13-2952-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DEBORAH D. PETERSON, *et al.*,

Plaintiffs-Appellees,

—against—

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT BANK MARKAZI, THE CENTRAL BANK OF IRAN

DAVID M. LINDSEY
ANDREAS A. FRISCHKNECHT

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, New York 10017
(212) 257-6960

Attorneys for Defendant-Appellant Bank Markazi, The Central Bank of Iran

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Bank Markazi, the Central Bank of Iran, states that Bank Markazi is a joint-stock company organized under the laws of Iran and is wholly-owned by the Government of the Islamic Republic of Iran. No publicly held corporation directly or indirectly holds 10% or more of an ownership interest in Bank Markazi.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES & RULES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The District Court (Hon. Katherine B. Forrest, J.) had subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1330, 28 U.S.C. § 1331 and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. The District Court entered partial final judgment pursuant to Fed. R. Civ. P. 54(b) on July 9, 2013. Appellant's notice of appeal was timely filed on August 1, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in holding that Appellant Bank Markazi's purported admission that it owned the assets at issue in this action conclusively established Bank Markazi's ownership of the same even where the undisputed facts and applicable provisions of law negated any such finding of ownership.

2. Whether the District Court erred in holding that the test to determine immunity under FSIA § 1611(b)(1) and this Court's holding in *NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d 172 (2d Cir. 2011) is whether Appellant Bank Markazi generally was "engaged in activities protected by" that provision of the FSIA, and not whether the specific assets at issue in this action were used for central banking purposes.

3. Whether the District Court erred in holding that a statute, 22 U.S.C. § 8772, that explicitly and exclusively targets for adverse treatment assets in which Appellant Bank Markazi had an interest yet conspicuously avoids any mention of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, nevertheless abrogates that treaty.

4. Whether the District Court erred in holding that 22 U.S.C. § 8772 was not an invalid legislative act of adjudication under Article III of the United States Constitution notwithstanding the statute's explicitly stated purpose "to ensure that Iran is held accountable for paying [Plaintiffs-Appellees'] judgments" in this action.

5. Whether the District Court erred in holding that application of 22 U.S.C. § 8772 to award turnover to Plaintiffs-Appellees of assets in which Appellant Bank Markazi had an interest was not an impermissible taking under the Fifth Amendment to the United States Constitution even where those assets were not subject to attachment and execution under any provision of law at the time they were first restrained.

STATEMENT OF THE CASE

Plaintiffs' Commencement of Enforcement Proceedings in June 2008

Plaintiffs-Appellees ("Plaintiffs") are judgment creditors with billions of dollars in outstanding judgments against the Islamic Republic of Iran ("Iran").

(SPA-2). In June 2008, one of the Plaintiff groups (the "Peterson Plaintiffs") learned that an Iranian entity, namely Appellant Bank Markazi, the Central Bank of Iran ("Bank Markazi" or the "Bank"), had an interest in approximately $2 billion in security entitlements with respect to certain sovereign and supranational bonds held in an omnibus account of Clearstream Banking S.A. ("Clearstream") with Citibank N.A. ("Citibank") in New York. (A-Vol.V-1150; A-Vol.V-1386). At that time, Clearstream's customer was Banca UBAE SpA ("UBAE"), an Italian bank. (A-Vol.V-1151-52). UBAE's customer, in turn, was Bank Markazi. (A-Vol.V-1183-84). Prior to approximately February 2008, however, Bank Markazi had maintained a direct customer account with Clearstream. (*Id.*).

The Peterson Plaintiffs immediately commenced an enforcement proceeding in the Southern District of New York and served restraining notices on Clearstream and Citibank. (A-Vol.VI-1480). Following an evidentiary hearing on June 27, 2008 (A-Vol.V-1128-1213), Judge John G. Koeltl, acting as Part I judge, issued an Order vacating the restraints with respect to two security entitlements with a face value of $250 million because Bank Markazi had no interest in those assets. (A-Vol.VI-1502). Judge Koeltl left in place the restraints on the remaining security entitlements with a face value of $1.753 billion (the "Assets at Issue"). (*Id.*).

June 2009 Ruling That Clearstream Was Not a Proper Garnishee

In September 2008, Clearstream moved to vacate the restraints. Following briefing on that motion, the District Court (Jones, J.) held in an Order dated June 23, 2009 that "under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee" such that the Peterson Plaintiffs were not entitled to execute on the Assets at Issue. (A-Vol.XII-3317-18). However, Judge Jones left the restraints in place pending a determination of "whether Clearstream is, or could be made, a proper garnishee" if the Peterson Plaintiffs could establish a proper basis to return the parties to their pre-February 2008 positions under a fraudulent conveyance theory. (A-Vol.XII-3318). Yet the Peterson Plaintiffs never attempted to substantiate their fraudulent conveyance allegations, and the District Court never ruled on the matter.

Plaintiffs' Commencement of the Turnover Action in June 2010

In June 2010, the Peterson Plaintiffs commenced the underlying action against Citibank, Clearstream, UBAE and Bank Markazi for turnover of the Assets at Issue. Shortly after entering an appearance in that action, Bank Markazi in May 2011 moved to dismiss the Peterson Plaintiffs' claims on grounds of sovereign immunity under the FSIA.

Again, however, the District Court never ruled on Bank Markazi's motion. Instead, the District Court deferred further briefing to allow Citibank to interplead

additional judgment creditors of Iran. (A-Vol.V-1349-54). Subsequently, in December 2011, Plaintiffs filed their operative Second Amended Complaint and Clearstream renewed its motion to vacate the restraints.

Blocking of the Assets Pursuant to the February 2012 Executive Order

On February 5, 2012, President Obama issued Executive Order No. 13599, 77 Fed. Reg. 6659 (the "Executive Order"), pursuant to which "[a]ll property *and interests in property of* . . . the Central Bank of Iran" were blocked.[1] Pursuant to the Executive Order, Citibank immediately blocked the Assets at Issue based on Bank Markazi's interest in those assets. (A-Vol.XII-3280-81).

Thereafter, Bank Markazi again moved to dismiss the operative complaint in March 2012 on grounds of sovereign immunity under the FSIA and pursuant to the Treaty of Amity between the United States and Iran (the "Treaty of Amity" or the "Treaty").[2] Plaintiffs, in turn, moved for partial summary judgment in April 2012, contending that they were entitled to turnover of the now-blocked Assets at Issue under § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, Title II, § 201, 116 Stat. 2337.[3]

---

1 Exec. Order No. 13599 is included in the Special Appendix at SPA-128.

2 The Treaty of Amity is included in the Special Appendix at SPA-108.

3 TRIA § 201 is included in the Special Appendix at SPA-124.

Enactment of 22 U.S.C. § 8772 in August 2012

While the parties' motions were *sub judice*, Congress in July 2012 enacted a new provision, 22 U.S.C. § 8772 ("§ 8772"), in response to Plaintiffs' sustained lobbying efforts.[4] Section 8772 formed part of the Iran Threat Reduction and Syria Human Rights Act of 2012, which the President signed into law in August 2012. By its express terms, § 8772 applies exclusively to the Assets at Issue, and its stated purpose is "to ensure that Iran is held accountable for paying [Plaintiffs'] judgments" in this action.

Subsequently, the parties engaged in supplemental briefing concerning whether Plaintiffs were entitled to turnover under § 8772.

February 28, 2013 Order and July 9, 2013 Partial Final Judgment

In an Opinion and Order dated February 28, 2013 (the "February 28 Order"), the District Court denied Clearstream's motion to vacate the restraints and Bank Markazi's motion to dismiss and granted Plaintiffs' motion for partial summary judgment. (SPA-1-75).

In the February 28 Order, the District Court *inter alia* held: (1) that the Assets at Issue were subject to turnover pursuant to TRIA § 201 as "assets of" Bank Markazi (SPA-47); (2) that the Assets at Issue—assuming they could be

[4] 22 U.S.C. § 8772 is included in the Special Appendix at SPA-104.

deemed "assets of" Bank Markazi—nevertheless were not immune from attachment and execution under FSIA § 1611(b)(1) as "the property of" a foreign central bank (SPA-53); (3) that § 8772 abrogated the Treaty of Amity (SPA-51-52); (4) that § 8772 was not an invalid legislative act of adjudication under Article III of the United States Constitution (SPA-65); and (5) that turnover pursuant to § 8772 was not an impermissible taking under the Fifth Amendment to the United States Constitution (SPA-69).

The District Court's subsequent July 9, 2013 Order entering partial final judgment pursuant to Fed. R. Civ. P. 54(b) (the "Partial Final Judgment") incorporated the findings and conclusions in the February 28 Order and directed turnover of the Assets at Issue to an account in the name of a Qualified Settlement Fund established for Plaintiffs' benefit. (SPA-76-90).

Bank Markazi timely appealed to this Court from the Partial Final Judgment by notice of appeal dated August 1, 2013. (A-Vol.IV-1126-27).[5]

---

[5] Likewise, Clearstream timely appealed from the Partial Final Judgment by notice of appeal dated August 2, 2013 (Civ No. 10-CV-4518 (KBF), Dkt. 476). Subsequently, however, Clearstream and Plaintiffs entered into a settlement agreement (*id.* Dkt. 490) providing that Clearstream would not pursue its appeal. The District Court so-ordered the settlement agreement on November 8, 2013 (*id.* Dkt. 527). On November 13, 2013, this Court granted Clearstream's Motion to Withdraw its appeal (13-2961, Dkt. 87).

STATEMENT OF THE FACTS

The Parties

Plaintiffs are judgment creditors purporting to hold outstanding judgments against Iran. (SPA-2). The underlying judgments against Iran were entered pursuant to the "anti-terrorism" exceptions to immunity enumerated in former FSIA § 1605(a)(7) (since repealed) and current FSIA § 1605A.

