No.

IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Traditionally, a foreign sovereign's assets were absolutely immune from execution, wherever located. Congress modified that rule in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891, by providing that a foreign sovereign's "property in the United States" is immune from execution unless it falls within certain narrowly defined exceptions. 28 U.S.C. §§ 1609-1610. In the decision below, the Second Circuit held that the FSIA places no limits at all on the seizure of a foreign sovereign's property *outside* the United States, and in fact displaces any common-law immunity that would otherwise apply. Applying that rule, the Second Circuit held that the district court could order a foreign bank to transfer $1.68 billion of sovereign assets from Luxembourg to New York to satisfy default judgments. The question presented is:

Whether a foreign sovereign's property outside the United States is entitled to sovereign immunity.

PARTIES TO THE PROCEEDINGS BELOW

Due to its length, the list of parties to the proceedings below is set forth in full in the appendix (App., *infra*, 83a-95a).

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

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 876 F.3d 63 (2d Cir. 2017). The opinion of the district court (App., *infra*, 56a-79a) is unreported but available at 2015 WL 731221 (S.D.N.Y. Feb. 20, 2015).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 21, 2017. It denied rehearing and rehearing en banc on February 7, 2018. App., *infra*, 80a-82a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*, are set forth in the appendix. App., *infra*, 96a-125a.

PRELIMINARY STATEMENT

The Foreign Sovereign Immunities Act prohibits plaintiffs from executing against a foreign sovereign's property in the United States, subject only to narrow exceptions. In the decision below, however, the Second Circuit held that the Act places *no limits at all* on the seizure of property *outside* the United States—and in fact displaces any common-law immunity that would otherwise apply. Applying that rule, the Second Circuit held that the district court could order a foreign bank to transfer $1.68 billion of sovereign assets from Luxembourg to New York to satisfy default judgments.

The disastrous foreign policy implications of that rule are obvious. The seizure of another sovereign's property raises concerns under any circumstances. But a rule that permits the seizure of sovereign property outside the United States, without regard to any customary immunity standards, is destined to embroil the Nation in international disputes. It also threatens the U.S. assets of U.S. companies by exposing them to reciprocal treatment by foreign courts.

The Second Circuit acknowledged that the rule it adopted "abrogated decades of pre-existing sovereign immunity common law." App., *infra*, 2a. It nonetheless deemed its holding compelled by this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). But *NML*'s brief discussion of the topic was not necessary to the decision and rested on a mistaken premise. The question is important and warrants full consideration. As the Second Circuit observed, the "prob-

lem is one for the Supreme Court * * * to resolve." App., *infra*, 52a. The Court should grant review.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity for a state's "strictly commercial acts." *Id.* at 486-487. Two decades later, Congress codified the restrictive theory in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*).

The FSIA addresses both (1) the immunity of *foreign sovereigns from suit*; and (2) the immunity of *sovereign property from attachment and execution*. With respect to immunity from suit—commonly known as "jurisdictional" immunity—the FSIA confirms the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The Act then lists carefully circumscribed exceptions. *Id.* § 1605. For example, under the "commercial activity" exception, a foreign sovereign is not immune from actions "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Even after the State Department adopted the restrictive theory of immunity in 1952, U.S. courts continued to accord absolute immunity to sovereign property. As Congress observed: "Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment." H.R. Rep. No. 94-1487, at 8 (1976). Plaintiffs who obtained judgments thus had to rely on sovereign grace for their satisfaction.

In enacting the FSIA, Congress chose to "modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity." H.R. Rep. No. 94-1487, at 27. Section 1609 thus codifies the general rule that "property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Section 1610 then lists narrow exceptions for certain types of "property in the United States." Section 1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution," if one of certain additional conditions is met. *Id.* § 1610(a). Under § 1610(a)(2), for example, property in the United States of a foreign state used for commercial activity in the United States is not immune if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2). Section 1610(b) lists additional exceptions for "property in the United States of an agency or instrumentality of a foreign state en-

gaged in commercial activity in the United States." *Id.* § 1610(b).

Section 1611 sets forth additional immunities that are not subject to the exceptions in § 1610. Under § 1611(b)(1), for example, property of a "foreign central bank or monetary authority held for its own account" is immune unless the central bank or its parent government specifically waives the immunity. 28 U.S.C. § 1611(b)(1).

In 1996, Congress added an exception to jurisdictional immunity for certain claims based on acts of terrorism. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (currently codified at 28 U.S.C. § 1605A). Congress also added exceptions for execution of the resulting judgments. Section 1610(a)(7) provides that, with respect to such terrorism judgments, a foreign sovereign's "property in the United States * * * used for a commercial activity in the United States" is not immune, "regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) provides a similar exception for "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." *Id.* § 1610(b)(3). Both exceptions thus apply only to "property in the United States."

B. This Court's Decision in *NML*

For 35 years, no appellate court held that the FSIA permits execution against property *outside* the United States. Courts uniformly understood the Act to leave intact the traditional absolute immunity accorded to property abroad. See, *e.g.*, *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against

a foreign sovereign's property * * * wherever that property is located around the world."); pp. 13-15, *infra*.

This Court then decided *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). *NML* did not present any question of execution immunity. It concerned only whether the Republic of Argentina was immune from *discovery* into its foreign assets. *Id.* at 2254. The Court held that it was not. Argentina had waived its *jurisdictional* immunity in certain bond indentures. *Id.* at 2256. And while execution immunity might ultimately restrict the plaintiffs' ability to seize assets, it was no bar to discovery. *Id.* at 2256-2257.

NML addressed execution immunity in passing. Argentina claimed that discovery into foreign assets was inappropriate because Congress could not have intended to allow discovery into assets the plaintiff had no power to execute against. 134 S. Ct. at 2257. The Court rejected that argument on multiple grounds.

First, the Court identified no pre-FSIA precedent recognizing any common-law immunity for assets outside the United States. 134 S. Ct. at 2257. "Our courts generally lack authority in the first place to execute against property in other countries," the Court noted, "so how could the question ever have arisen?" *Ibid.* The FSIA did not itself grant such immunity, the Court added, because § 1609 by its terms "immunizes only foreign-state property '*in the United States*.'" *Ibid.*

Second, the Court held that any consideration of execution immunity was premature. "[T]he reason for these subpoenas," it noted, "is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law." 134 S. Ct. at 2257. That the subpoenas might sweep in information about property that *was* arguably

immune was not a basis to foreclose discovery. *Id.* at 2258. Accordingly, the Court refused to quash the subpoenas. *Ibid.*

II. PROCEEDINGS BELOW

A. Proceedings Before the District Court

1. Petitioner Bank Markazi is the Central Bank of Iran. App., *infra*, 2a. Like other central banks, it holds foreign currency reserves to carry out monetary policies, such as maintaining price stability. C.A. Confid. App. 425-426. Like other central banks, it often maintains those reserves in bonds issued by other sovereigns. App., *infra*, 5a; C.A. Confid. App. 426.

To carry out those central banking activities, in 1994 Bank Markazi opened an account in Luxembourg with Clearstream Banking, S.A., a Luxembourg-based bank that specializes in bonds and equities. App., *infra*, 5a; C.A. Confid. App. 426. Clearstream maintained its own accounts at banks in New York, including JPMorgan Chase Bank, N.A. and Citibank, N.A., which it used to process bond proceeds for customers. App., *infra*, 5a. In 2008, Bank Markazi stopped holding bonds at Clearstream directly and started doing so through an intermediary bank, Banca UBAE, S.p.A. *Id.* at 5a-6a.

2. This case arises out of efforts to seize those holdings to pay off default judgments against the Iranian government. Plaintiffs obtained those judgments in suits concerning terrorist attacks by organizations that allegedly received support from Iran. App., *infra*, 56a-57a; see, *e.g.*, *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003). Bank Markazi, an entity separate from the Iranian government, is not a party to any of those judgments and is not alleged to have been involved in the attacks.

In June 2008, plaintiffs sought to satisfy a portion of the judgments by restraining nearly $2 billion in bonds that Clearstream held at Citibank in New York for the ultimate benefit of Bank Markazi. App., *infra*, 6a. Bank Markazi resisted those efforts on multiple grounds, including that Clearstream's holdings in New York could not be seized to satisfy debts of Iran and that the assets were immune under the FSIA. See *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at *19-26 (S.D.N.Y. Mar. 13, 2013). While those proceedings were unfolding, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214, which abrogated Bank Markazi's defenses solely for that one case. See *id.* § 502, 126 Stat. at 1258 (codified at 22 U.S.C. § 8772). The district court ordered the assets distributed to plaintiffs, and the Second Circuit affirmed. App., *infra*, 6a-7a & n.3. This Court granted review but ultimately affirmed, holding that the statute did not violate the separation of powers. See *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016).

3. This case concerns an additional $1.68 billion in bond proceeds not at issue in the prior proceedings. App., *infra*, 9a-10a. In December 2013, plaintiffs filed a complaint against Bank Markazi, Clearstream, UBAE, and JPMorgan alleging that Clearstream was holding bond proceeds in a JPMorgan account in New York for the benefit of Bank Markazi. *Id.* at 9a, 56a-57a. Plaintiffs sought, among other relief, a "turnover" order directing Clearstream and JPMorgan to turn over the proceeds to satisfy the judgments. *Id.* at 10a. They relied on New York's turnover statute, which provides:

> Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in

> which the judgment debtor has an interest * * * , the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor * * * .

N.Y. C.P.L.R. §5225(b). The district court initially issued an *ex parte* order restraining the funds, but it later vacated the order. App., *infra*, 10a.

Plaintiffs moved to reinstate the order, while defendants moved to dismiss. App., *infra*, 10a-11a. Defendants urged, among other things, that the assets were located in Luxembourg rather than New York and were therefore immune from execution. *Id.* at 11a. The district court agreed and dismissed the complaint. *Id.* at 56a-79a.

Reviewing the evidence, the court found that the assets were located in Luxembourg, not New York. "[T]he records before the Court are clear: JPM received proceeds relating to the Remaining Bonds, which it credited to a Clearstream account at JPM. * * * Clearstream in turn credited amounts attributable to the Remaining Bonds to the UBAE/Bank Markazi account in Luxembourg." App., *infra*, 69a-70a. "The JPM records are clear that whatever happened to the proceeds, they are gone. There are numerous days in which the Clearstream account at JPM showed a zero or a negative balance. As a matter of law, there is no asset in this jurisdiction to 'turn over.'" *Id.* at 70a (citation omitted).

Because the proceeds were in Luxembourg, the court held, they were immune from execution. "The evidence in the record is clear that any assets in which Bank Markazi has an interest, and which are at issue in this action, are in Luxembourg." App., *infra*, 77a. "The FSIA does not allow for attachment of property outside of the United States." *Ibid.* Accordingly, "the Court cannot entertain the instant claims against Bank Markazi." *Id.* at 78a.

B. The Court of Appeals' Opinion

The Second Circuit vacated in relevant part. App., *infra*, 1a-55a.

The court of appeals agreed with the district court that the assets were located in Luxembourg, not New York. App., *infra*, 32a. The JPMorgan account in New York was "a general 'operating account' used to service transactions on behalf of many customers," and it was "not segregated by customer." *Id.* at 33a (citation omitted). The account "frequently had a near-zero or negative end-of-day balance." *Ibid.* When "Clearstream received cash payments into [that] general pool," it "caused a corresponding credit to be reflected in the Markazi, and later UBAE, account in Luxembourg as a right to payment equivalent to the bond proceeds that Clearstream received and processed in New York." *Id.* at 35a. Because "the situs of an intangible property interest * * * is 'the location of the party of whom performance is required,'" the court held, "the asset the plaintiffs seek—a right to payment—is located in Luxembourg." *Id.* at 35a-36a.

