments are to be enforced against any assets available in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act." *Id.*

Accordingly, we find it clear beyond cavil that Section 201(a) of the TRIA provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor, even if the instrumentality is not itself named in the judgment.

B. CONSTITUTIONALITY OF TRIA

The underlying judgment which plaintiff seeks to satisfy was obtained in February 2002, but the TRIA was

not enacted until November 2002 and Bank Melli was not designated a "proliferat[or] of weapons of mass destruction" until 2007. In another argument raised for the first time on appeal, Bank Melli argues that the TRIA, as here applied, is unconstitutional because it "mandates the reopening of a final judgment in violation of the separation of powers doctrine of Article III of the U.S. Constitution." Thus, to avoid any constitutional problem, Bank Melli urges this Court to read the TRIA as applying, prospectively, only to judgments rendered final after the TRIA's enactment, and thus not to apply here.

Although plaintiff contends, with some force, that the constitutional challenge has been waived for failure to raise it below, a claim that a legislative enactment intrudes on the courts' powers is the kind of claim that appropriately may be considered here, even if for the first time. *See, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 879, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (rejecting waiver and addressing constitutional challenge because of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers") (internal quotation marks omitted).

Bank Melli's constitutional challenge is largely derived from *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995), in which the Supreme Court held that a section of the Securities Exchange Act of 1934 violated separation of powers because it required federal courts retroactively to reopen final money judgments that had been dismissed as barred under the statute of limitations. *See id.* at 219, 115 S. Ct. 1447. "[R]etroactive legislation [that] requires its own application in a case already finally adjudicated . . . does no more and no less than 'reverse a determination once made, in a particular case' [and thus] exceeds the powers

of Congress." *Id.* at 225, 115 S. Ct. 1447 (quoting The Federalist No. 81, at 545 (J. Cooke, ed., 1961)).

Here, however, no such revision of the 2002 judgment is effectuated by the attachment of Bank Melli's property pursuant to the TRIA. Indeed, the judgment itself is unaffected. What the TRIA did, instead, was to override the Supreme Court's reading in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-28, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) ("*Bancec*"), that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 627, 103 S. Ct. 2591. This presumption related to enforceability of judgments against state instrumentalities, but it had [] nothing to do with the rendering of the judgment itself. Moreover, even under *Bancec*, the presumption could be overcome. *Id.* at 629. The effect of the TRIA, therefore, was simply to render a judgment more readily enforceable against a related third party. The judgment itself was in no way tampered with, and separation of powers was thus in no way offended.[6]

Bank Melli also argues that the delegation of authority to the Treasury Department to determine which entities' assets would be "blocked" is, as applied here, tantamount to an unconstitutional vesting of "review of the decisions of Article III courts in officials of the Executive Branch."

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[6] It should be noted that Hazi seeks attachment of property in partial satisfaction only of the portion of the underlying judgment that awarded compensatory damages in her favor. *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) ("Where a retroactive law is civil rather than criminal, it is only the imposition of *punitive* damages that might, in particular circumstances, raise a constitutional problem."). Of the total judgment of approximately $183,200,000, approximately $33,200,000 was compensatory damages, of which $5,000,000 was allocated to Hazi. *Weinstein*, 184 F. Supp. 2d at 22-25.

Plaut, 514 U.S. at 218, 115 S. Ct. 1447; *see Hayburn's Case*, 2 U.S. 408, 2 Dall. 409, 1 L. Ed. 436 (1792). Here, however, it is clear that no official from the Executive Branch stands in direct review of the district court's decision regarding execution and attachment of assets pursuant to the TRIA. OFAC simply made a factual determination that Bank Melli was a proliferator of weapons of mass destruction, pursuant to which Bank Melli's assets were "blocked." In so doing, OFAC did not in any way review or alter the district court's original entry of the default judgment.

Nor does the district court's reliance on OFAC's determination for its exercise of subject matter jurisdiction run afoul of separation of powers. In *Jones v. United States*, 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890), the Supreme Court held that the district court had subject matter jurisdiction over a murder trial where the crime occurred on an island that the State Department had deemed was "appertaining to the United States." *Id.* at 224, 11 S. Ct. 80. In that case, the exercise of subject matter jurisdiction based on an Executive Branch determination did not exceed the bounds of Article III. Similarly, in *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 83-84 (2d Cir. 1997), *overruled in part on other grounds by JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 122 S. Ct. 2054, 153 L. Ed. 2d 95 (2002), this Court found that alienage jurisdiction could depend on whether the Executive Branch had deemed a given foreign entity a "state," and because the foreign entity in question had not been recognized as a "state," jurisdiction was deemed lacking.