Bank Markazi is the Central Bank of Iran (SPA-4) and is thus a juridically distinct instrumentality of Iran pursuant to FSIA § 1603(b). Bank Markazi was not a party to the underlying actions that resulted in Plaintiffs' judgments against Iran, nor is Bank Markazi alleged to have played any role in the events that gave rise to those judgments.

Clearstream is an "international service provider for the financial industry offering securities settlement and custody-safekeeping services." (SPA-5). Prior to approximately February 2008, Bank Markazi maintained a direct customer account with Clearstream in Luxembourg. (A-Vol.V-1151-52).

UBAE is an Italian Bank and a client of Clearstream. (A-Vol.V-1151). In approximately February 2008, Bank Markazi's security entitlements were transferred from Bank Markazi's account with Clearstream in Luxembourg to a new customer account UBAE had opened with Clearstream, also in Luxembourg. (A-Vol.V-1151-52,83-84).

The Assets at Issue

At the time they were first restrained in June 2008, the Assets at Issue consisted of Clearstream's security entitlements vis-à-vis Citibank relating to Bank Markazi's investment in certain underlying sovereign and supranational bonds. (A-Vol.VI-1550-51). In the years since, the underlying bonds have matured in the ordinary course such that by the time the District Court entered its February 28 Order and subsequent Partial Final Judgment, the Assets at Issue consisted of the cash resulting from those bond redemptions, along with periodic interest payments since June 2008. (SPA-76). As of June 4, 2013, the aggregate value of the Assets at Issue was $1,895,600,513.03. (SPA-83).

SUMMARY OF THE ARGUMENT

The principal issue presented on this appeal concerns the distinction between Iranian *"interests"* in financial assets sufficient to trigger their blocking under the prevailing U.S. sanctions against Iran on the one hand—and actual *ownership* of those assets on the other. The District Court's most fundamental error was to conflate these two distinct concepts, and its Partial Final Judgment awarding turnover of the Assets at Issue to Plaintiffs is a direct result of that error.

The District Court held that Plaintiffs were entitled to turnover pursuant to two statutory provisions—TRIA § 201 and 22 U.S.C. § 8772. Yet by its plain terms, the first statute, TRIA § 201, applies only to the "blocked *assets of*" a

"terrorist party." Repeatedly and consistently, the United States Supreme Court has instructed that Congress's "use of the word 'of' [in a statute] denotes ownership." *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S.Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)).

TRIA § 201 provided no basis for turnover of the Assets at Issue here because Bank Markazi did not own those assets. Yet the District Court failed even to *consider* whether Bank Markazi could be deemed to own the Assets at Issue under applicable law, and instead relied solely on the Bank's purported "concessions" of beneficial ownership. (SPA-47).

This was error. Plainly, a party cannot become the owner of property it does not actually own merely by *claiming* ownership. As this Court has stated, "[i]t would be quite anomalous to hold" that a party claiming to be a beneficial owner *"is* a beneficial owner . . . while an identical [party] who makes no such statement is not such an owner." *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP,* 654 F.3d 276, 297 n.8 (2d Cir. 2011) (emphasis added).

As Clearstream demonstrated in extensive briefing, which the District Court failed entirely to consider, Bank Markazi had *no cognizable property interest* in the Assets at Issue under Article 8 of the New York Uniform Commercial Code—period. Indeed, more than three years before the Partial Final Judgment was

entered, the District Court (Jones, J.) unequivocally held in June 2009 that *"under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee"* such that Plaintiffs could not reach Bank Markazi's assets held by Clearstream (through UBAE) in Luxembourg by restraining *Clearstream's* corresponding assets in New York. (A-Vol.XII-3317) (emphasis added).

Evidently recognizing that the ownership requirement inherent in TRIA § 201 presented an insurmountable hurdle to turnover, Plaintiffs engaged in a sustained (and ultimately successful) effort to lobby Congress to enact the second statute at the center of this appeal, 22 U.S.C. § 8772. The overtly stated and plainly intended purpose of that new legislation was to *guarantee* turnover of the Assets at Issue to Plaintiffs.

Section 8772 unequivocally mandates that "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518" "*shall be* subject to execution" by Plaintiffs in this action. 22 U.S.C. § 8772(a)(1) & (b) (emphasis added).

Yet despite its sole purpose of targeting assets in which Bank Markazi—an Iranian instrumentality—had an interest, § 8772 makes no reference to the Treaty of Amity. The Treaty imposes a number of specific obligations on the United States, and Bank Markazi had squarely raised the Treaty as a bar to turnover under

TRIA § 201 in the District Court *months before* Congress enacted § 8772. Under these circumstances, Congress's conspicuous silence concerning the Treaty in § 8772 cannot be read as a clear statement of congressional intent to abrogate the multiple Treaty provisions that preclude turnover of the Assets at Issue here.

Should the Court find it necessary to reach the constitutional issues raised on this appeal, however, § 8772 on its face is the type of statute that impermissibly "usurp[s] the adjudicative function assigned to the federal courts under Article III" of the United States Constitution. *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir. 1993). Yet the District Court nevertheless deemed § 8772 to be constitutional, reasoning that the statute was not "self-executing" because it nominally "left [it] to the Court" to make certain "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs. (SPA-65).

Again, this was error. The stated purpose of these required "determinations" was *"to ensure that* Iran is held accountable *for paying* [Plaintiffs'] judgments." 22 U.S.C. § 8772(a)(2) (emphasis added). A clearer expression of Congressional intent to determine the outcome of a pending case is hard to imagine. *See infra,* Section II.B.

All § 8772 required the District Court to find was that Bank Markazi had a "beneficial interest" in the Assets at Issue. 22 U.S.C. § 8772(a)(2)(A). Yet the statute simultaneously directed the District Court to "exclud[e]" from consideration

any property interest of Clearstream—the only party with a *direct, legally cognizable* interest in those assets. *See id.* Thus, the outcome of that "determination" was preordained, as Bank Markazi's "beneficial interest" in the Assets at Issue had already been established long before § 8772 was enacted in August 2012.

Months earlier, the Assets at Issue had been blocked in February 2012 pursuant to the Executive Order's sweeping language providing that "[a]ll property *and interests in property* of . . . the Central Bank of Iran" in the United States are blocked. Exec. Order No. 13599 § 1(b) (emphasis added). The Assets at Issue were blocked because Bank Markazi had an *interest in* those assets—not because the Bank *owned* them. Indeed, it is well-established that any "interest" in property may be subject to blocking; "[t]he interest need not be a legally protected one." *Holy Land Found. for Relief & Development v. Ashcroft,* 333 F.3d 156, 162-63 (D.C. Cir. 2003).

The District Court further erred by holding that turnover pursuant to § 8772 and TRIA § 201 does not constitute a taking in violation of the Fifth Amendment to the United States Constitution (*see* Section II.C, *infra*), and that TRIA § 201 overrides the heightened protection that FSIA § 1611(b)(1) confers on foreign central bank property (*see* Section I.B, *infra*). Finally, the District Court plainly exceeded its jurisdiction under the FSIA by including a sweeping injunction in its

Partial Final Judgment purporting to preclude Bank Markazi from asserting its property rights against Clearstream in Luxembourg (*see* Section III, *infra*).

For all of these reasons and the additional reasons discussed below, the District Court's Partial Final Judgment should be reversed.

STANDARD OF REVIEW

1. The District Court's determinations concerning the legal question of ownership are reviewed *de novo*. *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 115 (2d Cir. 2010).

2. The District Court's interpretation of a statute is reviewed *de novo*. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 203 (2d Cir. 2012).

3. The District Court's determinations concerning sovereign immunity are reviewed *de novo*. *NML Capital v. Republic of Argentina*, F.3d 254, 256-57 (2d Cir. 2012).

4. The District Court's interpretation of a treaty is reviewed *de novo*. *Swarna v. Al-Awadi,* 622 F.3d 123, 132 (2d Cir. 2010).

5. The District Court's determinations concerning the constitutionality of a statute are reviewed *de novo*. *Commack Self-Serv.*, 680 F.3d at 203.

ARGUMENT

I. The District Court's Conclusion That Plaintiffs Were Entitled to Turnover Under TRIA § 201 Was Reversible Error.

A. The Assets at Issue Do Not Meet the Statutory Requirements for Turnover Under TRIA § 201 Because They Are Not "Assets Of" Bank Markazi.

The District Court's holding that Plaintiffs were entitled to turnover of the Assets at Issue pursuant to TRIA § 201(a) (SPA-46) was reversible error. On its face, that provision provides a basis for turnover only of blocked assets actually *owned by* a "terrorist party." Yet Bank Markazi in no sense owned the Assets at Issue here—regardless of *which* source of law (the Uniform Commercial Code or Luxembourg law) the Court applies to determine ownership.

1. TRIA § 201 Would Provide a Basis for Turnover of the Assets at Issue Only if Bank Markazi Actually Owned Those Assets.

By its plain terms, TRIA § 201(a) permits attachment and execution only against "the blocked *assets of* [a] terrorist party (including the blocked *assets of* any agency or instrumentality of that terrorist party)." In a number of different contexts and for over a century, the United States Supreme Court has instructed that Congress's "use of the word 'of' [in a statute] denotes ownership." *Stanford*, 131 S.Ct. at 2196 (quoting *Poe*, 282 U.S. at 109).[6]

---

[6] *Accord. Flores-Figueroa v. United States,* 556 U.S. 646, 648 (2009) (holding that identity theft statute imposing criminal sanctions where an

In light of these controlling precedents and the well-established rule of construction that "statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there,"[7] the phrase "blocked *assets of*" in TRIA § 201(a) unequivocally requires that in order for a particular blocked asset to come within the statute's purview, the relevant "terrorist party" (or its agency or instrumentality) "must actually *own* it." *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 400 (S.D.N.Y. 2011) (emphasis in original); *accord. Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 437-41 (D.D.C. 2012) ("[T]he plain language, as informed by the common law, strongly indicates that Congress intended to permit terrorist victims to execute on only the assets 'of'—or, in other words, 'belonging to'—the terrorist state committing the act.").