Nonetheless, the court of appeals rejected the district court's conclusion that assets located outside the United States are immune. The court conceded that "the district court's assumption was reasonable in light of many judicial decisions suggesting as much." App., *infra*, 38a. But it deemed the assumption "incorrect" after *NML*, which it characterized as "abrogat[ing] decades of pre-existing sovereign immunity common law." *Id.* at 2a, 38a.

Under Federal Rule of Civil Procedure 69(a), the Second Circuit explained, "'a district court has the authority to enforce a judgment by attaching property in accordance with the law of the state in which the district court sits'"—in this case, New York. App., *infra*, 42a. In *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), the

New York Court of Appeals construed New York's turnover statute to authorize turnover orders even for property outside the country. App., *infra*, 45a. So long as the court has personal jurisdiction over the property's custodian, *Koehler* held, the court can order the custodian to bring the property into New York: "'[T]he key to the reach of the turnover order is personal jurisdiction over a particular defendant,'" and thus "a court sitting in New York with personal jurisdiction over a party may order that party 'to bring property into the state.'" *Ibid.* (quoting 12 N.Y.3d at 540).

The Second Circuit saw nothing in the FSIA that precluded applying the same statute to sovereign assets abroad. "Following *NML Capital*," it held, "the FSIA appears to be no impediment to an order issued pursuant to *Koehler* directing Clearstream * * * to bring the Markazi-owned asset held in Luxembourg to New York State." App., *infra*, 45a. The Second Circuit acknowledged the "many cases cited by the defendants for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution." *Id.* at 46a. But the court deemed them "no longer binding" because they were "decided before the Supreme Court's decision in *NML Capital*." *Ibid.* "Following *NML Capital*, this body of former case law is of no help to the defendants." *Ibid.* "*NML Capital* and *Koehler*, when combined, * * * authorize a court sitting in New York * * * to recall to New York extraterritorial assets owned by a foreign sovereign." *Id.* at 47a.

The court of appeals directed the district court on remand to "determine in the first instance whether it has personal jurisdiction over Clearstream." App., *infra*, 50a. The district court would also consider other potential barriers to recalling the assets, whether under "state

law, federal law, international comity, or for any other reason." *Id.* at 50a-51a (footnotes omitted). Once the assets were recalled, the district court would determine whether they "qualif[ied] as an asset '*in the United States* of a foreign state' * * * afforded execution immunity as such." *Id.* at 51a. But "[w]hether [an] extraterritorial asset is owned by a foreign sovereign is of no moment," because "the FSIA's grant of execution immunity does not extend to assets located abroad." *Id.* at 52a.

The court of appeals confessed that it was "cognizant of the conundrum apparently posed by *NML Capital* and *Koehler* when read in tandem." App., *infra*, 51a. "The FSIA 'aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.'" *Ibid.* The court was "not at all sure that *NML Capital* when read in light of the law established by *Koehler* furthers that goal." *Id.* at 52a. "But if we are correct in our analysis," the court concluded, "any such problem is one for the Supreme Court or the political branches—not this Court—to resolve." *Ibid.*[1]

On February 7, 2018, the court of appeals denied rehearing and rehearing en banc. App., *infra*, 80a-82a. On March 1, 2018, the court stayed its mandate pending this Court's review. C.A. Dkt. 352.

[1] The Second Circuit also vacated the district court's ruling that certain settlement agreements from earlier proceedings precluded other claims. App., *infra*, 17a-31a. That ruling is not at issue here.

REASONS FOR GRANTING THE PETITION

The Second Circuit held that sovereign immunity places no limits on execution against a foreign sovereign's property outside the United States. That holding upends decades of practice, creates an incoherent regime that Congress could not have intended, puts the United States in violation of international law, and threatens disastrous consequences for the Nation's foreign relations. While the Second Circuit's ruling rests on language from *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), the stark result in this case confirms the need for this Court to confront directly an issue it considered only obliquely in *NML*.

I. This Case Presents An Important Question With Drastic Foreign Relations Consequences

Categorically denying immunity to all sovereign property outside the United States defies longstanding precedent and threatens grave foreign relations consequences. The issue warrants review.

A. For Decades, Courts Unanimously Agreed That Sovereign Assets Abroad Were Not Subject to Execution

The law was once well settled: Sovereign assets were subject to execution under the FSIA *only* if they were located in the United States *and* one of §1610's narrow exceptions applied. Assets outside the United States were—for that reason alone—immune.

Courts applied that rule to the plaintiffs in this very case. A decade ago, plaintiffs sought to execute their judgment against a French shipping company's debt to Iran. See *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1122 (9th Cir. 2010). The Ninth Circuit rebuffed the claim: "[T]he debt obligation [the respondent] owes

to Iran is located in France. Iran's rights to payment from [the respondent] are not 'property in the United States' and are immune from execution." *Id.* at 1131-1132 (quoting 28 U.S.C. § 1610(a)(7)).

Every court of appeals to confront the issue agreed. See *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property * * * wherever that property is located around the world."); *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) ("courts in the U.S. may execute only against property that meets the[ ] two statutory criteria," including that it be "'in the United States'"); *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) ("[S]ection 1610 does not empower United States courts to levy on assets located outside the United States."); cf. *Aurelius Capital Partners, LP* v. *Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("[P]roperty that is subject to attachment and execution must be 'property in the United States of a foreign state' * * * ."). District courts and state courts followed the same rule.[2]

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[2] See, *e.g.*, *Fid. Partners, Inc.* v. *Philippine Exp. & Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996) ("Under the FSIA, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts."); *Raccoon Recovery, LLC* v. *Navoi Mining & Metallurgical Kombinat*, 244 F. Supp. 2d 1130, 1142-1143 (D. Colo. 2002); *Quaestor Invs., Inc.* v. *State of Chiapas*, No. CV-95-6723, 1997 WL 34618203, at *6 (C.D. Cal. Sept. 2, 1997); *Philippine Exp. & Foreign Loan Guar. Corp.* v. *Chuidian*, 267 Cal. Rptr. 457, 476 (Ct. App. 1990); *Int'l Legal Consulting Ltd.* v. *Malabu Oil & Gas Ltd.*, No. 651773/11, 2012 WL 1032907, at *10-11 (N.Y. Sup. Ct. Mar. 15, 2012).

As those courts explained, the immunity of overseas assets flows directly from the history and structure of the statute. Before the FSIA, sovereign property was absolutely immune from execution, wherever located. See H.R. Rep. No. 94-1487, at 8 (1976) ("Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation * * * ."). Congress decided to "modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity." *Id.* at 27. It did so by creating new immunity rules *for property in the United States*. Specifically, Congress confirmed a presumption of immunity for "property in the United States" in §1609, while creating exceptions for certain "property in the United States" in §1610. Congress did not purport to address or alter the traditional treatment of sovereign property abroad—much less *eliminate* immunity for such property entirely. Rather, the provisions addressing sovereign property—both the one granting immunity and the one creating exceptions—speak only to property in the United States.

The Second Circuit conceded that state of the law below. It acknowledged the "many cases cited * * * for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution." App., *infra*, 46a; see also *id.* at 38a ("many judicial decisions suggesting as much"); *id.* at 2a ("decades of pre-existing sovereign immunity common law"). The court could not cite a single case to the contrary from the first 35 years of the FSIA's history. Its decision was a dramatic break from decades of precedent.

B. The Decision Below Will Have Far-Reaching Consequences for Sovereign Property

The Second Circuit held that, under *NML*, foreign sovereign property abroad has *no* immunity from execution under U.S. law—not even the immunity applicable to property in the United States. App., *infra*, 38a-42a. As a result, a custodian of sovereign assets abroad could be ordered to bring them here for execution. *Id.* at 42a-47a. The Second Circuit relied on New York's turnover statute and the construction of that statute in *Koehler* v. *Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009). But there is nothing unique about New York law. The decision below thus invites other courts across the country to seize foreign sovereign assets outside the United States.

Dozens of States have turnover statutes like New York's.[3] Some have been around for more than a century. See, *e.g.*, Ill. Rev. Stat. ch. 21, §§36-37 (1845); 1856 Wis. Gen. Acts ch. 120, §208; 1872-1873 W. Va. Acts ch. 218, §§10-11; 1881 Ind. Laws ch. 38, §226. Those statutes typically contain no express territorial limitation on the property's location.

Some courts have construed those statutes to apply only to property within the State. See, *e.g.*, *Sargeant* v. *Al-Saleh*, 137 So. 3d 432, 435 (Fla. Dist. Ct. App. 2014)

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[3] See, *e.g.*, Ariz. Rev. Stat. §12-1634; Cal. Civ. Proc. Code §708.205; Conn. Gen. Stat. §52-356b; Idaho Code §11-506; 735 Ill. Comp. Stat. 5/2-1402(c); Ind. Code §34-25-3-12; Iowa Code §630.6; Kan. Stat. §61-3604; 14 Me. Stat. §3131; Mich. Comp. Laws §600.6104; Minn. Stat. §575.05; Mont. Code §25-14-107; Neb. Rev. Stat. §25-1572; Nev. Rev. Stat. §21.320; N.C. Gen. Stat. §1-360.1; Ohio Rev. Code §2333.21; 12 Okla. Stat. §850; Or. Rev. Stat. §18.268; R.I. Gen. Laws §9-28-3; S.C. Code §15-39-410; S.D. Codified Laws §15-20-12; Tex. Civ. Prac. & Rem. Code §31.002; Va. Code §8.01-507; Wash. Rev. Code §6.32.080; W. Va. Code §38-5-15; Wis. Stat. §816.08; Wyo. Stat. §1-17-411.