It is true that, in *Rein*, 162 F.3d at 763, this Court, in dicta, raised the question of whether after the passage of the FSIA, designation of a foreign state as a sponsor of

terrorism by a branch other than Congress raised a potential issue of separation of powers. Specifically, in *Rein*, we rejected Libya's argument that the State Department's designation of Libya as a state sponsor of terrorism violated separation of powers, since Libya had already been designated as such when section 1605(a)(7) was added to the FSIA; but we queried whether a different "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises." 162 F.3d at 764; *see also Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) (noting that Congress cannot delegate the power of any federal agency to "oust state courts and federal district courts of subject matter jurisdiction"); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (raising doubts about whether Congress could delegate its control over federal court jurisdiction to any agency or commission).

In effect, Bank Melli now raises, albeit obliquely, the kind of issue left unaddressed in *Rein*. Like Libya, Iran was already deemed a state sponsor of terrorism when the relevant provision of the FSIA was applied to abrogate foreign sovereign immunity in the district court. However, here, the district court's jurisdiction over a proceeding to attach Bank Melli's assets depended, at least in part, on OFAC's subsequent determination that Bank Melli was a proliferator of weapons of mass destruction. Reaching only the instant variation on the issue alluded to in the dicta in *Rein*, we hold that Congress, by virtue of providing subject matter jurisdiction over execution and attachment proceedings based in part on OFAC's determination of what assets are blocked, has

not unconstitutionally delegated its authority to the Executive Branch.

The TRIA provides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA (which is not challenged here) if certain statutory elements are satisfied. The fact that satisfaction of one of those statutory elements—that Bank Melli's assets were blocked—was based on the factual determination by a coordinate branch that Bank Melli supported terrorist activity is not, on its own, a delegation of Congress's authority over the courts' subject matter jurisdiction that exceeds the boundaries of Article III. The TRIA only delegates to the Executive the authority to make a factual finding upon which jurisdiction turns in part. *See, e.g.*, *Owens v. Rep. of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008) (rejecting Sudan's argument that the FSIA unconstitutionally delegated subject matter jurisdiction to Executive Branch because the FSIA only granted "authority to make a factfinding upon which jurisdiction partially rests"). That factfinding, moreover, is one peculiarly within the expertise of the Executive, a fact Congress itself implicitly recognized in creating the TRIA.

In short, none of Bank Melli's belatedly-raised constitutional arguments persuades the Court that there has been any defect in the application of the TRIA in this case.

C. TRIA & TREATY OF AMITY

We next turn to the arguments that Bank Melli did raise in the district court, the first of which concerns the Treaty of Amity (the "Treaty") that the United States and Iran (then governed by the Shah) signed in 1955, which took effect in 1957 and still remains in place. Treaty of Amity, Economic Relations, and Consular

Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899. Article III.1 of the Treaty provides that "[c]ompanies constituted under the applicable laws of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party." *Id.*, art. III.1. Article IV.2 adds that "[p]roperty of nationals and companies of either High Contracting Party, including interest in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law." *Id.*, art. IV.2.

Bank Melli asserts that these provisions, read together, require that Iranian companies be treated as distinct and independent entities from their sovereign. But this is not correct. As the district court noted, the key provision, Article III.1., is "substantively identical" to a provision in a number of Friendship, Commerce, and Navigation ("FCN") treaties negotiated by the U.S. following World War II. In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982), the Supreme Court held that these provisions are designed, not to give separate juridical status to instrumentalities of the sovereign entity, but simply "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Id.* at 185-86.

Bank Melli argues that *Sumitomo* only addressed the language in the provision of the U.S.-Japan FCN Treaty that a company "constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof," but did not address the rest of the provision, "and shall have their juridical status recognized within the territories of the other Par-

ty." While it is true that the Court focused its analysis on the phrase "shall be deemed companies thereof," it went on to explain that the intent behind the FCN treaties as a whole was simply to grant legal status to corporations of each of the signatory countries in the territory of the other, thus putting the foreign corporations on equal footing with domestic corporations. 457 U.S. at 185-86, 102 S. Ct. 2374. There is, therefore, no conflict between the TRIA and the Treaty.

Moreover, even assuming, *arguendo*, that there were a conflict between the two, the TRIA would have to be read to abrogate that portion of the Treaty. Although 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, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120, 53 S. Ct. 305, 77 L. Ed. 641 (1933)), Section 201(a) of the TRIA expressly states that it permits attachment of the assets of a foreign sovereign's instrumentalities in satisfaction of a terrorism-related judgment against the foreign sovereign "*[n]otwithstanding any other provision of law*" (emphasis supplied). *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993) (noting that the Courts of Appeals have regularly interpreted such "notwithstanding" provisions "to supersede all other laws"); *see also Ministry of Defense and Support for the Armed Forces of the Islamic Rep. of Iran v. Elahi*, — U.S. —, 129 S. Ct. 1732, 173 L. Ed. 2d 511 (2009); *Hill v. Rep. of Iraq*, No. 99 CV 03346TP, 2003 WL 21057173, at *2, 2003 U.S. Dist. LEXIS 3725, at *10-11 (D.D.C. Mar. 11, 2003) (holding that the "notwithstanding provi-

sion" is "unambiguous and effectively supersedes all previous laws").