Moreover, the United States Government repeatedly has made clear its position that TRIA § 201(a) requires ownership. *See* Brief of the United States of

---

offender "knowingly transfers, possesses, or uses . . . a means of identification *of another person*" "requires the Government to show that the defendant knew that the means of identification at issue *belonged to another person"*) (emphasis added); *Poe v. Seaborn,* 282 U.S. 101, 109 (1930) (use of the word "of" in statute imposing tax "upon the net income of every individual" denoted ownership); *Ellis v. United States,* 206 U.S. 246, 254, 59 (1907) ("the most natural meaning of [the statutory phrase] '*of the United States*' [wa]s '*belonging to the United States*'") (emphasis added).

[7] *Collazos v. United States,* 368 F.3d 190, 196 (2d Cir. 2004) (internal quotation omitted).

America as *Amicus Curiae* in Support of Appellees at 3, *Calderon-Cardona v. JPMorgan Chase Bank, N.A.,* No. 12-75 (2d Cir. Sept. 21, 2012) (Dkt. # 210) (TRIA § 201(a)'s "plain meaning and case law construing similarly worded statutes demonstrate" that TRIA § 201(a) "permit[s] attachment only of assets owned by the terrorist party or its agency or instrumentality—and do[es] not extend further to permit attachment of any assets blocked under the relevant OFAC sanctions regulations, which include both property and property interests of the terrorist party"); Statement of Interest of the United States of America in Response to Petitioners' Motion for Immediate Turnover of Funds at 10-11, *Rux v. ABN Amro Bank NV*, 08 Civ. 6588 (AKH) (S.D.N.Y. Jan. 12, 2009) (Dkt. # 185) (same); Brief for the United States as *Amicus Curiae* in Support of the Appellees at 14, *Rubin v. Islamic Republic of Iran*, No. 11-2144 (1st Cir. June 8, 2012) (same).

Yet contrary to the plain language of TRIA § 201(a) and the authorities cited above, some district courts have held that *any* blocked asset—irrespective of ownership—is available for distribution to a judgment creditor under TRIA § 201(a). *See, e.g., Hausler v. JPMorgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 533 (S.D.N.Y. 2010) (*"Hausler I"*) (finding that TRIA § 201(a) "contemplates execution . . . against all assets blocked pursuant to [an applicable sanctions regime]"); *Hausler v. JPMorgan Chase Bank,* N.A., 845 F. Supp. 2d 553, 567-68 (S.D.N.Y. 2012) (*"Hausler II"*) (adhering to prior holding in *Hausler I* despite the

United States Supreme Court's intervening decision in *Stanford*). Thus, a split exists among district courts in this Circuit concerning the proper interpretation of TRIA § 201(a).

In any event, however, the question of whether TRIA § 201(a) requires ownership is presently before another panel of this Court (the "*Calderon* Panel"), which almost certainly will resolve that question one way or the other. The district courts' conflicting opinions in *Calderon* and *Hausler II* have both been appealed to this Court as Case Nos. 12-75 and 12-1264, respectively. Both appeals are being considered in tandem and have been fully briefed, and the *Calderon* Panel heard oral argument on February 11, 2013 (*see* Case No. 12-75 and 12-1264, Dkt. # 244). The *Calderon* Panel's decision may be expected in the near future and likely will bind this Court as well.[8]

Assuming that the *Calderon* Panel resolves this critical question of statutory interpretation in accordance with the plain wording of the statute and finds that TRIA § 201(a) requires ownership, the District Court's reliance on that provision

---

[8] *See, e.g., Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 101 n.12 (2d Cir. 2005) ("Generally, this court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.") (internal quotation and citation omitted).

as a basis for turnover was error because Bank Markazi plainly did not own the Assets at Issue under applicable law.

2. The Assets at Issue Were Blocked Because Bank Markazi Had a Beneficial Interest in Those Assets—Not Because the Bank *Owned* Them.

The fact that the Assets at Issue were blocked pursuant to the Executive Order in no way demonstrates that Bank Markazi owned those assets. Instead, Bank Markazi's undisputed beneficial *interest* in the Assets at Issue was sufficient to trigger their blocking under the Executive Order, which contains sweeping language providing that "[a]ll property *and interests in property* of . . . the Central Bank of Iran" in the United States are blocked. Exec. Order 13599 § 1(b) (emphasis added).

Yet "interests" in property and "ownership" are distinct concepts; the former category is far more expansive than the latter. *See Exp.-Imp. Bank,* 609 F.3d at 121 (a party's "lack of 'ownership' is not dispositive" of whether that party has an "interest in" property; it merely "suggests that whatever interests or rights exist, if any, are limited"). Indeed, the other statute at issue on this appeal—§ 8772—explicitly recognizes this critical distinction by characterizing the Assets at Issue as "equal in value to"—and thus *distinct from*—the "financial *asset[s] of Iran"* that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad."* 22 U.S.C. § 8772(a)(1)(C) (emphasis added).

For purposes of blocking, "OFAC defines [the term] 'interest' as *'an interest of any nature whatsoever*, direct or indirect,' and property as any 'property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.'" *Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch,* 919 F. Supp. 2d 411, 418 (S.D.N.Y. 2013) (quoting 31 C.F.R. §§ 544.305 & 544.308) (emphasis added). Applying this expansive definition, "OFAC block[s] assets based on interests in property and the use to which such property was put, *not based on who own[s] the property in question.*" *Bank of New York v. Norilsk Nickel*, 14 A.D.3d 140, 147 (1st Dep't 2004) (emphasis added); *accord. Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002); *Holy Land Found.,* 333 F.3d at 162-63.

Consequently, the blocking of the Assets at Issue is not indicative of Bank Markazi's ownership of those assets. Instead, it merely reflects the fact that Bank Markazi had an "interest" in them.

3. The District Court Never Ruled on the Dispositive *Legal* Question of Ownership.

The District Court's conclusion that "Bank Markazi is the only owner" of the Assets at Issue (SPA-47) was based solely on a finding that Bank Markazi had "repeatedly conceded" its purported beneficial ownership of the Assets at Issue,

coupled with an erroneous characterization of Clearstream's position as being that Clearstream "ha[d] no legally cognizable interest" in the assets. (SPA-47,49).[9]

Yet the District Court ignored that ownership "is a mixed question of law and fact." *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers,* 442 F.3d 101, 111 (2d Cir. 2006). Plainly, a party cannot become the owner of property it does not actually own merely by *claiming* ownership.[10]

That the District Court characterized Bank Markazi's ownership as "beneficial" makes no difference. Because "beneficial ownership is a legal question," Bank Markazi's *assertions* of ownership "add nothing to [the Bank]'s rights" under applicable law. *CSX Corp.,* 654 F.3d at 297 n.8; *see id.* ("It would be quite anomalous to hold that a [party] who makes such a remark [asserting ownership] is a beneficial owner . . . while an identical [party] who makes no such statement is not such an owner."); *see also Pfizer Inc. v. Teva Pharmaceuticals*

---

9 As the District Court later acknowledged, the court overlooked at least three instances in which Clearstream *had* asserted an interest in the Assets at Issue. (A-Vol.4-1018n.1); *see* Clearstream's Consol. Mem. (A-Vol.VI-1568,78); Clearstream's Supp. Mem. (A-XXI-6011).

10 The sole instance in which Bank Markazi asserted its beneficial ownership of the Assets at Issue was in connection with the Bank's original May 2011 motion to dismiss Plaintiffs' then-operative complaint on sovereign immunity grounds. (A-Vol.V-1253; A-Vol.V-1329). Importantly, however, the other parties' filings—including Clearstream's—were all under seal at that time and unavailable to Bank Markazi. Consequently, Bank Markazi expressly reserved its right to amend or supplement its arguments if and when it gained access to the sealed filings. (A-Vol.V-1230n.3).

USA, Inc., 803 F. Supp. 2d 409, 425 n.33 (E.D. Va. 2011) (party's subjective understanding of the term "beneficial owner" as used in a contract was "entirely beside the point because the term 'beneficial owner' . . . is a legal term for the court to decide"); *New York State Nat'l Org. for Women v. Terry,* 159 F.3d 86, 97 n.7 (2d Cir. 1998) ("[J]udicial admissions . . . are statements of fact rather than legal arguments made to a court.").

To determine whether Bank Markazi may be deemed the beneficial owner of the Assets at Issue, the District Court first should have identified "the appropriate standards for determining beneficial ownership," which is "a question of law." *Wilson v. Comm'r,* 560 F.2d 687, 690 (5th Cir. 1977).[11] Then, the court should have applied those standards to determine "whether [Bank Markazi] meets them and qualifies as" the beneficial owner of the Assets at Issue, which is a question of fact. *Id.*

The District Court's failure to undertake *either* step of the two-step inquiry necessary to determine beneficial ownership was reversible error. Moreover, as

---

[11] As this Court has stated, "[t]here appears to be no generally accepted or universal definition of the term 'beneficial owner.'" *CSX Corp.,* 654 F.3d at 296; *see also GAF Corp. v. Milstein,* 453 F.2d 709, 715 (2d Cir. 1971) (describing beneficial ownership as an "amorphous and occasionally obfuscated concept[]"). One potential "general definition of [the term] 'beneficial owner,'" however, is that it refers to a person or entity that "has most to all of the traditional property rights of the owner, except for actual legal title to the property." *Pfizer,* 803 F. Supp. 2d at 425.

demonstrated in Section II.A.5, *infra,* the District Court's reliance on the common law concept of beneficial ownership was fundamentally flawed in any event because Article 8 of the U.C.C., not the common law of property, determines the nature of Bank Markazi's property interest, if any, in the Assets at Issue.