(declining to follow *Koehler*). But others have rejected that limitation, holding that a court with *in personam* jurisdiction may compel a party to turn over property outside the State—even outside the country. See, *e.g.*, *Inter-Reg'l Fin. Grp.* v. *Hashemi*, 562 F.2d 152, 154-155 (2d Cir. 1977) (requiring party to "bring [stock] certificates into the State of Connecticut from their locations in other states, and indeed, even in other countries"); *Lozano* v. *Lozano*, 975 S.W.2d 63, 68 (Tex. App. 1998) (ordering "turnover of appellants' property located in Mexico"); *Schaheen* v. *Schaheen*, 169 N.W.2d 117, 118 (Mich. Ct. App. 1969) (enforcing order to transfer property in Lebanon because "a court may compel execution of a deed to land located outside a court's jurisdiction by acting *in personam*").[4]

More than a century ago, this Court observed that "[a] court of equity acting upon the person of a defendant may control the disposition of real property belonging to him situated in another jurisdiction, and *even in a foreign country*." *Corbett* v. *Nutt*, 77 U.S. 464, 475 (1871) (emphasis added); see also *Fall* v. *Eastin*, 215 U.S. 1, 8 (1909) ("A court of equity having authority to act upon the

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[4] See also *Aurelio* v. *Camacho*, No. 2011-SCC-0023-CIV, 2012 WL 6738437, at *3 (N. Mar. I. Dec. 31, 2012) (ordering transfer of real property in the Philippines); *Reeves* v. *Fed. Sav. & Loan Ins. Corp.*, 732 S.W.2d 380, 381 (Tex. App. 1987) (real estate in Portugal); *Estates of Ungar ex rel. Strachman* v. *Palestinian Auth.*, 715 F. Supp. 2d 253, 257-264, 269 (D.R.I. 2010) (funds in Israel); *Clark* v. *Allen*, No. 95-2487, 1998 WL 110160, at *7 (4th Cir. Mar. 13, 1998) ("Under West Virginia law, appellants could be required to turn over property in their possession * * * in Florida."); *Dalton* v. *Meister*, 239 N.W.2d 9, 14 (Wis. 1976) ("Wisconsin courts may issue *in personam* orders which may operate on out-of-state property."); *Lyons Hollis Assocs.* v. *New Tech. Partners, Inc.*, 278 F. Supp. 2d 236, 246 (D. Conn. 2002); *In re Martin*, 145 B.R. 933, 948 (Bankr. N.D. Ill. 1992).

person may indirectly act upon real estate in another State."). Courts issued such orders long before the FSIA's enactment. See, *e.g.*, *Hodes* v. *Hodes*, 155 P.2d 564, 566, 570 (Or. 1945) (ordering turnover of stock certificates in Washington); *Wilson* v. *Columbia Cas. Co.*, 160 N.E. 906, 908 (Ohio 1928) (funds in Pennsylvania); *Tomlinson & Webster Mfg. Co.* v. *Shatto*, 34 F. 380, 381 (C.C.D. Minn. 1888) (real estate in Dakota territory); *Mitchell* v. *Bunch*, 2 Paige Ch. 606, 607, 615 (N.Y. Ch. 1831) (ordering defendant to turn over property located in Colombia because, "[a]lthough the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction").

Because New York is the Nation's financial capital, the Second Circuit's ruling would be important even if confined to that jurisdiction. But State turnover statutes are ubiquitous, and the decision below invites plaintiffs across the country to invoke those statutes to seize sovereign property abroad. The question presented is thus a matter of nationwide importance.

C. The Decision Below Threatens Serious Foreign Relations Consequences

This Court has long recognized that "[t]he judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity" as to "affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945); see also *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (noting "affront that could result * * * if property * * * is seized by the decree of a foreign court"). "[A]t the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sov-

ereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce*, 309 F.3d at 255-256; see also *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016), aff'd, 138 S. Ct. 816 (2018). For that reason, the FSIA's exceptions to execution immunity are "narrower" than its exceptions to jurisdictional immunity. *NML*, 134 S. Ct. at 2256.

Whatever friction may result from restraining a foreign state's property *within* the United States, ordering foreign state property *outside* the United States to be seized and brought here for execution is profoundly more provocative. Foreign sovereigns will inevitably perceive such orders to be a serious overreach. Cf. *Kiobel* v. *Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013) (noting potential for "diplomatic strife" and "serious foreign policy consequences" from extraterritorial application of U.S. law); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 269 (2010) (same). The court below candidly admitted that it was "not at all sure" its decision could be reconciled with the FSIA's goal of "'minimiz[ing] irritations in foreign relations.'" App., *infra*, 51a-52a. That was an understatement. The decision increases the risk of international discord exponentially.

The decision below, moreover, permits such orders in total disregard of the property's nature or use. Congress strictly limited execution against sovereign property *in the United States* by imposing a "commercial activity" requirement as well as other conditions. 28 U.S.C. § 1610(a), (b). That limitation reflects the settled view that a sovereign's commercial property is entitled to lesser protection than property used for traditional sovereign functions. See *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821-822, 825 (2018). Under the decision below, however, property *outside* the United States

would be fair game even if used for core sovereign functions. The threat to foreign relations is self-evident. Cf. *Colella* v. *Republic of Argentina*, No. C 07-80084, 2007 WL 1545204, at *1, *6 (N.D. Cal. May 29, 2007) (rejecting attempt to seize Argentina's equivalent of Air Force One because "transport[ing] the president of Argentina" is not a "commercial activity").

Novel departures from traditional immunity principles threaten United States interests by encouraging reciprocal or retaliatory action by other nations. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) (rejecting rule that would "produc[e] friction in our relations with [other] nations and lead[] some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation'"). Those concerns apply with special force to execution immunity. "[J]udicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad." *Rubin*, 830 F.3d at 480; see also U.S. Br. in *Rubin*, No. 16-534, at 31 (Oct. 2017) (urging that "execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States' own property abroad"); 2007 Pub. Papers 1592, 1593-1594 (Dec. 28, 2007) (vetoing amendment that would "invite reciprocal action against United States assets abroad").[5]

Under the approach adopted below, *foreign* courts could order the custodians of *U.S. government* property to transfer the property to a foreign country for execution, whether the property was located in the United

[5] Indeed, "some foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). Denying immunity may thus impair United States interests even absent specific retaliatory measures.

States or in any third country. The disruption that would result is obvious. "U.S. citizens, corporations, the United States Government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose" if traditional protections are eroded. *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 54 (Apr. 13, 2000) (joint statement of the State, Treasury, and Defense Departments). The threat to United States interests is thus particularly acute.

D. The Second Circuit's Decision Violates International Law

The decision below also puts the United States in violation of international law. The U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004), imposes an express territorial limitation on execution against sovereign property: Absent consent, execution is allowed only if "the property is specifically in use or intended for use by the State for other than government non-commercial purposes *and is in the territory of the State of the forum*." *Id.* art. 19(c) (emphasis added). This Court has looked to that Convention for "basic principles of international law." *Helmerich*, 137 S. Ct. at 1320. The Convention's territorial limitation reflects settled law.[6]

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[6] See, *e.g.*, *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, 12, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (execution must be "instituted before a court of the State where the property is located"); Institut de Droit International, *Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* art. 4(3)(b) (1991) (limiting execution to "property of the State within the

Violations of those principles could have serious consequences. The Treaty of Amity between the United States and Iran, for example, requires that property of Iranian entities receive protection "in no case less than that required by international law." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.2, Aug. 15, 1955, 8 U.S.T. 899, 903; see also *id.* art. IV.1, 8 U.S.T. at 903 (requiring "fair and equitable treatment" and proscribing "unreasonable * * * measures"). Similar provisions appear in the United States' commercial treaties with many countries. See Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 386 (1956).

Denying immunity where required by international law violates those protections and exposes the United States to claims for reparations in international tribunals. In the treaty with Iran, for example, the United States agreed to resolve disputes in the International Court of Justice. Treaty of Amity art. XXI.2, 8 U.S.T. at 913. The United States is already a party to ongoing ICJ proceedings seeking reparations for, among other things, the statute this Court upheld in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016). See *Certain Iranian Assets (Iran* v. *United States)* (I.C.J. filed June 14, 2016).

The State Department has cited such proceedings in urging restraint. "Virtually all of the Iranian blocked property that has been the subject of attachments," it notes, "is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it." *Bene-*

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territory of the forum State"); cf. Geneva Convention on the High Seas art. 23(2), Apr. 29, 1958, 13 U.S.T. 2312 (prohibiting maritime seizures where ship "enters the territorial seas of its own country or a third State").

fits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations, S. Hr'g No. 108-214, at 8 (July 17, 2003). "And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, it will no doubt be confronted with offsetting claims to cover judgments against the United States rendered in other national courts." *Ibid.*

E. The Decision Below Conflicts with the Position of the Executive Branch

Finally, the Second Circuit's decision contradicts the considered views of the Executive Branch. The United States has made its position clear: Assets outside the United States are immune. "The FSIA provides that only foreign-state property that is * * * situated 'in the United States' * * * is subject to execution * * * ." U.S. Br. in *NML*, No. 12-842, at 24 (Mar. 2014). "The FSIA therefore does not authorize U.S. courts to order execution against sovereign property located outside the United States." *Id.* at 24-25.

The decision below thus conflicts with the views of the Executive Branch—the branch with primary responsibility for the Nation's foreign relations. This Court regularly grants review where a decision threatens the Executive's ability to conduct foreign affairs, even absent a clear circuit conflict. See, *e.g.*, *Republic of Iraq* v. *Beaty*, 555 U.S. 1092 (2009) (granting review of sovereign immunity ruling despite concession that "[t]here is no circuit conflict," U.S. Br. in No. 07-1090, at 17 n.1 (Dec. 2008)).[7]

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[7] Other examples abound. See, *e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2081 (2015) ("difficult and complex [question] in international affairs"); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) ("sensitive and weighty interests of national se-

At a minimum, given the weighty foreign relations repercussions and the United States' prior submissions, the Court should invite the Solicitor General to file a brief expressing the views of the United States, as it has done in many similar cases. See, *e.g.*, *Rubin* v. *Islamic Republic of Iran*, 137 S. Ct. 708 (2017); *Bank Markazi* v. *Peterson*, 135 S. Ct. 1753 (2015); *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008).

II. THE DECISION BELOW IS INCORRECT

The Second Circuit's ruling produces an incoherent statutory regime that Congress could not plausibly have intended. Those issues, not fully explored in *NML*, warrant thorough consideration here.

A. The Decision Below Produces an Incoherent Immunity Regime That Flouts the FSIA's Structure and History

1. The Second Circuit's decision creates an irrational immunity regime. The FSIA sharply limits execution against sovereign property *in the United States* by requiring both commercial activity and one of several other conditions. 28 U.S.C. § 1610(a), (b). Under the decision below, however, the statute leaves *no immunity at all* from execution against property *outside* the United States. That makes no sense. Execution against assets abroad raises far more serious foreign relations concerns

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curity and foreign affairs" that raised "acute foreign policy concerns"); *Kiyemba* v. *Obama*, 559 U.S. 131 (2010) (Guantánamo detainees); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (Alien Tort Statute); *Société Nationale Industrielle Aerospatiale* v. *U.S. Dist. Court*, 482 U.S. 522, 528 (1987) (international comity).

and presents a much weaker case for the involvement of U.S. courts. There is no rational reason why Congress would impose sharp limits on seizure of domestic assets while declaring open season on assets elsewhere throughout the world. The decision below thus produces an "'absurd * * * result which Congress could not have intended'"—something this Court strives to avoid. *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998).

The decision also completely unmoors execution immunity from the principles Congress sought to adopt. Congress passed the FSIA to codify the restrictive theory of immunity. The statute declares: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. §1602. Congress codified jurisdictional immunity rules consistent with that theory. *Id.* §§1604-1605. And it "partially lower[ed]" the absolute immunity from execution that previously prevailed in U.S. courts "to make this immunity conform more closely with the provisions on jurisdictional immunity." H.R. Rep. No. 94-1487, at 27; see 28 U.S.C. §§1610-1611.

Under the Second Circuit's holding, however, property outside the United States can be seized whether it is commercial or not. Far from "conform[ing]" execution rules "more closely with the provisions on jurisdictional immunity," that approach abrogates them entirely. In *Rubin*, this Court refused to construe another provision to authorize execution against non-commercial property, citing Congress's "historical practice of rescinding attachment and execution immunity primarily in the con-

text of a foreign state's commercial acts." 138 S. Ct. at 825. The decision below does the opposite.