D. TAKINGS CLAUSE

In the next of the arguments raised below, Bank Melli argues that the attachment here in issue constitutes a *per se* taking of physical property, not for a public purpose and without just compensation, and therefore offends the Takings Clause of the Fifth Amendment of the U.S. Constitution, as well as Article IV.2 of the Treaty of Amity. *See* U.S. Const., amend. V ("nor shall private property be taken for public use, without just compensation"); Treaty, art. IV.2 (property of Iranian companies "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation").

The argument is without merit. Bank Melli was added to the OFAC list because of its unlawful actions in support of terrorism. In so doing, it 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. *See Paradissiotis v. United States*, 304 F.3d 1271, 1275-76 (Fed. Cir. 2002) (rejecting a takings clause claim that OFAC's freezing of the plaintiff's stock options, which eventually became valueless, constituted a taking without just compensation); *see also Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (noting that seizure of assets to offset tax liability or pay a civil penalty would not constitute a taking).

Here, where the underlying judgment against Iran has not been challenged, seizure of Bank Melli's property, as an instrumentality of Iran, in satisfaction of that liability does not constitute a "taking" under the Takings Clause. *See Branch*, 69 F.3d at 1577 (noting absence of "any principle of takings law under which an imposition

of liability is deemed a *per se* taking as to any party that cannot pay it"). Instead, Bank Melli's own conduct as a funder of weapons of mass destruction opened it to liability for judgments already entered against Iran. *See, e.g.*, *Meriden Trust and Safe Deposit Co. v. FDIC*, 62 F.3d 449, 455 (2d Cir. 1995) (citing cases holding that deprivation of property resulting from voluntary conduct cannot constitute a "taking").

As the Supreme Court has noted, the Takings Clause is designed "to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *E. Enters. v. Apfel*, 524 U.S. 498, 522, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). Here, where Bank Melli's assets are subject to attachment to satisfy a judgment against its foreign sovereign, the underlying purpose of the Takings Clause is in no way violated by attachment of Bank Melli's assets.

Finally, Bank Melli does not advance any argument to find that the Takings Clause in the Treaty of Amity would require a different analysis. *Cf. Kahn Lucas Lancaster v. Lark Int'l*, 186 F.3d 210, 215 (2d Cir. 1999) (treaties are construed in much the same manner as statutes and district court interpretations are subject to *de novo* review).

E. ALGIERS ACCORDS

In the last of the arguments it raised below, Bank Melli argues that the attachment here in issue violates the so-called Algiers Accords (the "Accords"). In 1980, the United States and Iran, under the auspices of the Government of Algeria, entered into the Accords to settle a number of disputes between the two countries, in par-

ticular, matters arising out of the hostage crisis that occurred on November 4, 1979 in Tehran in which the Iranian Government seized the U.S. Embassy and held captive 52 U.S. citizens.[7] Previously, in response to the hostage crisis, President Carter had issued Executive Order 12,170, which "blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States . . . ." Exec. Order 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). As part of the Accords, the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," and to "commit[ ] itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction." 20 I.L.M. at 224. The United States also agreed, subject to some exceptions to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad." *Id.* at 227.

Bank Melli argues that, because the obligations of the United States under the Accords are ongoing, and the Forest Hills property at issue was owned by Bank Melli prior to November 14, 1979 (making it a blocked asset under Executive Order 12,170) the property is subject to

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[7] The Accords are comprised primarily of two documents: the Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981), and The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981), *reprinted in* 20 I.L.M. 223 (1981); 81 Dep't of State Bull. No. 2047, Feb. 1981 at 1. *See Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 143 (2d Cir. 1992).

these ongoing Accords and therefore the subsequent "blocking" of the asset under Executive Order 13,382 violated the Accords.

This argument confuses the United States's obligation to unblock assets that had been blocked based on pre-Accords violations with post-Accords blocking based on post-Accords violations. As the district court noted in an earlier decision, after the United States and Iran entered into the Accords most Iranian assets were automatically unblocked. *See Weinstein*, 299 F. Supp. 2d at 67-68. Since the Forest Hills property was no longer blocked after the Accords, Bank Melli was entitled to exercise any and all rights of ownership, including sale of the property, until it was subsequently blocked on October 25, 2007. Although Bank Melli argues that no specific expiration date was given in the Accords, and therefore the obligations of the U.S. are ongoing, nothing in the Accords suggests that the United States is precluded from blocking Iranian assets based on subsequent events unrelated to the hostage crisis. Indeed, the United States has implemented several sanctions programs against Iran, subsequent to the Accords, that have had the effect of limiting the mobility of Iranian property. *See, e.g.*, Executive Order 12,613, 52 Fed. Reg. 41940 (Oct. 29, 1987) (prohibiting, pursuant to 3 U.S.C. § 301 and Section 505 of the International Security and Development Cooperation Act of 1985, 22 U.S.C. § 2349aa-9, certain Iranian imports); *see also Weinstein*, 299 F. Supp. 2d at 68 (providing overview of executive orders imposing sanctions that affected property controlled or owned by Iran).