4. New York Law Determines Whether Bank Markazi Owned the Assets at Issue Here.

To determine the question of ownership, the District Court should have applied New York law in the first instance. "In the absence of a superseding federal statute or regulation, state law generally governs the nature of any interests in or rights to property that an entity may have." *Exp.-Imp. Bank,* 609 F.3d 117. The key test is whether a federal statute such as TRIA § 201 "itself creates . . . property rights" or instead "merely attaches consequences, federally defined, to rights created under state law." *Id.* at 117 (quoting *United States v. Craft,* 535 U.S. 274, 278 (2002)).

TRIA § 201 plainly falls into the latter category because it does not purport to create any property rights under federal law. "Nowhere in TRIA is there a definition of 'property' or 'property ownership,' or any other indication that the statute intends to create a special regime of federal property interests or rights." *Calderon,* 867 F. Supp. 2d at 400. Thus, TRIA § 201 "provides no guidance for determining *which blocked assets* are 'of that terrorist party.'" *Id.* at 401

(emphasis added); *accord. Peterson v. Islamic Republic of Iran,* 938 F. Supp. 2d 93, 96 (D.D.C. 2013) (same).

Consequently, "state law fills an interpretive gap in TRIA by giving meaning to the phrase 'of that terrorist party.'" *Calderon,* 867 F. Supp. 2d at 405. TRIA § 201 thus leaves "ample room" for the application of New York law to determine "which subset of 'blocked assets' constitutes those that are 'of that terrorist party' and that should therefore be subject to attachment." *Id.* at 403.

5. Under the New York U.C.C., Bank Markazi Did Not Own the Assets at Issue Even Assuming *Arguendo* That the Presence of UBAE as an Additional Securities Intermediary Could Be Disregarded Under Plaintiffs' (Unproven) Fraudulent Conveyance Theory.

Had the District Court undertaken the requisite inquiry to determine whether Bank Markazi can be deemed to have owned the Assets at Issue under applicable law, it would have found that the answer to that dispositive question is "no." The pertinent source of New York law to determine ownership of the security entitlements first restrained in June 2008 in Clearstream's omnibus account with Citibank is Article 8 of the New York Uniform Commercial Code.[12]

---

[12] Alternatively, if the question of ownership under TRIA § 201 were determined by federal common law, as at least one court has held, application of federal common law likewise would lead to application of the U.C.C. here. *See Estate of Heiser v. Islamic Republic of Iran,* 885 F. Supp. 2d at 448 (applying U.C.C. Article 4A to determine ownership of blocked EFTs in the context of a federal common law analysis); *accord.* U.S. Amicus

Under N.Y.C.P.L.R. § 5201(c)(4), therefore, "section 8-112 of the uniform commercial code . . . govern[ed] *the extent to which and the means by which"* Plaintiffs could reach "any interest in" those security entitlements "by garnishment, attachment or other legal process" (emphasis added). U.C.C. § 8-112(c) provides in pertinent part that "[t]he interest of a debtor in a security entitlement may be reached by a creditor *only* by legal process upon the securities intermediary with whom the debtor's securities account is maintained" (emphasis added).

As of June 2008, the "securities intermediary with whom [Bank Markazi]'s securities account [wa]s maintained" was UBAE—not Clearstream. Consequently, the District Court (Jones, J.) ruled in June 2009 that *"under the plain meaning of NY UCC § 8-112(c), Clearstream is not a proper garnishee."* (A-Vol.XII-3317) (emphasis added).

Inserting the names of the relevant parties here, Official Comment to U.C.C. § 8-112(c) makes clear that Plaintiffs had no legal recourse against Clearstream with respect to Bank Markazi's security entitlements maintained in UBAE's customer account with Clearstream in Luxembourg:

Brief in *Calderon,* at 23, note (even under federal common law, "[t]he Uniform Commercial Code would presumably constitute a particularly relevant source" of law).

> If [Bank Markazi] holds securities through [UBAE], and [UBAE] in turn holds through [Clearstream], [Bank Markazi]'s property interest is a security entitlement against [UBAE]. Accordingly, [Bank Markazi]'s creditor cannot reach [Bank Markazi]'s interest by legal process directed to [Clearstream].

U.C.C. § 8-112 cmt. 3.[13] The *only* issue the June 2009 Order left open was "whether Clearstream is, or could be made, a proper garnishee," assuming *arguendo* Plaintiffs could show that the transfer from Bank Markazi's account with Clearstream to UBAE's account with Clearstream in February 2008 constituted a fraudulent conveyance such that a direct customer relationship between Bank Markazi and Clearstream could be deemed to exist. (A-Vol.XII-3318). Plaintiffs never even attempted to make that showing.

a. Bank Markazi's Property Rights Are Determined by the New York U.C.C. and Luxembourg Law, the Law to Which the U.C.C.'s Choice of Law Provisions Refer.

U.C.C. Article 8 refers to the laws of Luxembourg—the jurisdiction where Bank Markazi maintained its account with Clearstream (A-Vol.VI-1608-09; A-Vol.VII-1944,47)—to determine Bank Markazi's property rights vis-à-vis Clearstream.

---

[13] "Bank Markazi" has been inserted in place of the term "Debtor," UBAE in place of the term "Broker," and Clearstream in place of the term "Clearing Corporation" in this quote from U.C.C. § 8-112 cmt. 3. N.Y.U.C.C. § 8-112 is included in the Special Appendix at SPA-148.

Specifically, U.C.C. § 8-112(b)(2) provides that "[t]he local law of the securities intermediary's jurisdiction . . . governs . . . the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement." Here, the "law of the securities intermediary's jurisdiction" is Luxembourg law pursuant to U.C.C. § 8-112(e)(2), which provides that where "an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction." Clearstream's General Terms and Conditions expressly provide that they "shall be governed by and construed in accordance with the laws of the Grand Duchy of Luxembourg." (A-Vol.VII-1744, Art. 61).

b. Under Luxembourg Law, Bank Markazi Did Not Own the Assets at Issue, Consisting of Clearstream's Security Entitlements With Citibank in New York, at the Time They Were First Restrained in June 2008.

The expert opinion Clearstream proffered in the District Court, consisting of three memoranda prepared by its Luxembourg counsel, Arendt & Medernach ("Arendt"), demonstrates that under Luxembourg law, Bank Markazi cannot be deemed the owner of the assets restrained in Clearstream's omnibus account with Citibank in New York (A-Vol.VI-1600; A-Vol.VI-1602; A.Vol.XV-4220). As Arendt explains, Article 6 of the Luxembourg law of 1 August 2001 on the

Circulation of Securities and Other Financial Instruments (the "Luxembourg Securities Act") provides in pertinent part:

> The depositor has a right *in rem* of an intangible nature, up to the number of securities and other financial instruments booked to its account, on the entirety of the securities and other financial instruments of the same kind deposited with or held in an account by its depository.

(A-Vol.XV-4221). This "right *in rem* can only be enforced by the depositor against its depository." (*Id.*).

Arendt further explains that Bank Markazi has "no rights against Citibank but it can only exercise its rights to the securities against Clearstream." (A-Vol.XV-4222). The fact that *Clearstream's* security entitlements vis-à-vis Citibank were held in Clearstream's omnibus account in New York does not change the analysis under Luxembourg law, as Arendt states: "[A] right *in rem* can pursuant to Article 6 of the Securities Act only be exercised by the depositor against its custodian, even if its custodian (here Clearstream) has subdeposited the Securities with a higher tier intermediary." (A-Vol.VI-1603).

c. Application of the U.C.C. Leads to the Same Result: Bank Markazi Did Not Own the Assets at Issue at the Time They Were First Restrained.

Application of the U.C.C. leads to the same result: Bank Markazi had no cognizable property interest in the assets Plaintiffs restrained in New York, consisting of Clearstream's security entitlements vis-à-vis Citibank.

Under U.C.C. Article 8, Clearstream acquired its security entitlements against Citibank when Citibank credited those assets by book entry to Clearstream's omnibus account with Citibank in New York. Likewise, Bank Markazi acquired its corresponding security entitlements against Clearstream by book entry to its customer account with Clearstream in Luxembourg. *See* U.C.C. § 8-501(b) ("[A] person acquires a security entitlement if a securities intermediary . . . indicates by book entry that a financial asset has been credited to the person's securities account."); U.C.C. § 8-102(a)(7) (defining an "entitlement holder" as "a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary").[14]

A security entitlement represents "a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security." U.C.C. § 8-110 cmt. 1.[15] Consequently, Clearstream acquired the sole property interest in the security entitlements maintained in its omnibus account with Citibank in New York, just as Bank Markazi acquired the sole property interest in the security entitlements maintained in its customer account with Clearstream in Luxembourg. *See Fidelity Partners, Inc. v. First*

---

[14] N.Y.U.C.C. § 8-501 is included in the Special Appendix at SPA-151; N.Y.U.C.C. § 8-102 is included at SPA-132.

[15] N.Y.U.C.C. § 8-110 is included in the Special Appendix at SPA-142.

Trust Co. of N.Y., 58 F. Supp. 2d 52, 54 (S.D.N.Y. 1997) (where Philippine judgment debtor held a security entitlement through ING Bank of Manila, which in turn held its interest in the underlying bonds at issue through a securities account in Brussels, Belgium, court held that "[debtor]'s interest in the bonds is located in the Philippines, where the debtor resides, and where ING Bank of Manila – upon whose books the debtor's interest is represented – is located.").