By permitting execution against property with no connection to the United States, moreover, the decision inverts the ordinary relationship between jurisdiction and execution. Traditionally, the execution exceptions to sovereign immunity are "narrower" than the jurisdictional exceptions. *NML*, 134 S. Ct. at 2256. The Act's commercial activity exception to jurisdictional immunity carefully specifies the required nexus to the United States. See 28 U.S.C. §1605(a)(2) (allowing actions "based upon a commercial activity carried on in the United States," "an act performed in the United States in connection with a commercial activity" elsewhere, or an act in connection with a commercial activity that causes a "direct effect in the United States"). By contrast, the decision below permits execution against property with *no* nexus to the United States whatsoever, sweeping far beyond the jurisdictional exception. That ruling stands the statutory structure on its head.

2. Nothing in the FSIA supports those results. It is true, as this Court observed in *NML*, that §1609 refers to the immunity of "property 'in the United States.'" 134 S. Ct. at 2257 (quoting 28 U.S.C. §1609) (emphasis omitted). But it is equally true that §1610's *exceptions* to immunity apply only to "property in the United States." 28 U.S.C. §1610(a), (b). The most reasonable inference from that domestic focus is not that Congress meant to declare open season on sovereign assets abroad. Rather, Congress was legislating only for domestic assets, leaving the pre-existing rules for foreign assets in place.

"'Congress generally legislates with domestic concerns in mind.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). It did precisely that here.

Congress created a statutory immunity regime for property in the United States. It reaffirmed the presumption of immunity for sovereign "property in the United States." 28 U.S.C. §1609. And it created exceptions for certain "property in the United States." *Id.* §1610(a), (b). The point of those territorial references was not to imply that property *outside* the United States is completely up for grabs. It was to mark out the scope of the issue Congress was addressing.

This Court construed the FSIA in precisely that fashion when addressing the immunity of foreign *officials* in *Samantar* v. *Yousuf*, 560 U.S. 305 (2010). The FSIA provides immunity to "'agenc[ies] or instrumentalit[ies] of a foreign state'" but does not mention officials. *Id.* at 313-319 (quoting 28 U.S.C. §1603(a)). Finding "nothing in the [FSIA's] origin or aims to indicate that Congress * * * wanted to codify the law of foreign official immunity," the Court held that claims against foreign officials remained "governed by the common law" that predated the FSIA. *Id.* at 325. So too here. Extraterritorial property is beyond the scope of the issues the FSIA addresses. It thus retains the absolute immunity it enjoyed before the statute.[8]

3. If the FSIA were meant to expose extraterritorial assets to execution, with no limitation on the type of

[8] Reading §1609's reference to "property in the United States" to create an immunity-free zone outside the United States would also render other language in the FSIA superfluous. If property outside the United States categorically lacked immunity, Congress would have had no reason to limit §1610's *exceptions* to "property in the United States." 28 U.S.C. §1610(a), (b). The Act would have the same effect without that language. "'[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Rubin*, 138 S. Ct. at 824.

property that may be seized, there would be some evidence Congress intended that result. There is none. The FSIA's history belies any such design.

The House Report's description of §1609 does not even mention the "in the United States" language. It simply explains that "section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611." H.R. Rep. No. 94-1487, at 26; see also S. Rep. No. 94-1310, at 26 (1976) (identical language in Senate Report). If Congress had intended the phrase "in the United States" to work a fundamental transformation by lifting the immunity of assets abroad, the legislative history would have mentioned it.[9]

Finally, as explained above, denying immunity to sovereign property abroad violates international law. See pp. 21-23, *supra*. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming*

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[9] Hearing testimony described the Act as subjecting to execution "some property of foreign states *located here*." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 98 (June 2, 1976) ("*1976 House Hearings*") (Michael M. Cohen, Maritime Law Ass'n) (emphasis added). Other passages discuss concerns about sovereigns frustrating execution by removing assets from the jurisdiction—concerns that make little sense if assets lack *any* immunity once outside the United States. See H.R. Rep. No. 94-1487, at 30 (stating that courts may consider whether a "foreign state is about to remove assets from the jurisdiction" in deciding how much notice to give under §1610(c)); *1976 House Hearings* 76 (N.Y.C. Bar Ass'n); *id.* at 81 (Cecil Olmstead, Rule of Law Comm.).

Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). That, too, is a powerful reason to reject the interpretation.

B. This Court's Decision in *NML* Confirms the Need for Review

The Second Circuit's holding rested almost entirely on language from this Court's decision in *NML*. App., *infra*, 1a, 38a-55a. But the question here was not directly presented or properly briefed in *NML*; the discussion was not necessary to the Court's decision; and the matter did not receive careful attention.

NML concerned immunity from discovery, not execution. The question presented was whether the plaintiff could obtain discovery into Argentina's foreign assets—not whether it could ultimately execute against them in a U.S. court. 134 S. Ct. at 2254. Although the Court's opinion contains one paragraph discussing execution immunity, *id.* at 2257, that question simply was not presented in the case. The parties' briefs barely touched it.

The Court's discussion of execution immunity was not even necessary to its decision. Discovery into foreign assets may be appropriate even if a plaintiff must commence a proceeding in the country where the assets are located to execute against them. Thus, while the Court invoked the scope of execution immunity, the decision also rests on a separate rationale: "[T]he reason for these subpoenas," the Court noted, "is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law." 134 S. Ct. at 2257. The plaintiff was entitled to "ask for information about Argentina's worldwide assets generally, so that [it] can identify where Argentina may be holding property that *is* subject to execution." *Id.* at 2258.

NML's discussion of execution immunity, moreover, misapprehends a key fact. This Court assumed there were no pre-FSIA cases recognizing execution immunity for extraterritorial assets because the issue was wholly theoretical: "Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen?" 134 S. Ct. at 2257. That was the basis for the Court's suggestion that there was no common-law immunity for such assets. See *ibid.* But plaintiffs have often sought extraterritorial assets by means of *in personam* turnover orders directed to the custodians of the assets, and courts had issued such orders decades before Congress enacted the FSIA. See pp. 16-18, *supra*. Had that history been brought to the Court's attention in *NML*, the Court may well have concluded that the more persuasive explanation for the dearth of pre-FSIA precedent concerning the seizure of extraterritorial sovereign assets was that everyone understood that such assets were immune—just like assets in the United States.

This Court is not bound by prior statements concerning a matter that was not at issue in the case, not fully briefed, and not necessary to the decision. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (declining to follow language from prior case where "[t]he language * * * was not at issue in [the case]" and "the point before us now was not then fully argued"); *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (same where "the point now at issue was not fully debated" and "[c]areful study and reflection have convinced us * * * that th[e] assumption was erroneous"). The question warrants careful consideration in a case that actually presents the issue.

III. This Is An Appropriate Case For Review

This case squarely presents the issue. Both courts below issued thorough opinions finding that the assets at issue were located in Luxembourg. App., *infra*, 32a-38a, 69a-70a. And New York's highest court has authoritatively construed that State's turnover statute to reach assets abroad. See *Koehler*, 12 N.Y.3d at 540. This case is thus unlike others where there are doubts over the location of the assets or the content of state law. See, *e.g.*, *Peterson*, 627 F.3d at 1131-1132 (dispute over situs of intangible property).

There is no reason to wait for further decisions from the courts of appeals. Whatever the merits of *NML*'s statements regarding extraterritorial execution immunity, those statements are clear enough. 134 S. Ct. at 2257. While they do not bind this Court, it is highly unlikely that lower courts would feel free to disagree. See, *e.g.*, *Utah Republican Party* v. *Cox*, 885 F.3d 1219, 1231 (10th Cir. 2018) (lower courts are "'bound by Supreme Court dicta almost as firmly as by the Court's outright holdings'"). As the Second Circuit observed, the problem is thus "one for the Supreme Court * * * to resolve." App., *infra*, 52a.

The nature of the issue favors immediate review. A denial of sovereign immunity, like other immunities, is "effectively unreviewable on appeal from a final judgment" because the immunity includes "an entitlement not to be forced to litigate." *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985); see also *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011) (denial of execution immunity immediately appealable because "[t]he FSIA protects foreign sovereigns from court intrusions on their immunity in its various aspects"). Further delay simply exacerbates the intrusion on immunity.

Whether or not the district court ultimately distributes the assets to plaintiffs, an order directing that $1.68 billion of Bank Markazi's property be transferred from Luxembourg to the United States and then kept here for years while the parties litigate further is a serious infringement on immunity. See *Stephens* v. *Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-1230 (2d Cir. 1995) (prohibiting order requiring sovereign to post security because it would "force [the] foreign sovereign * * * to place some of [its] assets in the hands of the United States courts for an indefinite period"). Bringing the assets to the United States also threatens to alter the immunity analysis substantially.[10] For those reasons too, this case warrants review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] The Terrorism Risk Insurance Act ("TRIA") provides that "blocked assets" are subject to execution. 28 U.S.C. § 1610 note § 201(a). Under Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012), "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, *[or] that hereafter come within the United States*, * * * are blocked." *Id.* § 1(a), 77 Fed. Reg. at 6659 (emphasis added). Thus, plaintiffs may argue that bringing the assets to the United States defeats immunity under TRIA.

Respectfully submitted.

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MAY 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 15-0690

DEBORAH D. PETERSON, *et al.*,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI, AKA CENTRAL BANK OF IRAN, BANCA UBAE S.P.A., CLEARSTREAM BANKING, S.A., JP MORGAN CHASE BANK, N.A.,

*Defendants-Appellees.**

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

OPINION

Argued: June 8, 2016
Decided: November 21, 2017**

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* The Clerk of Court is respectfully directed to amend the official caption to conform to the caption as it appears above. A complete list of plaintiffs in this appeal is attached as an appendix to this opinion.

** The decision on this appeal has been delayed for some six months pending the completion of proceedings before the panel with respect to transferring a substantial amount of material in the record that was filed by the parties under seal to the public files of the Court in light of the public's "presumptive right of access to judicial documents." *Gambale* v. *Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004); see also *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982).

Before POOLER, SACK, and LOHIER,
Circuit Judges.

SACK, *Circuit Judge*:

In this litigation, judgment creditors of the Islamic Republic of Iran ("Iran") attempt to execute on $1.68 billion in bond proceeds allegedly owned by Iran's central bank. The Supreme Court has instructed that in an execution proceeding concerning a foreign sovereign's assets, any defense predicated on foreign sovereign immunity must rise or fall on the text of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.* See *Republic of Argentina* v. *NML Capital, Ltd.*, — U.S. —, 134 S. Ct. 2250, 2256 (2014). In the same decision, the Court explicitly abrogated decades of pre-existing sovereign immunity common law in light of its background understanding that most courts lack jurisdiction to reach extraterritorial assets in any event. See *id.* at 2257. But that is not so in New York.

The plaintiffs-appellants, judgment creditors of Iran and Iran's Ministry of Intelligence and Security ("MOIS"), obtained federal-court judgments against Iran and MOIS awarding the plaintiffs billions of dollars in compensatory damages. They now seek to enforce their judgments in part by executing on $1.68 billion in bond proceeds allegedly owned by Bank Markazi ("Markazi"), Iran's central bank. The plaintiffs allege that those bond proceeds were processed by and through a global chain of banks, specifically by Clearstream Banking, S.A. ("Clearstream") through JPMorgan Chase Bank, N.A. ("JPMorgan"), in the name of Banca UBAE, S.p.A. ("UBAE"), on behalf of Markazi (collectively, "the defendants" or "the defendant

banks"). The plaintiffs further allege that the bond proceeds are denominated as United States dollars ("USD") and held in cash in Clearstream's account at JPMorgan in New York City, rendering the assets subject to this Court's jurisdiction and a turnover order.[1] The plaintiffs also asserted several related non-turnover claims against the defendant banks, alleging primarily that the defendants effected the foregoing transactions by means of fraudulent conveyances in violation of state law.