Nor is *Roeder v. Islamic Rep. of Iran*, 333 F.3d 228 (D.C. Cir. 2003), upon which Bank Melli heavily relies, to the contrary. In *Roeder*, the D.C. Circuit found that, despite a Congressional amendment to the FSIA specifi-

cally intended to abrogate Iran's sovereign immunity for that particular case, plaintiff's action was still nevertheless barred because it was based on the events of the November 4, 1979 hostage crisis and the Accords "bar[red] and preclude[d] the prosecution against Iran of any pending or future claim of . . . a United States national arising out of the events" of the seizure and detention of the 52 U.S. citizens. *Id.* at 236 (internal quotation marks omitted). It concluded that the specific amendment to the FSIA in no way addressed the Accords and, given the express statement in the Accords barring such actions, refused to interpret the amendment to the FSIA, despite its being passed specifically to permit plaintiffs to go forward with their case, as abrogating or modifying that agreement without an express statement from Congress to that effect. *Id.* at 237-38. While the Accords prevent suits arising out [of] the hostage crisis, the language regarding Iranian assets in no way suggests that Iranian assets would be immunized from blocking for all time. The blocking of assets undertaken by President Carter in his Executive Order was done in response to the particular events of November 1979, and the Accords unblocked those assets. Since nothing in the Accords suggests that the United States has a limitless obligation to ensure that Iranian assets remain free from attachment based on events unrelated to the 1979 hostage crisis, Bank Melli's arguments that blocking its assets and subsequent attachment of those assets would violate the Accords are simply unavailing.

CONCLUSION

The Court has considered Bank Melli's other arguments and finds them without merit. Accordingly, for the foregoing reasons, the Court affirms the district court's decision to grant plaintiff's motion and appoint a receiver

to attach Bank Melli's property in partial satisfaction of the judgment against Iran and to deny Bank Melli's motion to dismiss.

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

NO. MISC. 02-237

SUSAN WEINSTEIN, INDIVIDUALLY, AS CO-ADMINISTRATOR OF THE ESTATE OF IRA WILLIAM WEINSTEIN, AND AS NATURAL GUARDIAN OF PLAINTIFF DAVID WEINSTEIN, *ET AL.*,

Plaintiffs-Judgment Creditors,

v.

THE ISLAMIC REPUBLIC OF IRAN, *ET AL.*,

Defendants-Judgment Debtors.

June 5, 2009

MEMORANDUM AND ORDER

WEXLER, District Judge.

Plaintiffs-judgment creditors ("plaintiffs") move for the appointment of a receiver pursuant to Federal Rule of Civil Procedure ("FRCP") 69 and New York Civil Practice Law & Rules ("CPLR") § 5228(a) to sell property located at 135 Puritan Avenue, Forest Hills, New York (the "Property") owned by Bank Melli to satisfy their judgment in the underlying action against defendants-judgment debtors the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information, and three senior Iranian officials. Plaintiffs assert that the Property is subject to attachment under the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116

Stat. 2322, 28 U.S.C. § 1610 note. Bank Melli moves to dismiss this proceeding and to stay the appointment of a receiver pending resolution of its motion to dismiss. Plaintiffs oppose Bank Melli's motion to dismiss.[1] The Court, having granted Bank Melli's motion to stay, now denies Bank Melli's motion to dismiss and grants plaintiffs' motion to appoint a receiver.

I. *BACKGROUND*

For purposes of this proceeding, the relevant background has been summarized sufficiently in the Court's earlier decision in *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004) ("*Weinstein I*")[,] and will not be repeated here, except as necessary to this decision. In *Weinstein I*, this Court held that Bank Melli's assets were not, at that time, "blocked" under §§ 202 and 203 of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, 1702, and, therefore, not subject to attachment under the TRIA. *Weinstein I*, 299 F. Supp. 2d at 74-75. However, as plaintiffs assert, on October 25, 2007, the United States Department of Treasury, Office of Foreign Assets Control ("OFAC") designated Bank Melli as a proliferator of weapons of mass destruction under Executive Order 13,382. *See* Exec. Order 13,382, 70 Fed. Reg. 38,567 (June 28, 2005). Executive Order 13,382, which the President issued pursuant to the IEEPA, provides that "all property and interests in property" of persons listed in the order or subsequently designated by the Treasury Department "that

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[1] By letter (docket number 72), plaintiffs seek leave to submit a one-page surreply, purportedly to correct a misstatement in Bank Melli's reply papers. The request is granted. In addition, the Court notes that the United States Department of Justice has declined to make a submission on the issues raised by the parties, despite an invitation from the Court.

are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, *are blocked* and may not be transferred, paid, exported, withdrawn or otherwise dealt in." *Id.* (emphasis added). As a result of Bank Melli's designation, according to plaintiffs, the Property is blocked and subject to attachment under the TRIA, which authorizes attachment of the "blocked assets" of not only a terrorist party, such as Iran, but the assets of its agencies and instrumentalities, such as Bank Melli. In this respect, TRIA § 201(a) provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States 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 the 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 § 201(a), 116 Stat. at 2337 (emphasis added). Thus, plaintiffs claim, they are entitled to enforce their judgment against the Property because the Property is a "blocked asset" under the TRIA and Bank Melli is an "agency or instrumentality" of Iran.