U.C.C. § 8-503(c) further confirms the absence of any cognizable property interest of Bank Markazi in Clearstream's security entitlements maintained in Clearstream's omnibus account with Citibank. That provision makes clear that "[a]n entitlement holder's property interest with respect to a particular financial asset . . . may be enforced *against the securities intermediary only* by exercise of the entitlement holder's rights under Sections 8-505 through 8-508." U.C.C. § 8-503(c) (emphasis added).[16]

As the Official Comment to § 8-503 explains, "[t]he entitlement holder cannot assert rights directly against other persons, such as other intermediaries through whom the intermediary holds the positions." U.C.C. § 8-503 cmt. 2. This is so because "[a] security entitlement is not a claim to a specific identifiable

[16] N.Y.U.C.C. § 8-503 is included in the Special Appendix at SPA-156.

thing" but rather "a package of rights and interests that a person has against the person's securities intermediary and the property held by the intermediary." *Id.*

Hence, "[t]he idea that discrete objects might be traced through the hands of different persons has no place in the Revised Article 8 rules for the indirect holding system." *Id.* For the same reason, common-law property concepts such as beneficial ownership are fundamentally incompatible with the modern, indirect holding system for securities under U.C.C. Article 8. *See id.* ("[T]he incidents of [an entitlement holder's] property interest are established by the rules of Article 8, *not by common law property concepts."*) (emphasis added); *S.E.C. v. Credit Bancorp, Ltd.*, No. 99 CIV. 11395 (RWS), 2000 WL 1752979, at *24 (S.D.N.Y. Nov. 29, 2000) ("Where, as here, the U.C.C. states specifically that an entitlement holder's property rights over assets held by its securities intermediary are defined by the U.C.C. and not by the common law, and specific U.C.C. provisions are identified as the 'only' mechanism for enforcing those rights, then the common law has been supplanted.").

d. Bank Markazi Did Not Become the Owner of the Cash Credited to Clearstream's Omnibus Account With Citibank When the Underlying Bonds Matured in the Ordinary Course of Business.

The fact that the underlying bonds had matured in the ordinary course by the time the District Court entered the February 28 Order did not transform Bank Markazi into the owner of the resulting cash credited to Clearstream's omnibus

account with Citibank. Courts do not "permit[] a party to benefit from the tainted results of an improper attachment." *Calais Shipholding Co. v. Bronwen Energy Trading Ltd.,* No. 07 Civ. 10609(PKL), 2009 WL 4277246, at *3 (S.D.N.Y. Nov. 24, 2009). Accordingly, where, as here, "there was no property of the defendant that could have been attached in the first instance," "[n]o alchemy by the [garnishee] bank [can] transform[] [property] that cannot be attached into property of the defendant that can be attached." *Setaf-Segat v. Cameroon Shipping Lines S.A.,* No. 09 Civ. 6714(JGK), 2009 WL 4016502, at *1 (S.D.N.Y. Nov. 16, 2009).

This Court has applied this fundamental principle in at least two cases involving electronic fund transfers ("EFTs"), which are not attachable under *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.,* 585 F.3d 58 (2d Cir. 2009). Thus, in *Scanscot Shipping Services GmbH v. Metales Tracomex LTDA*, 617 F.3d 679, 682 (2d Cir. 2010), this Court rejected a creditor's argument that the garnishee bank's transfer of EFTs to a separate suspense account in compliance with an attachment order "created an attachable interest even where none may have previously existed." *Accord. India S.S. Co. v. Kobil Petroleum Ltd.,* 663 F.3d 118, 121 (2d Cir. 2011) (where garnishee bank paid proceeds from EFTs into court registry in response to an attachment order, creditor could not attach check issued by court registry, as the check "represented the proceeds of EFTs now deemed to be beyond the reach of the district court").

Bank Markazi in any event cannot be deemed the owner of any cash credited to Clearstream's omnibus account with Clearstream. Under Luxembourg law, Bank Markazi's property right is limited to a claim against Clearstream for return of any cash credited to Bank Markazi's account with Clearstream. Bank Markazi's property right does not extend to cash maintained in Clearstream's omnibus account with Citibank. (A-Vol.VI-1600-01). Similarly, Bank Markazi's rights under the U.C.C. are limited to the right to be paid by Clearstream, its immediate intermediary, once Clearstream has received a payment or distribution. *See* U.C.C. § 8-505(b).[17]

Further—and importantly, Clearstream did not operate as a mere pass-through to Bank Markazi when cash was credited to Clearstream's omnibus account at Citibank. Such cash represented a debt that Citibank owed *to Clearstream*—not Bank Markazi. *See, e.g., Shapiro v. McNeill,* 92 N.Y.2d 91, 98 (N.Y. 1998) (noting that there is a "contractual debtor/creditor relationship between a bank and its depositor"). When Clearstream received a payment into its cash account with Citibank, Clearstream credited Bank Markazi's account by book entry in Luxembourg, but Clearstream did not debit its omnibus account with Citibank accordingly; instead, the cash in the omnibus account remained available

[17] N.Y.U.C.C. § 8-505 is included in the Special Appendix at SPA-161.

for Clearstream to use as it saw fit—for *any* transaction on behalf of *any* of Clearstream's customers. (A-Vol.V-1139-40,45,85).

B. Assuming *Arguendo* that the Assets at Issue Could Be Deemed "Assets of" Bank Markazi, the Special Protection FSIA § 1611(b)(1) Extends to "the Property of" a Foreign Central Bank Overrides TRIA § 201.

Should this Court conclude—contrary to Bank Markazi's showing above—that the Assets at Issue may be deemed "assets of" Bank Markazi within the meaning of TRIA § 201, then those assets necessarily also would constitute "the property of" a foreign central bank within the meaning of FSIA § 1611(b)(1).[18] That provision of the FSIA immunizes from attachment and execution "the property . . . of a foreign central bank or monetary authority held for its own account." 28 U.S.C. § 1611(b)(1).

Consequently, the Assets at Issue presumptively would be immune from attachment and execution under this Court's holding in *NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d 172 (2d Cir. 2011). Where, as here, "funds are held in an account in the name of a central bank or monetary authority, the funds are *presumed to be immune* from attachment under § 1611(b)(1)." *Id.* at 194 (emphasis added). The test for immunity under § 1611(b)(1) is whether the

[18] FSIA § 1611 is included in the Special Appendix at SPA-122.

specific *"funds* are . . . being used for central banking functions as such functions are normally understood." *Id.* (emphasis added).

To overcome the presumption of immunity, Plaintiffs had the burden of "demonstrating with specificity" that the Assets at Issue *were not* being used by Bank Markazi for central banking functions, such as maintaining and investing the Bank's foreign currency reserves. *Id.; see id.* at 195 ("the accumulation of foreign exchange reserves" is a "paradigmatic central banking function[]"). Plaintiffs never even attempted to meet that burden.

Yet the District Court nevertheless found that the Assets at Issue were not immune from attachment and execution under FSIA § 1611(b)(1) based on a finding that Bank Markazi *as an entity* purportedly "is not entitled to immunity" because the Executive Order "suggests" that "Bank Markazi is not engaged in activities protected by § 1611(b)." (SPA-53). This was error.

1. Plaintiffs Never Even Attempted to Overcome the Presumption of Immunity Under This Court's Holding in *NML Capital.*

The District Court cited no evidence that the Assets at Issue were used for anything other than central banking purposes at the time they were first restrained in June 2008—and no such evidence exists. On the contrary, the record is entirely *consistent with* Bank Markazi's position throughout this litigation that the Assets at

Issue were used for the classic central banking purpose of investing Bank Markazi's currency reserves.

First, the Assets at Issue related to an investment by Bank Markazi in certain U.S. dollar-denominated bonds "issued by sovereigns like the Republic of Italy or 'supranationals' such as the European Investment Bank." (A-Vol.V-1396). As Clearstream's Executive Vice President and Head of Business Management, Mark Gem, testified during a hearing in the District Court (Koeltl, J.) in June 2008, such "very high grade securities . . . would all tend to appeal to central banks, for example, as stores of reserve investments." (A-Vol.V-1149).

Second, Ali Asghar Massoumi, the Head of Bank Markazi's Foreign Exchange Negotiable Securities Section, submitted an affidavit in the District Court confirming that the Assets at Issue were "examples of the type of bonds in which Bank Markazi invests part of its reserves." (A-Vol.V-1330). The purpose of such investments, Mr. Massoumi explained, is "to instill market confidence, and promote [the] central bank's primary objective of price stability." (*Id.*).

2. The Heightened Protection FSIA § 1611(b)(1) Confers on Central Bank Property Overrides TRIA § 201

Like TRIA § 201, FSIA § 1611(b) contains its own "notwithstanding" clause. *See* 28 U.S.C. § 1611(a) & (b) ("the property . . . of a foreign central bank or monetary authority held for its own account" "shall be immune from attachment and from execution" *"[n]otwithstanding* the provisions of [FSIA] section 1610")

(emphasis added). Yet the District Court held that TRIA § 201 trumps FSIA § 1611(b)(1) *solely* on the basis that the former was "enacted well after §1611(b) was adopted in 1976."[19] (SPA-53).

Two basic principles of statutory construction militate against that result. *First,* TRIA § 201 "must be read in the context of the overarching statutory scheme of the FSIA." *Levin v. Bank of New York*, No. 09 CV5900 (RPP), 2011 WL 812032, at *10 (S.D.N.Y. Mar. 4, 2011).[20] "Section 1609 [of the FSIA] . . . provides that where a valid judgment has been entered against a foreign sovereign, property of that foreign state is immune from attachment and execution *except* as provided in the subsequent sections, Sections 1610 and 1611." *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 48 (2d Cir. 2010) (emphasis in original). TRIA § 201, in turn, is "codified as a note to Section 1610 of the FSIA." *Id.; accord. Weininger,* 462 F. Supp. 2d at 498 (TRIA section 201 "is appended to [FSIA] § 1610, which provides the sole bases for exceptions to immunity from execution of property").