The defendant banks respond that there is no cash to turn over: The bond proceeds are in fact recorded as book entries made in Clearstream's Luxembourg offices and reflected as a positive account balance showing a right to payment owed by Clearstream to Markazi through UBAE. The defendants argue that this fact is fatal to the plaintiffs' turnover claims because federal courts lack jurisdiction to order the turnover of a foreign sovereign's extraterritorial assets. Lastly, the defendants posit that the plaintiffs released their non-turnover claims in separate settlement agreements reached between several of the plaintiffs, on the one hand, and Clearstream or UBAE, on the other.

In a single order, the district court (Katherine B. Forrest, *Judge*) granted the defendants' motions to dismiss and for partial summary judgment in favor of the defendants on all claims in dispute. We affirm that decision in part, vacate it in part, and remand for further proceedings.

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[1] A turnover order is "[a]n order by which the court commands a judgment debtor to surrender certain property to a judgment creditor, or to the sheriff or constable on the creditor's behalf." *Turnover Order*, BLACK'S LAW DICTIONARY (10th ed. 2014). In this opinion, we use "turnover" and "turnover order" interchangeably.

BACKGROUND

The plaintiffs-appellants are, or represent persons who have been adjudicated in a federal court to be, victims of Iranian-sponsored terrorism. They obtained judgments from the United States District Court for the District of Columbia against Iran and MOIS pursuant to §§ 1605(a)(7) and 1605A of the FSIA, and were awarded a total of approximately $3.8 billion in compensatory damages. Confidential Appendix ("C.A."[2]) at 679-81. The plaintiffs have since registered their judgments with the United States District Court for the Southern District of New York, which enables them to seek partial enforcement of their judgments by obtaining an order compelling the turnover of approximately $1.68 billion in bond proceeds allegedly owned by Iran's central bank and held as cash in New York City. The plaintiffs' claims target four banks that were allegedly involved in processing those bond proceeds: JPMorgan, a financial institution organized under the laws of New York, *id.* at 679; Markazi, Iran's central bank, *id.* at 677; UBAE, an Italian bank that engaged in transactions on behalf of Iran, *id.* at 678; and Clearstream, a Luxembourg bank with which Markazi and UBAE opened customer accounts, *id.*

The plaintiffs contend that through a series of fraudulent transactions, these banks managed to process billions of dollars in bond proceeds ultimately owed to Markazi. According to the plaintiffs, the fruit of those

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[2] "C.A." refers to the sealed "Confidential Joint Appendix" filed in this Court on June 1, 2015. On November 8, 2017, we ordered the parties to unseal their briefs and the C.A., allowing only redactions we concluded were justified despite the presumptively public nature of court files. The parties recently completed this process. We have nevertheless maintained the title of the appendix to avoid confusion with a separate "Joint Appendix" in this case that was never filed under seal.

transactions is a pool of cash traceable to the Markazi-owned bond proceeds and held by Clearstream at JPMorgan in New York City. Because much of this dispute turns on the nature and location of the bond proceeds, we review the processing of those assets, and previous attempts to obtain turnover of similar assets, in some detail.

1. *Processing Markazi's Bonds*

Like many large financial institutions, Markazi invests in foreign sovereign bonds. *Id.* at 701. Many of the bonds purchased by Markazi were issued pursuant to prospectuses that require the purchaser to receive interest and redemption payments in New York State. *Id.* at 555. Markazi has long engaged Clearstream, a Luxembourg bank that specializes in "the settlement and custody of internationally traded bonds and equities," *id.* at 678, to facilitate that process. Clearstream uses correspondent accounts at banks in New York State, including JPMorgan and Citibank, N.A. ("Citibank"), to receive bond proceeds on behalf of its customers, including Markazi. *Id.* at 690. As Clearstream receives these cash payments in New York, it credits customer accounts based in Luxembourg with an equivalent positive amount. *Id.* at 685.

In 1994, Markazi opened a direct account with Clearstream in Luxembourg. *Id.* at 117-18. Thereafter, Clearstream received bond payments into its New York-based JPMorgan correspondent account on behalf of Markazi; Clearstream then credited Markazi's account in Luxembourg with a corresponding right to payment. In 2008, apparently because of increasing scrutiny of Iranian financial transactions, Markazi stopped processing its bond proceeds through Clearstream directly and instead began doing so through an intermediary bank: UBAE.

Id. at 699-700. In January 2008, UBAE opened a customer account with Clearstream in Luxembourg—account number 13061. *Id.* at 118-19. Shortly thereafter, Markazi arranged for Clearstream to transfer the Markazi account balance at Clearstream in Luxembourg to the UBAE account. *Id.* at 118, 434.

Clearstream continued to receive bond proceeds in New York on behalf of Markazi, but pursuant to the terms of the documentation directing the Markazi account transfer, Clearstream credited UBAE account number 13061 with a corresponding right to payment. *Id.* at 701. In June 2008, apparently due to increasing attention, Clearstream notified UBAE that it had blocked UBAE account number 13061 and transferred the balance of that account to a "sundry blocked account"—account number 13675. *Id.* at 683-84. That account, which remains blocked, is at the center of the present dispute.

2. *Peterson I*

Clearstream has previously been the focus of an attempt by judgment creditors of Iran to obtain turnover of Markazi-linked assets. See generally *Peterson* v. *Islamic Republic of Iran*, No. 10-cv-4518-KBF, 2013 WL 1155576, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. Mar. 13, 2013) ("*Peterson I*"), aff'd, 758 F.3d 185 (2d Cir. 2014). Many, but not all, of the plaintiffs in the case at bar attempted in an earlier litigation to enforce part of their judgments by executing against approximately $2 billion in Markazi-owned bond proceeds allegedly held by Clearstream at Citibank in New York City. See C.A. at 671. Those plaintiffs successfully obtained a judgment from the United States District Court for the Southern District of New York (Katherine B. Forrest, *Judge*) ordering the turnover of $1.75 billion in cash denominated in USD and held in New York City by Clearstream at Citibank on behalf

of Markazi and UBAE. *Peterson I*, 2013 WL 1155576, at *2, *35, 2013 U.S. Dist. LEXIS 40470, at *42, *138. The district court's decision in that case did not address the plaintiffs' related fraudulent-conveyance claims concerning an additional $250 million in bond proceeds allegedly transferred by Markazi and UBAE to UBAE's customer account at Clearstream in Luxembourg. See *id.* at *3-4, *28 n.14, 2013 U.S. Dist. LEXIS 40470, at *46-48, *117 n.15.

While Markazi unsuccessfully appealed the district court's turnover order in *Peterson I*,[3] Clearstream and UBAE reached separate settlement agreements with the plaintiffs to resolve not only the *Peterson I* appeal but also the plaintiffs' then-pending fraudulent-conveyance claims. C.A. at 900-45 (Clearstream settlement agreement); *id.* at 1646-62 (UBAE settlement agreement).

Of relevance here, the Clearstream settlement agreement released Clearstream from "any and all past, present or future claims or causes of action . . . whether direct or indirect" relating to:

> any account maintained at Clearstream . . . by or in the name of or under the control of any Iranian Entity . . . or any account maintained at Clearstream or at any Clearstream Affiliate by or in the name of or under the control of UBAE, including, but not limited to, accounts numbered . . . 13061 . . . [or]

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[3] In *Peterson I*, the district court concluded that the cash Clearstream held at Citibank was subject to turnover under both the Terrorism Risk Insurance Act of 2002 ("TRIA") and the Iran Threat Reduction and Syria Human Rights Act of 2012. *Peterson I*, 2013 WL 1155576, at *22-23, 2013 U.S. Dist. LEXIS 40470, at *97-103. We reached only the latter basis for jurisdiction on appeal and affirmed. *Peterson*, 758 F.3d at 189-92. The Supreme Court granted Markazi's petition for writ of certiorari and also affirmed. *Bank Markazi* v. *Peterson*, — U.S. —, 136 S. Ct. 1310, 1328-29 (2016).

> 13675 . . . or any asset or interest held in an Account in the name of an Iranian Entity . . . or . . . any transfer or other action taken by or at the direction of any Clearstream Party, Citibank, or any Iranian Entity, including any transfer or other action in any account, including a securities account or cash account or omnibus account or correspondent account maintained in Clearstream's name or under its control, that in any way relates to any Account or any Iranian Asset.

Id. at 903.

The Clearstream settlement agreement did, however, reserve the following claims to the *Peterson I* plaintiffs:

> Garnishee Actions. Notwithstanding the [claim release described above], the Covenant shall not bar any action or proceeding regarding (a) the rights and obligations arising under this Agreement, or (b) efforts to recover any asset or property of any kind, including proceeds thereof, that is held by or in the name, or under the control, or for the benefit of, Bank Markazi or Iran . . . in an action against a Clearstream Party solely in its capacity as a garnishee (a "Garnishee Action.") Such a Garnishee Action may include, without limitation, an action in which a Clearstream Party is named solely for the purpose of seeking an order directing that a Clearstream Party perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer under any legal or equitable theory, provided however that such a Garnishee Action shall not seek an award of damages against a Clearstream Party.

Id. at 905 (emphasis omitted).

The UBAE settlement agreement similarly released UBAE and its "beneficiaries" from "any and all liability, claims, causes of action, suits, judgments, costs, expenses, attorneys' fees, or other incidental or consequential damages of any kind, whether known or unknown, arising out of or related to the Plaintiffs' Direct Claims against UBAE," except for those specifically listed in the agreement. *Id.* at 1648. The agreement defined "Plaintiffs' Direct Claims" as those brought in *Peterson I* "for damages against UBAE with regard to certain assets transferred prior to the initiation of the [t]urnover [a]ction and valued at approximately $250,000,000.00 . . . including, but not limited to, claims for fraudulent conveyance, tortious interference with the collection of a money judgment, and prima facie tort." *Id.* at 1646.

The UBAE settlement agreement also contained a carve-out provision by which the "[p]laintiffs agree[d] that any future claim against UBAE for the Remaining Assets shall be limited to turnover only"; the plaintiffs "waive[d] all other claims against UBAE for any damages regarding the Remaining Assets whether arising in contract, tort, equity, or otherwise." *Id.* at 1648. The agreement defined "Remaining Assets" as "assets [that] remain in an account at Clearstream[ ] [in] a UBAE customer account, that are beneficially owned by Bank Markazi." *Id.* at 1647.

3. *Procedural History*

On December 30, 2013, the plaintiffs filed a complaint in the United States District Court for the Southern District of New York alleging that Clearstream held an additional $2.5 billion in Markazi-owned bond proceeds not at issue in *Peterson I*. See *id.* at 3, 28. On April 25, 2014, the plaintiffs filed an amended complaint specifically alleging that UBAE's "blocked sundry account" at Clear-

stream reflected a balance of approximately $1.68 billion, and that Clearstream held a corresponding amount of cash at JPMorgan in New York City. *Id.* at 687. The amended complaint named Iran, Clearstream, JPMorgan, Markazi, and UBAE as defendants, seeking: (1) declaratory relief identifying Markazi as the beneficial owner of the assets at issue, *id.* at 720-21; (2) rescission of fraudulent conveyances under New York Debtor and Creditor Law ("DCL") §§ 273-a, 276(a), against Iran, Markazi, Clearstream, and UBAE, *id.* at 721-25; (3) turnover of the $1.68 billion in assets at issue under New York Civil Practice Law and Rules ("C.P.L.R.") §§ 5225, 5227 and § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), against Clearstream, Iran, JPMorgan, Markazi, and UBAE, *id.* at 725-27; (4) rescission of fraudulent conveyances under DCL §§ 273-a, 276, 278 and common law, against Clearstream and Markazi, *id.* at 728-29; and (5) unspecified equitable relief against each defendant, *id.* at 729.