Although Bank Melli concedes that the Property is a "blocked asset" under the TRIA and that Bank Melli is an "agency or instrumentality" of Iran, it argues: (1) that the attachment and sale of the Property would violate the

"Treaty of Amity" between the United States and Iran, *see* Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853, 1957 WL 52887 ("Treaty of Amity"); (2) that the attachment and sale would constitute a "taking" not for public purpose and without just compensation in violation of the Treaty of Amity and the Fifth Amendment of the United States Constitution; (3) that the Treasury Department's blocking of Bank Melli's assets, including the Property, violates the "Algiers Accords," *see* Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* 20 I.L.M. 224 (1981) ("Algiers Accords"); and (4) that a Court order permitting the attachment and sale would put the United States in further breach of the Algiers Accords.

II. *DISCUSSION*

A. *Bank Melli's Motion to Dismiss*

1. *Treaty of Amity Article III(1)*

Bank Melli argues that the attachment and sale of the Property would violate Article III(1) of the Treaty of Amity, which provides:

> Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, 'companies' means 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). According to Bank Melli, the Treaty of Amity "adopts an established principle of cus-

tomary international law," namely, that the separate juridical status of an Iranian company must be respected. Memorandum of Law in Support of Bank Melli's Motion to Dismiss ("Bank Melli Mem."), at 15. In Bank Melli's view, this principle prohibits the statutory veil-piercing authorized by TRIA § 201(a). This "presumption of separateness," according to Bank Melli, may only be overcome under circumstances specified in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) ("*Bancec*"). Under *Bancec*, to pierce the corporate veil distinguishing a foreign state and from its agencies and instrumentalities, a judgment-holder must show that the agency or instrumentality is "so extensively controlled by [the foreign state] that a relationship of principal and agent is created" or that recognizing the entity as separate "would work fraud or injustice." *See id.* In other words, under *Bancec*, plaintiffs cannot recover on their judgment against defendants by executing on Bank Melli's blocked assets unless they overcome the presumption that treats Iran's agencies and instrumentalities as entities juridically separate from Iran.

Plaintiffs argue that the veil piercing authorized by TRIA § 201(a) obviates application of *Bancec* and does not violate the Treaty of Amity. This Court agrees. Neither the language nor purpose of Article III(1) of the Treaty of Amity supports Bank Melli's position. As Bank Melli points out, the Treaty of Amity between Iran and the United States is one of a number of friendship, commerce, and navigation ("FCN") treaties negotiated by the United States following WWII. Bank Melli Mem. at 3. As plaintiffs point out, "most if not all of these FCN treaties contain [corporation] provisions substantively identical to Article III(1)." Plaintiff-Judgment Creditor's

Memorandum in Opposition to Bank Melli's Motion to Dismiss and Reply in Further Support of Motion for Appointment of a Receiver Pursuant to CPLR § 5228(a), at 7-9 (citing treaties). As the Supreme Court has recognized, "the primary purpose of the corporation provisions of the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185-86, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982). Indeed, "the purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." *Id.* at 187-88, 102 S. Ct. 2374. There is nothing in the language or purpose of Article III(1) of the Treaty of Amity that precludes the veil-piercing authorized by TRIA § 201(a).

In any event, to the extent that TRIA § 201(a) may conflict with Article III(1) of the Treaty of Amity, the TRIA would "trump" the Treaty of Amity. *See United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (recognizing Supreme Court holdings that subsequent "legislative acts trump treaty-made international law"). Indeed, the Supreme Court has held explicitly that "when a statute which is subsequent in time [to a treaty] is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Breard v. Greene*, 523 U.S. 371, 376, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) (internal quotations omitted); *see also Whitney v. Robertson*, 124 U.S. 190, 194, 8 S. Ct. 456, 31 L. Ed. 386 (1888) (holding that if treaty and federal statute conflict, "the one last in date will control the other").

As for the applicability of *Bancec*, Judge Victor Marrero of the United States District Court for the Southern District of New York, in a persuasive analysis, concluded that the plain language and legislative history of TRIA § 201(a) demonstrate a clear expression to make agencies and instrumentalities substantively liable for the debts of their related foreign governments, overriding the *Bancec* presumption of independent status for the agencies and instrumentalities of terrorist parties. *See Weininger v. Castro*, 462 F. Supp. 2d 457, 484-87 (S.D.N.Y. 2006). For the same reasons, this Court concludes that TRIA § 201(a) obviates the application of *Bancec* to a determination of whether the blocked assets of Bank Melli (admittedly an agency or instrumentality of a terrorist party) are available [to] satisfy the judgment against defendants (terrorist parties). That there was no FCN treaty at issue in *Weininger* (Cuba does not have such [a] treaty with the United States) is not significant, given this Court's determination that Article III(1) of the Treaty of Amity does not preclude the veil piercing authorized by TRIA § 201(a).