---

19 Only one other court had previously reached the same conclusion. *See Weininger v. Castro,* 462 F. Supp. 2d 457, 499 (S.D.N.Y. 2006). Importantly, however, none of the other sovereign defendants had appeared in that case to contest jurisdiction under the FSIA. *See id.* at 463.

20 *See Dodd v. United States,* 545 U.S. 353, 370 n.10 (2005) ("Our cases make clear that when interpreting a particular section of a statute, we look to the entire statutory scheme rather than simply examining the text at issue.") (citation omitted).

The legislative history of TRIA § 201 "suggests that Congress placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009). Accordingly, the "notwithstanding" clause in TRIA § 201(a) was not intended to alter the basic statutory framework of the FSIA whereby the immunity of central bank property under § 1611(b)(1) overrides any exception to immunity pursuant to § 1610.

Second, as the more specific provision extending special protection to the property of a foreign central bank held for its own account, FSIA § 1611(b)(1) must take precedence over TRIA § 201, which applies generally to the assets of "any agency or instrumentality" of a "terrorist party." *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, *regardless of their temporal sequence*.") (emphasis added); *Creque v. Luis*, 803 F.2d 92, 94-95 (3d Cir. 1986) (more specific statutory provision took precedence over more general provision even where the latter was enacted later in time and purported to apply "notwithstanding any other provision of law").

The heightened immunity of central bank property under FSIA § 1611(b)(1) reflects a Congressional policy determination that central banking assets should

receive special protection from attachment and execution. *See NML Capital, Ltd. v. Banco Central de la República Argentina,* 652 F.3d at 188 (the FSIA does not treat "foreign central banks . . . as generic 'agencies and instrumentalities' of a foreign state" but rather extends "special protections" to central banks "befitting the particular sovereign interest in preventing the attachment and execution of central bank property") (internal quotation and citation omitted).

C. Turnover Pursuant to TRIA § 201 Contravenes Both the United States Supreme Court's Holding in *Plaut* and the Treaty of Amity.

Finally, Bank Markazi submits that turnover of the Assets at Issue to Plaintiffs pursuant to TRIA § 201 is improper for at least two additional reasons. Bank Markazi acknowledges that this Court may be constrained under *Weinstein* to find that at least some of these additional arguments do not preclude turnover. However, Bank Markazi must raise these arguments here to preserve them for further review as appropriate.[21]

First, Bank Markazi respectfully disagrees with *Weinstein's* conclusion that turnover pursuant to TRIA § 201 is compatible with the United States Supreme Court's holding in *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 219 (1995) that a statute which "retroactively command[s] the federal courts to reopen final judgments" violates the separation of powers between the legislative and judicial

[21] *See, e.g., Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001).

branches of Government under Article III of the United States Constitution. *See Weinstein,* 609 F.3d at 50-51. On the contrary, TRIA § 201 retroactively seeks to impose liability for Plaintiffs' judgments against Iran on Bank Markazi, which was not a party to the underlying actions that resulted in those judgments and was never alleged to have played any role in the events at issue.

Second, turnover pursuant to TRIA § 201 violates multiple provisions of the Treaty of Amity for many of the same reasons discussed immediately below in connection with § 8772. As demonstrated there, this Court is not bound by *Weinstein's dicta* in any event—and the actual *holding* with respect to the Treaty in *Weinstein* pertained to only two of the five Treaty provisions Bank Markazi has invoked here.

II. The District Court's Application of 22 U.S.C. § 8772 to Order Turnover to Plaintiffs of the Assets at Issue Contravenes the Treaty of Amity Between the United States and Iran and the United States Constitution.

A. Turnover of the Assets at Issue Pursuant to § 8772 Contravenes the Treaty of Amity Between the United States and Iran.

Evidently recognizing that the ownership requirement inherent in TRIA § 201 precludes turnover of the Assets at Issue under that provision, Plaintiffs successfully lobbied Congress to enact new, bespoke legislation explicitly targeted at this action. As demonstrated below, the new provision, § 8772, contravenes

both the separation of powers under Article III of the United States Constitution and the Fifth Amendment's Takings Clause. *See infra,* Section II.B-C.

Yet this Court need not reach those constitutional issues if it finds that the Treaty of Amity between the United States and Iran precludes turnover of the Assets at Issue here. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (courts must "construe [a] statute to avoid" constitutional problems whenever "an alternative interpretation of the statute is 'fairly possible'") (internal citation omitted).

1. The Generic "Notwithstanding" Clause in § 8772, Which Conspicuously Fails to Mention the Treaty, Is Not a Clear Indication of Congressional Intent to Abrogate the Treaty.

The Treaty of Amity is self-executing, and accordingly has the force and effect of a legislative enactment. *Brzak v. United Nations,* 597 F.3d 107, 111 (2d Cir. 2010) (quoting *Medellin v. Texas,* 552 U.S. 491, 505-06 (2008)).[22] The Treaty remains in full force and effect. Indeed, courts in the United States continue to apply the Treaty, and American litigants continue to rely on its provisions for their own benefit. *See, e.g., McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) ("We hold that the Treaty of Amity, construed under

[22] *See McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008) ("The Treaty of Amity, like other treaties of its kind, is self-executing.").

Iranian law, provides [the American plaintiff] with a private right of action against the government of Iran.").

The United States Supreme Court has instructed that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (internal quotation and citation omitted). Section 8772 contains no such expression of a clear Congressional intent to abrogate the Treaty.

Yet the District Court relied on *Weinstein,* 609 F.3d 43, to hold that the phrase "notwithstanding any other provision of law" in § 8772(a)(1) "evinces clear Congressional intent to abrogate treaty language inconsistent with . . . § 8772." (SPA-52). However, *Weinstein* addressed a *different statute,* TRIA § 201, and the *Weinstein* Court's statement that "even assuming, *arguendo,* that there were a conflict between [the Treaty and TRIA § 201], the TRIA would have to be read to abrogate that portion of the Treaty" is classic *dicta* that cannot bind this Court in any event. *Weinstein,* 609 F.3d at 53; *see, e.g., Alsol v. Mukasey,* 548 F.3d 207,

217 (2d Cir. 2008) (*dicta* in a prior opinion "does not control in [subsequent] proceedings").[23]

Unlike TRIA § 201, § 8772 includes particularized language providing that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law[.]"* 22 U.S.C. § 8772(a)(1) (emphasis added). Thus, Congress was quite specific about which "provision[s] of law" it intended to abrogate in § 8772—yet Congress failed to include any reference whatsoever to the Treaty in § 8772.

This failure is all the more telling given that: (1) § 8772 on its face applies exclusively to assets in which Bank Markazi—an Iranian instrumentality—had an interest, and (2) Bank Markazi had previously argued—months before the wording of § 8772 was finalized—that the Treaty precludes Plaintiffs' claim under TRIA § 201 in this very same action (A-Vol.XIII-3646-48), a fact that Plaintiffs' counsel, who evidently were closely involved in the drafting of § 8772, cannot have overlooked. *See infra,* Section II.B.3.

Accordingly, the rationale that "Congress is not required to investigate the array of international agreements that arguably provide some protection that it

---

[23] *See Indep. U.S. Tanker Owners Comm. v. Skinner,* 884 F.2d 587, 595 (D.C. Cir. 1989) (the phrase "even assuming *arguendo"* in a court's opinion is indicative of *dicta*); *Calderon*, 867 F. Supp. 2d at 405 (characterizing the quoted language in *Weinstein* as *dicta*).

wishes to annul and then assemble a check-list reciting each one"[24] plainly does not apply to § 8772. On the contrary, the conspicuous omission of any reference to the Treaty in § 8772 despite its obvious relevance to the very issues the statute purports to determine suggests that Congress in fact was reluctant to abrogate the Treaty. *See United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988) (Congress's failure to reference a plainly pertinent treaty in a statute even where the relevant treaty provisions "had been raised repeatedly" prior to the statute's enactment "reflects equivocation and avoidance" rather than a clear statement of Congressional intent).

2. Turnover of the Assets at Issue Based on the District Court's Erroneous Reading of § 8772 as Abrogating the Binding Treaty of Amity Contravenes Multiple Provisions of the Treaty.

The District Court not only rejected Bank Markazi's showing that the "notwithstanding" clause in § 8772 cannot be deemed a clear indication of Congressional intent to abrogate the Treaty of Amity, it further relied on *Weinstein* to find that *all* of "the Treaty of Amity provisions cited by Bank Markazi are inapposite." (SPA-51).

This was error. The District Court overlooked that *Weinstein* dealt with *only two of the five* Treaty provisions relied on by Bank Markazi—and it did so in the

[24] *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir. 2000).

context of a *different statute,* namely TRIA § 201. *See Weinstein,* 609 F.3d at 53 (discussing Articles III.1 and IV.2 of the Treaty). *Weinstein* did not so much as mention—much less find "inapposite"—the remaining three provisions upon which Bank Markazi relies (Articles III.2, IV.1 and V.1).

The Treaty imposes a number of specific obligations on the United States. In particular, the Treaty requires the United States: *first,* to refrain from "applying unreasonable or discriminatory measures that would impair the[] legally acquired rights and interests" of Iranian "nationals and companies," and from subjecting the acquisition or disposal of property by Iranian "nationals and companies" to treatment "less favorable than that accorded nationals and companies of any third country" (Art. IV.1 and V.1); *second,* "at all times [to] accord fair and equitable treatment to nationals and companies" of Iran and "to their property and enterprises" (Art. IV.1); *third,* to afford "[n]ationals and companies" of Iran "freedom of access to the courts of justice and administrative agencies" in the United States (Art. III.2); *fourth,* to refrain from taking the property of Iranian "nationals and companies," "except for a public purpose" and upon "prompt payment of just compensation" (Art. IV.2); and *fifth,* to recognize the "judicial status" of "[c]ompanies constituted under the applicable laws and regulations" of Iran (Art. III.1).