On April 9, 2014, the district court (Katherine B. Forrest, *Judge*) granted an ex parte application for an order directing the clerk of the district court to issue a writ of execution with respect to any Markazi-owned property in the possession of JPMorgan. *Id.* at 104-05. The district court thereafter held a hearing to address the defendants' argument that the writ was improper because the Clearstream correspondent account at JPMorgan contains "nothing . . . except cash, and the cash turns over in billions of dollars every day, so there's no possibility the cash in the account can be identified to any defendant," including Markazi. *Id.* at 792. The district court thereupon vacated the order issuing the writ. *Id.* at 793, 800.

The plaintiffs moved to reinstate the order and the defendants responded with various motions seeking dismis-

sal of the amended complaint. Clearstream moved to dismiss on the ground that the assets were located in Luxembourg, and therefore immune from execution under the FSIA. Clearstream also argued that the plaintiffs released all non-turnover claims against Clearstream under their settlement agreement. Markazi moved to dismiss on similar jurisdictional grounds. JPMorgan moved for partial summary judgment on the plaintiffs' turnover claims on the ground that it possessed no assets owned by Markazi. Finally, UBAE moved to dismiss for want of subject-matter jurisdiction, and for partial summary judgment on the plaintiffs' non-turnover claims on the ground that those claims had been released by the UBAE settlement agreement.

The parties' motions were accompanied by a voluminous record.[4] Among the documents before the district court was a chart depicting a "Recap of Total Debits [and] Credits" in Clearstream's correspondent account at JPMorgan for each month over the four-year period that Clearstream processed the bond proceeds at issue. *Id.* at 1959. The chart indicates that the Clearstream account at JPMorgan was both debited and credited many hundreds of billions of dollars each month. Moreover, the Clearstream correspondent account at JPMorgan frequently posted a negative balance. *Id.* JPMorgan submitted, *inter alia*, two declarations prepared by Gauthier Jonckheere, *id.* at 1862-68, 2533-43, a JPMorgan vice president and "relationship manager[]" for the Clearstream account, *id.* at 1862. Jonckheere stated that Clearstream's correspondent account at JPMorgan is an "operating account" that processes "hundreds of bond-

[4] For example, JPMorgan responded to the plaintiffs' request for the production of pertinent documents, see C.A. at 1733, by producing more than 100,000 pages of banking records, see JPMorgan Br. at 9.

related payments each day." *Id.* at 1863. Because this is a general operating account, indeed Clearstream's only account at JPMorgan, "the account's balance at both the beginning and the end of a given business day would . . . be, if not $0, usually very low . . . . During the day, the account balance would frequently be negative . . . ." *Id.* at 1864. Jonckheere also asserted that "Clearstream's operating account at [JPMorgan] . . . holds no funds that are the property of Markazi" because all bond "proceeds have long since left Clearstream's operating account and are no longer maintained at [JPMorgan]." *Id.* at 1865. Jonckheere added that Clearstream never segregated Markazi's bond proceeds from or within its general operating account. *Id.* at 2537-39.

Clearstream also submitted evidence concerning its JPMorgan correspondent account. For example, it produced a chart documenting its account balance at JPMorgan for each day in October 2012, during which the Clearstream correspondent account balance did not exceed $817,959,813.65, and was frequently negative. *Id.* at 1957. Clearstream also submitted a declaration executed by Mathias Papenfuß, then Head of Operations for Clearstream, *id.* at 1972, who stated: "Each business day Clearstream uses U.S. dollars deposited in the JPMorgan [a]ccount to pay its current U.S. dollar obligations. Each business day, approximately $7-9 billion flows into the JPMorgan [a]ccount, and each business day a roughly equivalent sum flows out." *Id.* at 1973. Papenfuß explained that "[t]he obligations credited to Clearstream by JPMorgan are booked as assets of Clearstream on Clearstream's balance sheet pursuant to applicable Luxembourg banking law and accounting rules." *Id.* "When Clearstream receives a payment in the JPMorgan [a]ccount on its own security entitlements, Clearstream cred-

its the account of any customers in Luxembourg holding security entitlements against Clearstream relating to a security with the same [identification number]." *Id.* at 1974. Papenfuß corroborated Jonckheere's statement that "[n]o transfer of cash [was] made," adding that "Clearstream does not hold funds in the JPMorgan [a]ccount in relation to specific U.S. dollar obligations to specific customers." *Id.* Papenfuß concluded that "Clearstream never issued instructions to JPMorgan to transfer any funds received in the JPMorgan [a]ccount to the [Clearstream account in Luxembourg], and no such transfers occurred." *Id.* at 1976.

The plaintiffs proffered the opinions of a putative financial-services expert, Peter U. Vinella, *id.* at 2385-440, who asserted that "the customary practice in international banking . . . is for a securities intermediary (such as Clearstream) to segregate its assets from customer assets generally. Thus, the [assets at issue] should [not be] included as part of Clearstream's general operating funds and should remain in the USD JPMorgan [a]ccount," *id.* at 2389. Vinella also stated that "even if Clearstream had failed and continues to fail to properly segregate the funds at issue in this matter in the [Clearstream account at JPMorgan] . . . , the Markazi USD [b]alance . . . still remains in the USD JPMorgan [a]ccount." *Id.* Vinella attributed evidence that the Clearstream correspondent account often reflected a near-zero or negative end-of-day balance, see, *e.g.*, *id.* at 1957, 1959, 2568-698, to industry-standard "[s]weeps," whereby the account's funds were "invested [by JPMorgan] in very short-dated USD investments and subsequently redeposited in the . . . JPMorgan [a]ccount the next day," *id.* at 2422.

On September 19, 2014, the district court heard arguments on the defendants' motions, focusing in particular

on the nature and location of the assets at issue. See Joint Appendix ("J.A."[5]) at 83-151. Although the district court appeared to harbor some doubt about the validity of Vinella's expert report, *id.* at 88, it stopped short of holding a hearing pursuant to *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), see J.A. at 105-06 (considering whether a *Daubert* hearing would be appropriate). Following oral argument, the district court issued an order declining to hold an evidentiary hearing on the nature and location of the assets at issue. See *id.* at 153.

On February 20, 2015, the district court issued a single opinion and order granting the defendants' various motions to dismiss and for partial summary judgment on all claims in dispute. *Peterson* v. *Islamic Republic of Iran*, No. 13-cv-9195-KBF, 2015 WL 731221, 2015 U.S. Dist. LEXIS 20640 (S.D.N.Y. Feb. 20, 2015) ("*Peterson II*") (construing each motion as one "for dismissal"). The district court first dismissed the plaintiffs' non-turnover claims against Clearstream, UBAE, and Markazi on the ground that those claims had been released by the Clearstream and UBAE settlement agreements. *Id.* at *6, 2015 U.S. Dist. LEXIS 20640, at *18-19 (dismissing the non-turnover claims against Clearstream); *id.* at *9, 2015 U.S. Dist. LEXIS 20640, at *28-30 (dismissing the non-turnover claims against UBAE); *id.* at *10, 2015 U.S. Dist. LEXIS 20640, at *30-31 (dismissing the non-turnover claims against Markazi as a "beneficiary" of UBAE under the UBAE settlement).

[5] "J.A." hereinafter refers to the parties' unsealed joint appendix filed in this Court on June 1, 2015.

The district court also dismissed the plaintiffs' turnover claims on jurisdictional grounds, having found that the assets at issue are not in the United States:

> [JPMorgan] received proceeds relating to the [assets], which it credited to a Clearstream account at [JPMorgan]. Whether it should have or should not have, Clearstream in turn credited amounts attributable to the [assets] to the UBAE/Bank Markazi account in Luxembourg. The [JPMorgan] records are clear that whatever happened to the proceeds, they are gone.

Id. at *6, 2015 U.S. Dist. LEXIS 20640, at *20. That finding sufficed to require dismissal of JPMorgan from the lawsuit because JPMorgan "does not have an account for UBAE or Bank Markazi." *Id.* at *10 n.17, 2015 U.S. Dist. LEXIS 20640, at *33 n.17. Turning to the remaining defendants, the district court concluded that Markazi's interest in book entries that Clearstream held in Luxembourg was not subject to turnover because the "FSIA does not allow for attachment of property outside of the United States." *Id.* at *10, 2015 U.S. Dist. LEXIS 20640, at *31. Therefore, because Markazi "d[id] not maintain the assets that plaintiffs seek in the United States," the district court held that it "lack[ed] subject-matter jurisdiction." *Id.*

The plaintiffs appealed. With respect to the non-turnover claims, they argue that the Clearstream and UBAE settlement agreements: (1) do not apply to many of the plaintiffs, including several who were not party to *Peterson I*, Pls.' Br. at 23; and, in any event, (2) did not release the non-turnover claims against Clearstream, UBAE, or Markazi, *id.* at 24-33. With respect to the turnover claims, the plaintiffs argue that the court has subject-matter jurisdiction because the assets at issue

are (1) cash holdings located in New York, *id.* at 47-51; and (2) therefore subject to turnover under the TRIA, *id.* at 35-36, and the FSIA, *id.* at 61-66. The plaintiffs argue in the alternative that even assets "located abroad" may be subject to turnover pursuant to the court's exercise of *in personam* jurisdiction over the holder of the assets. *Id.* at 55.

DISCUSSION

A. Standard of Review

With respect to the non-turnover claims, the district court granted Clearstream's motion to dismiss and UBAE's motion for partial summary judgment on the ground that the Clearstream and UBAE settlement agreements released those claims. "We review a district court's interpretation of a contract *de novo*." *Seabury Constr. Corp.* v. *Jeffrey Chain Corp.*, 289 F.3d 63, 67 (2d Cir. 2002).