Accordingly, this ground for dismissal is rejected.

2. *Treaty of Amity Article IV(2) and the Fifth Amendment*

Bank Melli further argues that the attachment and sale would constitute a "taking" not for public purpose and without just compensation in violation of Article IV(2) of the Treaty of Amity and the Fifth Amendment of the United States Constitution. Article IV(2) of the Treaty of Amity provides, in relevant part: "Property of nationals and companies of either High Contracting Party . . . shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation." Treaty of Amity art. IV(2). The Fifth

Amendment prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. amend. V.

The parties primarily dispute whether there is a "taking" for Fifth Amendment purposes. Plaintiffs rely on the decision in *Paradissiotis v. United States*, 304 F.3d 1271 (Fed. Cir. 2002), for their argument that there is no "taking" of Bank Melli's Property under the circumstances. In that case, the plaintiff, Paradissiotis, was a Cypriot national with close affiliations to the government of Libya. Based on those affiliations, OFAC listed him as a "Specially Designated National" under OFAC's "Libyan Sanctions Regulations." As a result of that designation, Paradissiotis was treated "as an agent of the government of Libya" and his assets within the United States were "frozen." *Id.* at 1273. Among Paradissiotis's frozen assets in the United States were stock options in a Delaware corporation. Due to the blocking order, and OFAC's denial of his requests for a license to sell or exercise his stock options, Paradissiotis was unable to sell or exercise the stock options. Eventually those options expired and became worthless. Paradissiotis brought suit in the Court of Federal Claims against the United States, asserting that the freezing of his assets and the destruction of the value of his stock options was an unconstitutional "taking."[2] The Court of Federal Claims re-

[2] Paradissiotis originally brought an action in the United States District for the Southern District of Texas challenging the denial of a license to sell or exercise the options and asserting, *inter alia*, a Fifth Amendment takings claim. *Paradissiotis*, 304 F.3d. at 1273. The district court granted summary judgment dismissing his action, including his takings claim, just two days before the stock options expired. *Id.* The Fifth Circuit affirmed, except as to the takings claim, holding that the Court of Federal Claims had exclusive jurisdiction over that issue. *Id.* at 1273-74.

jected this argument, and the Federal Circuit affirmed, stating:

> On several occasions, this court has addressed Fifth Amendment takings claims raised by persons or entities that have been adversely affected by actions taken for national security reasons to freeze the assets of, or prohibit transactions by, foreign entities, and on each occasion we have held that the actions have not violated the Takings Clause. With specific reference to the Libyan Sanctions Regulations, we have held that those regulations substantially advance the national security of the United States and that the frustration of contract rights resulting from the application of those regulations does not constitute a Fifth Amendment taking.
>
> The principle underlying those decisions was articulated by the Supreme Court in the *Legal Tender Cases (Knox v. Lee)*, 79 U.S. (12 Wall.) 457, 551, 20 L. Ed. 287 (1870), where the Court explained:
>
> > A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [W]as it ever imagined this was taking private property without compensation or without due process of law?
>
> While takings law has changed significantly since those words were written, the language used by the Supreme Court has often been quoted, and the principle remains sound. Thus, valid regulatory measures taken to serve substantial national secu-

> rity interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes. As applied to economic sanctions such as orders blocking transactions and freezing assets, that principle disposes of any suggestion that the United States could freeze Libyan assets in this country only if it were prepared to pay the cost of any losses resulting from the freeze. Economic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.

Paradissiotis, 304 F.3d at 1274-75 (citations omitted).

Moreover, the Federal Circuit noted that Paradissiotis's loss of the stock options was the entirely foreseeable result of his own voluntary conduct:

> Mr. Paradissiotis's stock options were in no jeopardy until 1990, when he took the step that ultimately resulted in his loss—serving as a director of a Libyan-controlled corporation. At that time, the consequences of his conduct were entirely foreseeable. The Libyan Sanctions Regulations had been in effect for four years, it was clear that his position made him subject to those regulations, and it was clear that exercising his stock options would be a prohibited transaction under the regulations. The pertinent date for considering Mr. Paradissiotis's expectations was 1990, when he took the step that subjected him to regulations that otherwise would have had no effect on him. As of that date, he had clear notice of what the consequences of his actions would be. Mr. Paradissiotis took the risk—a big risk, in light of the high visibility of the Libyan

> sanctions regime—that his involvement with a Libyan-controlled corporation would result in loss of access to his United States assets. The fact that his risk-taking turned out badly for him does not render it a taking in violation of the Fifth Amendment.