The District Court's Partial Final Judgment pursuant to § 8772 contravenes each of the Treaty provisions just cited. *First,* turnover of the Assets at Issue pursuant to § 8772 violates Articles IV.1 and V.1 by targeting Bank Markazi for adverse treatment while expressly excluding *even other "terrorist parties"* from comparable treatment. *See* 22 U.S.C. § 8772(c) ("Nothing in this section shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than [these] proceedings.").[25]

Second, turnover pursuant to § 8772 similarly contravenes Art. IV.1 of the Treaty. A state may breach its obligation to accord fair and equitable treatment when its individualized legislative or regulatory decision-making is primarily driven by political considerations. *Azurix Corp. v. Republic of Argentina,* ICSID Case No. ARB/07/12, Award, ¶¶ 373-75 (July 14, 2006) (A-Vol.XXI-5966-67); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

Third, Congress's attempt to determine virtually every issue in this action by way of retroactive legislation cannot be reconciled with Article III.2 of the Treaty.

---

[25] Notably, the original draft of the provision that ultimately became § 8772 would have applied to the property of any "terrorist party." (A-Vol.XIX-5548-55). Yet all references to a "terrorist party" or "terrorist parties" in the draft provision were later removed and replaced with references only to "Iran." (A-Vol.XIX-5559-61).

While § 8772 may not formally constrain Bank Markazi's "access to the courts," it leaves virtually nothing for the courts to decide, thereby rendering such access illusory.

Fourth, for the reasons discussed below with respect to the Fifth Amendment's Takings Clause, turnover of the Assets at Issue pursuant to § 8772 violates Art. IV.2 of the Treaty. *See infra,* Section II.C. In particular, the rule that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B"[26] is equally applicable as a matter of international law.[27]

Fifth—and finally, Congress's definition of "Iran" in § 8772(d)(3) to "mean[] the Government of Iran, *including the central bank or monetary authority of that Government,"* contravenes Art. III.1 of the Treaty. In this respect, Bank Markazi respectfully disagrees with the *Weinstein* Court's interpretation of *Sumitomo Shoji America Inc. v. Avagliano,* 457 U.S. 176 (1982). The "juridical status" language that is pertinent here was never discussed in *Sumitomo. See*

---

26 *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

27 *See, e.g.,* U.N. G.A. Res. 1803 (XVII), ¶ 4, U.N. Doc. A/RES/1803 (Dec. 14, 1962) (public purposes that may justify expropriation include "reasons of public utility, security or the national interest which are *recognized as overriding purely individual or private interests,* both domestic and foreign") (emphasis added).

Sumitomo, 457 U.S. at 181-82. Bank Markazi wishes to preserve this issue for further review as appropriate.[28]

B. The District Court's Conclusion that § 8772 Does Not Violate the Separation of Powers Under Article III of the United States Constitution Ignores the Statute's Expressly Stated Purpose *"to Ensure"* Turnover of the Assets at Issue to Plaintiffs.

1. Standard for Determining the Constitutionality of § 8772 under Article III.

As this Court has explained, the key inquiry in determining whether a statute such as § 8772 violates the separation of powers between the legislative branch and the judiciary under Article III of the Constitution is whether the statute "usurp[s] the adjudicative function assigned to the federal courts under Article III" or instead

[28] Were this Court to find that § 8772 abrogates the Treaty as a matter of domestic U.S. law, § 8772 still would not relieve the United States of its Treaty obligations to Iran as a matter of international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 115(1)(b) (1987) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."). Article XXI.2 of the Treaty provides that "any dispute" concerning "interpretation or application of the present Treaty . . . shall be submitted to the International Court of Justice." Accordingly, if the District Court's Partial Final Judgment were affirmed following exhaustion of all opportunities for relief on direct review, Iran (on behalf of Bank Markazi) would have a cause of action against the United States before the International Court of Justice ("ICJ") for violation of the Treaty and the law of nations. However, exhaustion of Bank Markazi's domestic remedies in the United States is a precondition to any such claim under the "well-established rule of customary international law" that "local remedies must be exhausted before international proceedings may be instituted." *Interhandel (Switzerland v. U.S.)*, 1959 I.C.J. 6, 1959 WL 2, at *27 (Mar. 21).

merely "chang[es] the law applicable to pending cases." *Axel Johnson,* 6 F.3d at 81; *compare Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 438 (1992) (statute was constitutional where it "compelled changes in law, not findings or results under old law") *with United States v. Klein,* 80 U.S. 128, 146 (1871) (Congress may not constitutionally "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]").

In practice, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw." *Axel Johnson,* 6 F.3d at 81. "Whether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question in cases in which, as a practical matter, simple adherence to the 'new' standard in effect mandates a particular result." *Benjamin v. Jacobson,* 124 F.3d 162, 174 (2d Cir. 1997), *vacated on other grounds,* 172 F.3d 144 (2d Cir. 1999).

Yet at its core, Article III commands that Congress may not predetermine the results in any given case. "Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases." *Lindh v. Murphy,* 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds,* 521 U.S. 320 (1997).

The Seventh Circuit in *Lindh* illustrated this critical distinction with the following hypothetical: While "Congress *cannot* say that a court must award Jones

$35,000 for being run over by a postal truck," the court explained, Congress *may,* for example, "prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages," or "establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed." *Id.* (citations omitted, emphasis added). The latter is constitutional; the former is not.

2. The Article III Violation Inherent in § 8772 Is Evident on the Face of the Statute.

Section 8772 unequivocally requires that "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518" "*shall be* subject to execution" by Plaintiffs in this action. 22 U.S.C. § 8772(a)(1) & (b) (emphasis added). On its face, therefore, § 8772 is akin to the hypothetical statute in *Lindh* providing that the "court must award Jones $35,000." *Lindh,* 96 F.3d at 872. Congress's overt attempt in § 8772 to determine the outcome of this case plainly "usurp[s] the adjudicative function assigned to the federal courts under Article III." *Axel Johnson,* 6 F.3d at 81.

Yet relying solely on the statute's formal "structure," the District Court nevertheless found § 8772 to be constitutional under Article III, reasoning that § 8772 "does not itself 'find' turnover required" and hence "is not a *self-executing* congressional resolution of a legal dispute." (SPA-65) (emphasis added). Instead,

the District Court found that § 8772 nominally "left [it] to the Court" to make certain "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs. (*Id.*). That, the District Court held, was all Article III requires.

This was error. Section 8772 nominally required the District Court to make only two "determinations" "prior to an award turning over" the Assets at Issue to Plaintiffs: (1) that "Iran" (defined to include Bank Markazi[29]) had a "beneficial interest in" the Assets at Issue; and (2) "that no other person possesses a constitutionally protected interest in the [Assets at Issue]." 22 U.S.C. § 8772(a)(2).

Yet the stated purpose of these "determinations" was *"to ensure that* Iran is held accountable *for paying* [Plaintiffs'] judgments." 22 U.S.C. § 8772(a)(2) (emphasis added). Congress thus made crystal clear its intent to determine the outcome of this action in Plaintiffs' favor.

It is axiomatic that "statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton,* 549 U.S. 84, 91 (2006). Here, the plain and ordinary meaning of "to ensure" in § 8772(a)(2) is *"to guarantee* (a thing) to a person." Oxford English Dictionary (2d ed. 1989)

---

[29] See § 8772(d)(3) ("The term 'Iran' means the Government of Iran, *including the central bank or monetary authority of that Government* and any agency or instrumentality of that Government.") (emphasis added).

(emphasis added); *accord., e.g.,* Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("to ensure" means "[t]o make sure, certain, or safe; guarantee").

When construing federal statutes, courts in a variety of contexts have interpreted the phrase "to ensure" in accordance with that plain and ordinary meaning. *See, e.g., Nat'l Petrochemical & Refiners Ass'n v. E.P.A.,* 630 F.3d 145, 153 (D.C. Cir. 2010) (where statute provided that Environmental Protection Agency "shall promulgate regulations *to ensure* that transportation fuel sold or introduced into commerce in the United States" meets certain standards, court held that "Congress thus delegated authority to EPA *to make certain* that" those standards were met) (first emphasis in original, second emphasis added); *United States v. Ray,* 273 F. Supp. 2d 1160, 1165-67 (D. Mont. 2003) (where "Congress did not define [the phrase] 'ensure'" in statute establishing judicial reporting requirements, court held that "[t]o ensure means *to guarantee* or to warrant") (emphasis added); *Corey H. v. Bd. of Educ.,* 995 F. Supp. 900, 913 (N.D. Ill. 1998) ("by repeatedly using the word 'ensure,'" Individuals with Disabilities Education Act "unambiguously require[d] the state *'to make certain'* that the [Act]'s statutory requirements are carried out by local school districts") (quoting Webster's II New Riverside University Dictionary 434 (1994)) (emphasis added).

Thus, the stated purpose of the "determinations" required by § 8772 is to "make certain" or "guarantee" turnover of the Assets at Issue to Plaintiffs. On that

basis, Congress carefully crafted the two "determinations" § 8772 required the District Court to make to ensure their resolution in Plaintiffs' favor.

First, the requisite finding that Bank Markazi had a "beneficial interest" in the Assets at Issue was predetermined because that fact already had been established by the time Congress enacted § 8772 into law in July 2012. Indeed, the Assets at Issue had been blocked several months previously pursuant to the Executive Order precisely *because* Bank Markazi had a beneficial interest in them. *See Norilsk Nickel,* 14 A.D.3d at 147 (emphasis added) ("OFAC block[s] assets based on interests in property and the use to which such property was put, not based on who own[s] the property in question."); *Global Relief Found.*, 315 F.3d at 753 (for purposes of determining the interests in property that are subject to blocking, "beneficial rather than legal interests matter"); *accord. Holy Land Found.,* 333 F.3d at 162-63 (any "interest" in property may be subject to blocking; "[t]he interest need not be a legally protected one").