As to the turnover claims, "[w]e accord deferential review to a district court ruling on a petition for an order of attachment or execution under the FSIA." *Walters* v. *Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 285 (2d Cir. 2011). "We review *de novo* legal conclusions denying [or granting] FSIA immunity to a foreign sovereign or its property," and factual findings for "abuse of discretion." *NML Capital, Ltd.* v. *Republic of Argentina*, 680 F.3d 254, 256-57 (2d Cir. 2012). "A district court is said to have abused its discretion if it has," *inter alia*, "made a clearly erroneous assessment of the evidence." *Id.* at 257 (internal quotation marks omitted).[6]

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[6] The plaintiffs contend that our review should be particularly meticulous because the district court should have "permitted [p]laintiffs to conduct the relevant discovery or at least held an evidentiary hearing" before ruling on the defendants' motions. Pls.' Br. at 34. We

B. The Non-Turnover Claims

The district court concluded that the Clearstream settlement agreement and the UBAE settlement agreement released the plaintiffs' non-turnover claims, including the

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review the district court's "determination not to hold an evidentiary hearing . . . for abuse of discretion." *United States* v. *Amico*, 486 F.3d 764, 779 (2d Cir. 2007). We do not think that the district court abused its discretion in this case, which was marked by a voluminous record that was reviewed by the court and upon which the parties based their arguments. See J.A. at 83-151 (transcript of September 19, 2014 district court proceedings). The plaintiffs principally rely on *Sharkey* v. *Quarantillo*, 541 F.3d 75 (2d Cir. 2008), in which we cautioned that "[a] district court has discretion to hold a hearing to resolve factual disputes that bear on the court's jurisdiction, but where . . . the case is at the pleading stage and no evidentiary hearings have been held, in reviewing the grant of a motion to dismiss . . . we must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." *Id.* at 83 (internal quotation marks and brackets omitted). *Sharkey* is inapposite because here, unlike in *Sharkey*, the plaintiffs dispute the district court's factual findings made pursuant to deciding, *inter alia*, JPMorgan's motion for partial summary judgment on the plaintiffs' turnover claims on the ground that there are no assets subject to turnover located in the United States. *Peterson II*, 2015 WL 731221, at *10, 2015 U.S. Dist. LEXIS 20640, at *32-33. Moreover, it is within the district court's discretion to decide disputed jurisdictional facts, even at the motion to dismiss stage, without holding an evidentiary hearing where, as here, the court "consider[ed] all the submissions of the parties" and it "has not [been] shown that a hearing was necessary because the resolution of factual issues was not readily ascertainable from the declarations of witnesses or turned on questions of credibility." *Filetech S.A.* v. *Fr. Telecom S.A.*, 304 F.3d 180, 183 (2d Cir. 2002) (per curiam) (internal quotation marks omitted). Indeed, we have previously stated in the context of an FSIA claim that "[o]n a Rule 12(b)(1) motion challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and *if necessary*, hold an evidentiary hearing." *Zappia Middle East Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000) (emphasis added).

fraudulent-conveyance claims, brought against those banks.[7] *Peterson II*, 2015 WL 731221, at *6, *9, 2015 U.S. Dist. LEXIS 20640, at *18-19, *28-29. The district court also determined that the UBAE settlement agreement released the plaintiffs' non-turnover claims against Markazi because Markazi was a "beneficiary" of UBAE and, therefore, the UBAE settlement agreement. *Id.* at *10, 2015 U.S. Dist. LEXIS 20640, at *30-31. We agree with respect to Clearstream, but not with respect to UBAE or Markazi.

Before turning to the substance of the settlement agreements, however, we address first the plaintiffs' argument that many of them, including several who were not plaintiffs in *Peterson I*, did not agree to the Clearstream or UBAE settlement agreements and are there-

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[7] The amended complaint contained several fraudulent-conveyance claims: First, the plaintiffs alleged that Iran, Markazi, Clearstream, and UBAE "engaged in a conspiracy to make fraudulent conveyances designed to avoid Iran's debt to [the] [p]laintiffs and other creditors" by transferring the bond proceeds "from Markazi's account at Clearstream to the UBAE/Markazi [a]ccount at Clearstream" in violation of DCL § 276, C.A. at 721, which states that "[e]very conveyance made . . . to hinder, delay, or defraud either present or future creditors" shall be deemed "fraudulent as to both present and future creditors," DCL § 276. Second, the plaintiffs alleged that the same transfer violated DCL § 273-a, C.A. at 724-25, which provides that "[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if . . . the defendant fails to satisfy the judgment," DCL § 273-a. Finally, the plaintiffs alleged that if the assets at issue are in fact located abroad, they are so located because of transfers that qualify as fraudulent conveyances under the DCL and common law. C.A. at 728-29. Each of the plaintiffs' fraudulent-conveyance claims seeks, *inter alia*, rescission of the allegedly fraudulent transfers. *Id.* at 723, 725, 729.

fore not bound by their provisions. See Pls.' Br. at 23 (arguing with respect to Clearstream); Pls.' Reply at 13-14 (arguing with respect to UBAE). Noting that this argument was not timely raised, the district court dismissed it on the ground that ninety-three percent of the *Peterson I* plaintiffs had agreed to the Clearstream settlement agreement and that figure surpassed "the percentage . . . needed . . . in order for the [Clearstream] settlement [agreement] to become effective" and binding on all of the plaintiffs. *Peterson II*, 2015 WL 731221, at *8, 2015 U.S. Dist. LEXIS 20640, at *27.[8] Moreover, the district court noted that none of the *Peterson I* plaintiffs had declined to sign the agreement. *Id.* We disagree with the district court's analysis insofar as we conclude that the Clearstream settlement agreement is binding only with respect to those plaintiffs who were a party to *Peterson I*.

As an initial matter, the district court correctly observed that the plaintiffs belatedly raised this issue. See *id.*, 2015 U.S. Dist. LEXIS 20640, at *25-26. Only after argument on the parties' motions did plaintiffs' counsel notify the district court by letter that not all of the *Peterson II* plaintiffs were parties to *Peterson I*, or therefore, the resultant Clearstream settlement agreement. J.A. at 154. Moreover, the plaintiffs' letter noted that many of the *Peterson II* plaintiffs who were *Peterson I* plaintiffs had not yet assented to the terms of the Clearstream settlement agreement. *Id.*

"An argument raised for the first time on appeal is typically forfeited." *Katel Ltd. Liab. Co.* v. *AT & T Corp.*,

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[8] The plaintiffs' post-briefing letter first alerting the district court to this issue concerned only the Clearstream settlement agreement. See J.A. at 154. The district court did not, therefore, address the UBAE settlement agreement.

607 F.3d 60, 68 (2d Cir. 2010). This rule applies even if a party ultimately presents an issue to the district court in an untimely manner, after briefing and argument on the merits is complete. See *Corsair Special Situations Funds, L.P.* v. *Nat'l Res.*, 595 F. App'x 40, 43 (2d Cir. 2014) (summary order).

Nonetheless, "[t]he general rule that an appellate court will not consider an issue raised for the first time on appeal is not an absolute bar." *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, 832 F.3d 92, 101 n.3 (2d Cir. 2016) (internal quotation marks omitted). Instead, a forfeited argument "may be reviewed for plain error." *United States* v. *Gore*, 154 F.3d 34, 41 (2d Cir. 1998). "To establish plain error, the [plaintiffs] must establish (1) error (2) that is plain and (3) affects substantial rights." *United States* v. *Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007). Then, "[i]f the error meets these initial requirements, we . . . must consider whether to exercise our discretion to correct it, which is appropriate only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (internal quotation marks omitted).

We must first determine whether the plaintiffs in fact forfeited, rather than waived, their argument concerning applicability of the Clearstream settlement agreement. "[F]orfeiture is the failure to make a timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). The distinction is meaningful because a waived argument is ordinarily reviewed only "to avoid a manifest injustice," *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008), whereas, as noted,

a forfeited argument "may be reviewed for plain error," *Gore*, 154 F.3d at 41.

We think that the plaintiffs forfeited, not waived, their argument. Nothing in the record or briefing suggests that plaintiffs "intentional[ly] relinquish[ed]," as opposed to mistakenly omitted, their argument. See *Olano*, 507 U.S. at 733. Accordingly, we review for plain error.

The district court did not plainly err with respect to those plaintiffs who were parties to *Peterson I*. As noted, the district court found that ninety-three percent of the *Peterson I* plaintiffs had agreed to the terms of the Clearstream settlement agreement, and that no *Peterson I* plaintiff had refused to sign. *Peterson II*, 2015 WL 731221, at *8, 2015 U.S. Dist. LEXIS 20640, at *25-26. The Clearstream settlement agreement plainly states that it "shall [be] effective" upon the agreement of "at least 80%" of the *Peterson I* plaintiffs. C.A. at 904-05. The plaintiffs' sole rebuttal is that the Clearstream settlement agreement "does not bind [non-signatory] [p]laintiffs." Pls.' Reply at 11 (citing C.A. at 902). We find nothing in the part of the record cited by the plaintiffs to support their assertion. Because the plaintiffs have not advanced any other rebuttals, or pointed us to other parts of the record, we cannot say that the district court committed an error "that is plain" with respect to this forfeited argument. *Villafuerte*, 502 F.3d at 209.

The district court did plainly err, however, with respect to those plaintiffs who were not parties to *Peterson I*. The plaintiffs argued, albeit belatedly, that several plaintiffs in this case were not parties to *Peterson I*, or therefore, the resultant Clearstream settlement agreement. J.A. at 154. The part of the district court's decision concerning the applicability of the Clearstream settlement agreement did not address this issue. See *Peter-*

son II, 2015 WL 731221, at *8, 2015 U.S. Dist. LEXIS 20640, at *25-26 (addressing only non-signatory *Peterson I* plaintiffs). The application of the Clearstream settlement to these non-party plaintiffs was plainly an error affecting those plaintiffs' substantial rights. See *Villafuerte*, 502 F.3d at 209. Moreover, it would "seriously affect[ ] the fairness" of judicial proceedings, *id.* (internal quotation marks omitted), were we to sanction an order errantly, and without apparent reason, binding several plaintiffs to a settlement agreement that arose from litigation to which they were not party. Accordingly, we vacate that part of the district court's order applying the Clearstream settlement agreement to the *Peterson II* plaintiffs who were not also plaintiffs in *Peterson I*.[9]

Our plain-error review does not extend, however, to the plaintiffs' argument, made for the first time in reply, that many of the plaintiffs, including those who were not party to *Peterson I*, should be similarly excused from the reach of the UBAE settlement agreement. See Pls.' Reply at 13. This argument was never raised before the district court, even belatedly, see J.A. at 154 (addressing only the Clearstream settlement agreement), nor was it directly raised in the plaintiffs' opening appellate brief, see Pls.' Br. at 23 (same). The preceding analysis aside, "[w]e will not consider an argument raised for the first time in a reply brief." *United States* v. *Yousef*, 327 F.3d 56, 115 (2d Cir. 2003).

Turning to the substance of the settlement agreements, New York law governs our review. See C.A. at 908 (providing that the Clearstream settlement agreement shall be governed by New York law); *id.* at 1650-51

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[9] Likewise, our substantive review of the Clearstream settlement agreement, see Part B.1 *infra*, applies only to the plaintiffs here who were also parties to *Peterson I*.

(providing that the UBAE settlement agreement shall be governed by New York law). Settlement agreements are "contract[s] and [their] meaning must be discerned under several cardinal principles of contractual interpretation." *Brad H.* v. *City of New York*, 17 N.Y.3d 180, 185, 951 N.E.2d 743, 746 (2011). "Where [a] contract is unambiguous, courts must effectuate its plain language." *Seabury*, 289 F.3d at 68 (citing *Slamow* v. *Del Col*, 79 N.Y.2d 1016, 594 N.E.2d 918, 919 (1992)). "To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole." *Brad H.*, 17 N.Y.3d at 185, 951 N.E.2d at 746. We consider the Clearstream and UBAE settlement agreements in light of those principles.

1. *The Clearstream Settlement Agreement*

The Clearstream settlement agreement released "all past, present or future claims or causes of action . . . arising out of, or relating in any way to" Clearstream "accounts numbered . . . 13061 [the UBAE customer account] . . . [or] 13675 [the sundry blocked account]." C.A. at 903. The settlement agreement excepted from that release "[g]arnishee [a]ctions" against Clearstream "regarding . . . efforts to recover any asset or property of any kind . . . that is held by or in the name, or under the control, or for the benefit of, Bank Markazi or Iran . . . in an action against . . . Clearstream . . . solely in its capacity as a garnishee." *Id.* at 905 (emphasis omitted). The district court properly concluded that these provisions released the plaintiffs' non-turnover claims against Clearstream.