Paradissiotis, 304 F.3d at 1276 (citation omitted).

This Court agrees with plaintiffs that, based on the reasoning in *Paradissiotis*[,] the blocking and attachment of the Property in the circumstances presented here does not constitute a "taking" of Bank Melli's assets under the Fifth Amendment. As plaintiffs argue, Bank Melli's property in the United States was placed in jeopardy because the bank itself acted to proliferate weapons of mass destruction, which in turn le[d] to its designation and the blocking of its assets—a designation it does not challenge here. Like Paradissiotis, Bank Melli had "clear notice of what the consequences of [its] actions would be"—i.e., designation and the blocking of its assets, thereby subjecting its assets to execution under the TRIA. Indeed, since enactment of the TRIA in 2002, one of the risks and consequences of a designation under IEEPA is that the designated entity's assets will be subject to execution under the TRIA. Bank Melli presumably knew this well, since it was subject to TRIA litigation in this Court shortly after the TRIA was passed. *See Weinstein I*, 299 F. Supp. 2d 63. Bank Melli took the risks that its involvement with Iran's proliferation of weapons of mass destruction would result in the very consequences it now faces under the Iranian sanctions programs. That those consequences may have led to the attachment of its Property—a blocked asset—does not make it a taking under the Fifth Amendment. *See Paradissiotis*, 304 F.3d at 1276 ("The fact that his risk-taking turned out badly for him does not render it a taking in

violation of the Fifth Amendment."). For similar reasons, there is no "taking" under the Treaty of Amity.

Accordingly, this ground for dismissal is rejected.[3]

3. *Algiers Accords*

Bank Melli also argues that the blocking of the Property violates the Algiers Accords. As detailed in *Weinstein I*, on November 14, 1979, President Carter issued Executive Order 12,170 in response to Iran's seizure of the U.S. Embassy in Tehran, Iran and the resulting hostage crisis. In Executive Order 12,170, the President directed:

> I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Exec. Order 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). Eventually, on January 19, 1981, the United States and Iran, through the efforts of the government of Algeria, reached an agreement, commonly known as the Algiers Accords, ending the hostage crisis. Under the Algiers Accords, the United States agreed, *inter alia*, to "restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979," and to "com-

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[3] Bank Melli also argues that attachment and sale of the Property will violate Treaty of Amity Articles IV(1), IV(4), and V(1) by failing to treat "Iranian companies . . . in the same manner as U.S. companies, that is without discrimination and without interference into their internal affairs and property interests." Bank Melli Mem. at 20. Bank Melli offers virtually no support for this argument. Accordingly, this ground for dismissal is rejected.

mit itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction." Algiers Accords, 20 I.L.M. at 224. The United States further agreed (with some exceptions) to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad." *Id.* at 227. As further detailed in *Weinstein I*, pursuant to the Algiers Accords, most Iranian assets were unblocked. *See Weinstein I*, 299 F. Supp. 2d at 67-68.

According to Bank Melli, the Property has been an asset within the United States prior to November 14, 1979, making the blocking by Executive Order 13,382 a breach of the Algiers Accords. This argument is without merit. As plaintiffs argue, and as noted above, under the Algiers Accords, the United States had obligations, *inter alia*, to "ensure the mobility and free transfer of all Iranian assets within its jurisdiction," to "commit itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction," and to "arrange . . . for the transfer to Iran of all Iranian properties which are located in the United States and abroad." These obligations were fulfilled by the series of executive orders and regulations releasing restraints on Iranian property, presumably including the Property. *See Weinstein I*, 299 F. Supp. 2d at 67-68. Presumably, Bank Melli was then free to use and dispose of the Property as it saw fit, at least until the Property was blocked on October 25, 2007. Bank Melli fails to explain how the United States has violated the Algiers Accords by subsequently imposing blocking sanctions on Iranian property (including property of Iran's agencies and instrumentalities) based on subsequent Iranian conduct (including the conduct of its agencies and instrumentalities) or how an order of this Court permit-

ting the attachment and sale would put the United States in further breach of the Algiers Accords.

Accordingly, these grounds for dismissal are rejected.

Based on the Court's rejection of the grounds raised by Bank Melli, the motion to dismiss is denied.

B. *Plaintiffs' Motion to Appoint a Receiver*

As for plaintiffs' motion to appoint a receiver, the Court concludes that the Property is subject to attachment under the TRIA. Accordingly, plaintiffs' motion for the appointment of a receiver is granted.

III. *CONCLUSION*

For the above reasons. Bank Melli's motion to dismiss is denied and plaintiffs' motion to appoint a receiver is granted. Nevertheless, the Court stays this proceeding during the pendency of an appeal by Bank Melli, should it choose to appeal. The Clerk of Court is directed to administratively close this matter without prejudice to the right to reopen following the expiration of the time to appeal or, if an appeal is taken, upon the determination of the appeal.