Moreover, § 8772(a)(2)(A) expressly required the District Court to "exclud[e]" from consideration any "custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran." 22 U.S.C. § 8772(a)(2)(A). By commanding the District Court to deem irrelevant any interest of Clearstream—the only party with a *direct, legally*

cognizable interest in the Assets at Issue—the statute guaranteed the outcome of the District Court's first "determination" in Plaintiffs' favor.

Second, the required finding pursuant to § 8772(a)(2)(B) "that no other person possesses a constitutionally protected interest in the [Assets at Issue] under the Fifth Amendment to the Constitution of the United States" was similarly predetermined. Once Clearstream's interest in the Assets at Issue was excluded from consideration pursuant to § 8772(a)(2)(A), the District Court could not possibly have found that any *other* party had a constitutionally protected interest in those assets.

3. The Circumstances Surrounding the Enactment of § 8772 Further Underscore Congress's Intent to Determine the Outcome of this Action in Plaintiffs' Favor.

The circumstances surrounding the enactment of § 8772 further confirm the statute's explicitly stated purpose of guaranteeing turnover of the Assets at Issue to Plaintiffs. To cite just one contemporaneous example, a February 2, 2012 press release issued by Senator Robert Menendez of New Jersey, one of two original Senate Co-Sponsors of the provision that ultimately became § 8772, stated that the new provision *"makes it so that"* Plaintiffs *"will be able to attach* two billion [sic]

in Iranian Central Bank assets being held at a New York Bank." (A-Vol.XIX-5574) (emphasis added). Evidently, that was always the Senator's intent.[30]

Moreover, Plaintiffs' counsel appear to have exercised substantial influence over the wording of the provision that ultimately became § 8772 throughout the legislative process. Senator Menendez's communications director was quoted in a May 22, 2012 article in the publication *Roll Call* as stating that the Senator "for months ha[d] been working with all of the plaintiff groups *to ensure that* the approximately $2.5 billion [sic] in Iranian blocked assets located in New York *are available"* for distribution to Plaintiffs. (A-Vol.XIX-5557) (emphasis added). The same article revealed that "lawyers and lobbyists" for various Plaintiff groups were still "jockeying" over the precise text of the new provision at that time. (A-Vol.XIX-5556).

---

30 While an individual legislator's statement ordinarily is entitled to "limited weight," Senator Menendez's press release is plainly relevant here because of its "consistency . . . with the general language of the statute itself." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008).

C. Turnover of the Assets at Issue Pursuant to § 8772 Constitutes an Impermissible Taking under the Fifth Amendment to the United States Constitution.

1. Section 8772's Retroactive Legalization of Plaintiffs' Improper Restraint of the Assets at Issue Violates the Takings Clause.

With barely any discussion, the District Court brushed away Bank Markazi's showing that § 8772 effects a taking by retroactively legalizing Plaintiffs' improper restraint of the Assets at Issue *more than three and a half years* before they were blocked in February 2012.[31] (SPA-69). Yet it is well-established that the retroactive application of civil statutes may constitute a taking where they "upset settled transactions." *E. Enterprises v. Apfel*, 524 U.S. 498, 501 (1998). The "ban on retrospective legislation embrace[s] all statutes, which, though operating only from their passage, affect vested rights and past transactions." *Landgraf*, 511 U.S. at 268 (internal quotation and citation omitted).

Section 8772 is precisely such a statute. While Bank Markazi's "reasonable investment-backed expectations"[32] are relevant in this context, the District Court's focus on whether Bank Markazi could have had a "reasonable expectation" that its

---

[31] The Takings Clause of the Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. Amend. V. *See* Special Appendix at SPA-103.

[32] *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980).

interests would not be diminished or extinguished *after* the Assets at Issue were blocked in February 2012 (SPA-69) was misplaced.

Instead, the relevant point in time to determine Bank Markazi's reasonable expectation was June 2008, when the Assets at Issue were first restrained. *See, e.g.*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (considering alleged regulatory taking in light of reasonable expectations at the time of investment). At that time, Bank Markazi plainly *did* have a reasonable expectation that its interests would not be diminished or extinguished because the Assets at Issue were not subject to attachment or execution under then-existing law. *See supra,* Section I.A.5.

2. Distribution of the Assets at Issue to Plaintiffs Is Not a Valid Public Purpose Under the Takings Clause.

Under the Takings Clause, § 8772's stated purpose "to ensure that Iran is held accountable for paying [Plaintiffs'] judgments" cannot justify the taking of property in which Bank Markazi had an interest. 22 U.S.C. § 8772(a)(2). Indeed, "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Yet here, the District Court concluded that *any* provision that somehow references "the unusual and extraordinary threat" allegedly posed by Iran *ipso facto* "does not violate the public use requirement" of the Takings Clause. (SPA-70).

This was error. While § 8772 deems turnover of the Assets at Issue to Plaintiffs to be "in furtherance of the broader goals of this Act to sanction Iran," that plainly cannot be deemed the statute's *primary purpose.* At most, it is an incidental or pretextual purpose that cannot cure the Takings Clause violation inherent in § 8772. *See Kelo,* 545 U.S. at 490 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with *only incidental or pretextual public benefits,* are forbidden by the Public Use Clause.") (emphasis added); *see generally Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

III. The District Court's Permanent Injunction Precluding Bank Markazi From Asserting Its Property Rights Against Clearstream in Luxembourg Is an Impermissible Restraint of Bank Markazi's Property Outside the United States.

This Court has made clear that "a district court sitting in Manhattan does not have the power to attach [a foreign sovereign's] property in foreign countries." *EM Ltd. v. Republic of Argentina,* 695 F.3d 201, 208 (2d Cir. 2012).[33] Equally

[33] *Accord. Bank of Tokyo-Mitsubishi, UFJ, Ltd. N.Y. Branch v. Peterson,* No. 12 Civ. 4038 (BSJ), 2012 WL 1963382, at *2 n.3 (S.D.N.Y. May 29, 2012); *Elliott Assocs., L.P. v. Banco De La Nación,* No. 96 Civ. 7916 (RWS), 2000 WL 1449862, at *3 (S.D.N.Y. Sept. 29, 2000); *Fidelity Partners, Inc. v.*

clearly, this Court has held that under the FSIA, "courts . . . may not grant, by injunction, relief which they may not provide by attachment." *S&S Mach. Co. v. Masinexportimport,* 706 F.2d 411, 418 (2d Cir. 1983). Indeed, "[t]he FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property." *Id.*

Yet that is precisely what the Partial Final Judgment purports to do here in the form of a sweeping injunction (the "Injunction") which—if allowed to stand—would "permanently restrain[] and enjoin[]" Bank Markazi "from instituting or prosecuting any claim or pursuing any actions against Clearstream *in any jurisdiction* or tribunal arising from *or relating to* any claim (whether legal or equitable) to the [Assets at Issue]." (SPA-87 ¶13) (emphasis added).

Bank Markazi objected to the Injunction, but the District Court nevertheless proceeded to enter the Injunction over Bank Markazi's objection.[34]

Yet to the extent the Partial Final Judgment purports to preclude Bank Markazi from asserting its property rights against Clearstream *in Luxembourg,* the

---

Philippine Exp. & Foreign Loan Guarantee Corp., 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996).

[34] In response to Bank Markazi's objection, the District Court modified the wording of the Injunction only very slightly in a manner that is not pertinent here.

District Court plainly exceeded its jurisdiction under the FSIA. Nor did either of the two other statutes at issue on this appeal, 22 U.S.C. § 8772 and TRIA § 201, confer jurisdiction on the District Court to adjudicate Bank Markazi's property rights outside the United States. On the contrary, § 8772 explicitly recognizes that the Assets at Issue in New York are distinct from—albeit "equal in value to"—the "financial asset[s] of Iran" (defined to include Bank Markazi) that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad.*" 22 U.S.C. § 8772(a)(1)(C) (emphasis added).[35]

The Injunction was included in the Partial Final Judgment at Clearstream's request and reflects its stated concern that "[e]xecuting against Clearstream's cash account at Citibank would leave Clearstream without the ability to cover the cash credited to Bank Markazi's account, thereby exposing Clearstream to the risk of turnover *of its cash* to Plaintiffs while its liability to Bank Markazi remains unresolved[.]" (A-Vol.XV-4164) (emphasis added).

Yet Clearstream's continued, potential liability to Bank Markazi is an unavoidable consequence of Congress's ill-advised attempt in § 8772 to override

---

[35] To be clear, Bank Markazi is not asking this Court to determine the nature and extent of Bank Markazi's rights against Clearstream in Luxembourg. Instead, the sole question before the Court here is whether the District Court had jurisdiction to enjoin Bank Markazi from asserting whatever property rights it may have against Clearstream outside the United States.

U.C.C. Article 8 and guarantee turnover of the Assets at Issue to Plaintiffs in a manner that is fundamentally at odds with the modern, indirect holding system for securities. The District Court lacked authority to shield Clearstream—at Bank Markazi's expense—from the inevitable adverse consequences of § 8772 by enjoining Bank Markazi from exercising its property rights against Clearstream in Luxembourg. The FSIA, and this Court's precedents, preclude such relief.

CONCLUSION

For the reasons set forth herein, the District Court's Partial Final Judgment should be reversed.

Dated: New York, New York
November 14, 2013

Respectfully Submitted,

/s/ David M. Lindsey

David M. Lindsey
Andreas A. Frischknecht

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com
www.chaffetzlindsey.com

Attorneys for Appellant Bank Markazi

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

November 14, 2013

/s/ David M. Lindsey

David M. Lindsey
Andreas A. Frischknecht

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com
www.chaffetzlindsey.com

Attorneys for Appellant Bank Markazi