SO ORDERED.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 09-3034-CV

SUSAN WEINSTEIN, INDIVIDUALLY AS CO-ADMINISTRATOR OF THE ESTATE OF IRA WILLIAM WEINSTEIN, AND AS NATURAL GUARDIAN OF PLAINTIFF DAVID WEINSTEIN, JEFFREY A. MILLER, AS CO-ADMINISTRATOR OF THE ESTATE OF IRA WILLIAM WEINSTEIN, JOSEPH WEINSTEIN, JENNIFER WEINSTEIN HAZI & DAVID WEINSTEIN, JENNIFER WEINSTEIN HAZI,
Plaintiffs-Appellees,

BANK OF NEW YORK,
Plaintiff,

v.

ISLAMIC REPUBLIC OF IRAN, IRANIAN MINISTRY OF INFORMATION AND SECURITY, AYATOLLAH ALI HOSEINI KHAMENEI, ALI AKBAR HASHEMI-RAFSANJANI, ALI FALLAHIAN-KHUZESTANI,
Defendants,

BANK MELLI IRAN NEW YORK REPRESENTATIVE OFFICE,
Respondent-Appellant,

BANK SADERAT IRAN, NEW YORK REPRESENTATIVE OFFICE, BANK SEPAH IRAN, NEW YORK REPRESENTATIVE OFFICE,
Respondents.

Appeal from the United States District Court
for the Eastern District of New York

(Filed: Sept. 20, 2010)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand-ten,

Respondent-Appellant Bank Melli Iran New York Representative Office having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

[seal]

/s/

APPENDIX D
RELEVANT STATUTORY AND TREATY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1330, 1602 *et seq.* (2006), but prior to its further amendment in 2008, provided in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial

activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

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

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

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

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

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

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means 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 na-

ture of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

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

(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;

(3) in which rights in property taken in violation of international law are in issue and that property or any

property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, 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; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitra-

tion under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, when-

ever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

* * * * *

[NOTE]

CIVIL LIABILITY FOR ACTS OF STATE SPONSORED TERRORISM

Pub. L. 104-208, div. A, title I, § 101(c) [title V, § 589], Sept. 30, 1996, 110 Stat. 3009-121, 3009-172, provided that:

"(a) an [sic] official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated [sic] under section 6(j) of the Export Administration Act of 1979 [50 U.S.C. App. 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

"(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply

to actions brought under this section. No action shall be maintained under this action [sic] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States."

* * * * *

§ 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, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) 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 with the act 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), (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.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(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.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) 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. App. 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 or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly,

and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

* * * * *

[NOTE]

SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM

Pub. L. 107-297, title II, § 201(a), (b), (d), Nov. 26, 2002, 116 Stat. 2337, 2339, provided that:

"(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), 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 States 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.

"(b) PRESIDENTIAL WAIVER.—

"(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) [of this note] in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(2) EXCEPTION.—A waiver under this subsection shall not apply to—

"(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

"(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(d) DEFINITIONS.—In this section, the following definitions shall apply:

"(1) ACT OF TERRORISM.—The term 'act of terrorism' means—

"(A) any act or event certified under section 102(1) [Pub. L. 107-297, set out in a note under section 6701 of Title 15, Commerce and Trade]; or

"(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

"(2) BLOCKED ASSET.—The term 'blocked asset' means—

"(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

"(B) Does not include property that—

"(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

"(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

"(3) CERTAIN PROPERTY.—The term 'property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and the term 'asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention

on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

"(4) TERRORIST PARTY.—The term 'terrorist party' means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)."

* * * * *

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

2. Title II of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337-2340, provides as follows:

TITLE II—TREATMENT OF TERRORIST ASSETS

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), 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 States 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.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN.—Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386; 114 Stat. 1542), as amended by section 686 of Public Law 107-228, is further amended—

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27, 2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN.—

"(1) PRIOR JUDGMENTS.—

"(A) IN GENERAL.—In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS.—The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Public Law 107-228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT.—

"(A) IN GENERAL.—The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS.—To the extent that funds are available, the amount paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS.—

"(A) IN GENERAL.—Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS.—The share payable under subparagraph (A) to each such person shall be equal to the prop[o]rtion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION.—Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED.—Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States

Code, except that such person shall be required to relinquish rights set forth—

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.—The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

3. The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, provides in relevant part as follows:

* * * * *

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent

of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the

Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an

agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is

not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or

motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

4. The Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899, provides in relevant part as follows:

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. Selden Chapin, Ambassador Extraordinary and Plenipotentiary of the United States of America at Tehran;

and

His Imperial Majesty, the Shah of Iran:

His Excellency Mr. Mostafa Samiy, Under Secretary of the Ministry of Foreign Affairs;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

* * * * *

Article III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of

the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

Article IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. 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 taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all other things necessary or incidental to the effective conduct of their affairs.

* * * * *