Under New York law, a "garnishee" action is one for the "turnover" of "assets already within [the garnishee's] possession." *Commonwealth of the Northern Mariana Islands* v. *Canadian Imperial Bank of Commerce*, 21

N.Y.3d 55, 64, 990 N.E.2d 114, 120 (2013). The plaintiffs' non-turnover claims, by contrast, involve more than obtaining the turnover of assets already within Clearstream's possession. For example, the plaintiffs' fraudulent-conveyance claims brought under DCL § 276 entail a showing of, *inter alia*, fraudulent intent. See *Wall St. Assocs.* v. *Brodsky*, 257 A.D.2d 526, 528-29, 684 N.Y.S.2d 244, 247-48 (1st Dep't 1999). The non-turnover claims brought against Clearstream therefore fall within the settlement agreement's broad release of "all" claims arising out of or relating to the Clearstream accounts at issue. C.A. at 903. The plaintiffs' argument that the release should be construed in their favor, Pls.' Br. at 22-23, 28, yields to an "explicit, unequivocal statement of a present promise to release [a party] from liability." *Golden Pac. Bancorp* v. *FDIC*, 273 F.3d 509, 515 (2d Cir. 2001) (internal quotation marks omitted); see also *Vt. Teddy Bear Co.* v. *538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 807 N.E.2d 876, 879 (2004).

The plaintiffs contend that the Clearstream settlement agreement released only claims relating to those "litigated in *Peterson I*" and "damages claims against Clearstream." Pls.' Br. at 29 (emphasis omitted). The plain language of the release provision suggests otherwise. The settlement agreement purported to release all claims "concerning" several "Covered Subjects," C.A. at 903 (emphasis omitted), a defined term that includes "any claims alleged against Clearstream by judgment creditors . . . in *Peterson* [*I*]; or [ ] any account maintained at Clearstream . . . including . . . accounts numbered . . . 13061 [the UBAE customer account] . . . [or] 13675 [the sundry blocked account]," *id.* (emphasis added). The plaintiffs' argument rests on the (we think mistaken) suggestion that the release of "all" claims applies only to

"Peterson Direct Claims," a defined term that is distinct from "Direct Claims," also a defined term. Contrary to the plaintiffs' suggestion, only the former term is restricted to "asserted claims in *Peterson* [*I*]." *Id.* at 901. By contrast, the term "Direct Claims," the subject of the release provision, is defined more broadly as "all" claims "concerning" the "Covered Subjects." *Id.* at 903 (emphasis omitted).

The plaintiffs argue that their fraudulent-conveyance claims against Clearstream nonetheless qualify as "garnishee actions" under the settlement agreement's carveout provision. The plaintiffs note that "judgment creditors can obtain turnover from garnishees by undoing fraudulent conveyances." Pls.' Br. at 30. Be that as it may, the relief that one can obtain from a fraudulent-conveyance action does not convert that claim into a "garnishee action," which, as previously noted, is a cause of action that seeks the turnover of assets already in the garnishee's possession. See N.Y. C.P.L.R. §105(i) ("A 'garnishee' is a person . . . other than the judgment debtor who has property *in his possession or custody* in which a judgment debtor has an interest." (emphasis added)). Moreover, the Clearstream settlement agreement limits permissible "garnishee actions" to those in which Clearstream is named "solely in its capacity as a garnishee." C.A. at 905 (emphasis omitted).

The plaintiffs argue that this final provision encompasses their fraudulent conveyance claims because it permits "an action in which . . . Clearstream . . . is named solely for the purpose of seeking an order directing that . . . Clearstream . . . perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer." *Id.* We disagree. The plaintiffs' fraudulent-conveyance claims

against Clearstream allege more than a transfer "between other parties," including, for example, the allegation that Clearstream was an active "[c]onspirator[ ]" in the alleged fraudulent scheme.[10] *Id.* at 707, 721. We therefore affirm that part of the district court's order granting Clearstream's motion to dismiss the plaintiffs' non-turnover claims brought against Clearstream.

2. *The UBAE Settlement Agreement*

We vacate, however, the district court's order granting UBAE's motion for partial summary judgment with respect to the plaintiffs' non-turnover claims brought against UBAE.

The UBAE settlement agreement "release[d] UBAE and all of its past, present and future . . . beneficiaries . . . from any and all liability, claims, causes of action, suits, judgments, costs, . . . or other incidental or consequential damages of any kind . . . arising out of or related to the [p]laintiffs' Direct Claims against UBAE." *Id.* at 1648. "Direct Claims" as defined in the UBAE settlement agreement includes "claims in *Peterson* [*I*] for damages against UBAE with regard to certain assets transferred . . . and valued at approximately $250,000,000.00 . . . , including, but not limited to, claims for fraudulent conveyance, tortious interference with the collection of a money judgment, and prima facie tort." *Id.* at 1646. The same provision refers to these *Peterson I* "Direct Claims" collectively as "the Turnover Action." *Id.* The UBAE settlement agreement also provides that the "[p]laintiffs agree that any future claim against UBAE for the Re-

[10] The carve-out provision indicates that a permissible "[g]arnishee [a]ction" includes, *inter alia*, an order to reverse a transfer between other parties "that is *found* to have been a fraudulent transfer." C.A. at 905 (emphasis added). No such finding has been made with respect to the assets at issue.

maining Assets shall be limited to turnover only, and [the p]laintiffs waive all other claims against UBAE for any damages regarding the Remaining Assets." *Id.* at 1648. "Remaining Assets" are defined by the UBAE settlement agreement as "certain assets [that] remain in an account at Clearstream[ ] [in] a UBAE customer account[ ] that are beneficially owned by Bank Markazi." *Id.* at 1647.

As indicated in a summary order published in tandem with this decision,[11] we disagree with the district court's conclusion that these provisions necessarily released the plaintiffs' non-turnover claims, including their fraudulent conveyance claims, brought against UBAE. The UBAE settlement agreement provides that "any future claim against UBAE" for the assets at issue "shall be limited to turnover only." *Id.* at 1648. The term "turnover" is not defined. But the agreement, taken "as a whole," *Brad H.*, 17 N.Y.3d at 185, 951 N.E.2d at 746, suggests that the parties intended the term to encompass the plaintiffs' fraudulent conveyance claims insofar as the agreement refers to the *Peterson I* claims, which included both fraudulent-conveyance and turnover-qua-turnover claims, as "the Turnover Action," C.A. at 1646.

UBAE argues that under New York law, a claim seeking "turnover" is an action brought under C.P.L.R. Article 52, which provides "a procedural mechanism . . . rather than a . . . substantive right." *Mitchell* v. *Garrison Protective Servs., Inc.*, 819 F.3d 636, 640 (2d Cir. 2016) (emphases omitted). Although UBAE may be correct about the meaning of "turnover" as used in New York law, we do not think that this resolves what we conclude to be the ambiguity of that term as used by the parties in the UBAE settlement agreement. The question for us on

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[11] See generally *Olson* v. *Banca UBAE, S.p.A.*, Nos. 15-2213, 15-2535.

appeal is not whether a turnover proceeding and fraudulent-conveyance claim are one and the same under New York law. It is, instead, what the parties meant by use of the word "turnover" as employed in the UBAE settlement agreement. We conclude that when the UBAE settlement agreement is viewed in its entirety, the meaning of the term is ambiguous.

We also note that, under New York law, a party may allege a fraudulent conveyance claim within a turnover action brought under C.P.L.R. Article 52. See *Gelbard* v. *Esses*, 96 A.D.2d 573, 575, 465 N.Y.S.2d 264, 267 (N.Y. App. Div. 2d Dep't 1983) ("CPLR [§] 5225 may serve as the means to set aside a transfer made by a judgment debtor to defraud his creditors." (citation omitted)); see also *Mitchell* v. *Lyons Prof'l Servs., Inc.*, 109 F. Supp. 3d 555, 563 (E.D.N.Y. 2015) ("What C.P.L.R. §§ 5225 and 5227 provide, in contrast to a plenary action, is a procedural mechanism for attacking a fraudulent conveyance . . . , colloquially known as 'turnover proceedings.'"), aff'd *sub nom. Mitchell* v. *Garrison Protective Servs., Inc.*, 819 F.3d at 640 (describing C.P.L.R. § 5225 as a "mechanism for avoiding a fraudulent transfer in New York").[12] While UBAE correctly observes that "fraudu-

[12] As noted, whether the plaintiffs' fraudulent-conveyance claims are "turnover" claims as that term is used in the UBAE settlement agreement is ambiguous. The distinction between fraudulent-conveyance and turnover claims under New York law is also ambiguous. Although a turnover action may be based on and contain a fraudulent-conveyance allegation, a fraudulent-conveyance claim may also be pursued as a plenary action to avoid a transfer. See *Bienstock* v. *Greycroft Partners, L.P.*, 128 A.D.3d 459, 459, 7 N.Y.S.3d 893, 893 (N.Y. App. Div. 1st Dep't 2015) ("The motion court erred in awarding attorneys' fees since this is a turnover proceeding brought pursuant to [N.Y. C.P.L.R.] 5225(b) as opposed to an action or proceeding to set aside a fraudulent conveyance (*compare* [DCL] § 276-a)."). Thus, while we are sympathetic to UBAE's interpreta-

lent conveyance is not a *necessary* element of a turnover action," UBAE Br. at 26 (emphasis added), it incorrectly surmises from that observation that fraudulent conveyance therefore cannot be an element of a turnover action. But, as we have noted, whether UBAE is correct about New York law does not resolve whether it is also correct about the meaning of the UBAE settlement agreement.

UBAE might benefit from the plaintiffs' agreement to "release UBAE . . . from . . . causes of action . . . related to the . . . Direct Claims against UBAE." C.A. at 1648. In context, however, the meaning of "related to" is also ambiguous. It is certainly the case that both the *Peterson I* claims—i.e., the "Direct Claims"—and those at issue here concern related transactions, specifically, the allegedly fraudulent transfers of bond proceeds linked to Markazi. On the other hand, the plaintiffs in this litigation seek to recover proceeds related to a distinct set of bonds. Accordingly, it is not apparent to us that their fraudulent-conveyance claims here are necessarily "related to" the *Peterson I* Direct Claims.

Thus, although it is clear that the UBAE settlement agreement released UBAE from "any and all . . . claims [or] causes of action," C.A. 1648, "for damages against UBAE with regard to [the assets at issue in *Peterson I*]," *id.* at 1646, the settlement's applicability beyond such claims is unclear. Because the question on a motion for summary judgment is "whether the contract is unambiguous with respect to the question disputed by the parties," *Int'l Multifoods Corp.* v. *Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002), and "[a]n ambiguity exists where the terms of the contract could suggest

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tion of "turnover," the meaning of that term is ambiguous both as used in the UBAE Settlement Agreement and under state law.

more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire . . . agreement," *Law Debenture Tr. Co. of N.Y.* v. *Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (internal quotation marks omitted), the district court erred by granting UBAE's motion for partial summary judgment with respect to the plaintiffs' non-turnover claims.

UBAE argues that "[t]he definition of 'Plaintiffs' Direct Claims' in the [UBAE settlement agreement] specifically includes the *Peterson II* fraudulent conveyance claims." UBAE Br. at 21. We disagree. The UBAE Settlement Agreement defines "Direct Claims" as those "in *Peterson* [*I*] for damages against UBAE with regard to certain assets [at issue in *Peterson I*] . . . and valued at approximately $250,000,000.00 (the 'Transferred Assets'), including, but not limited to, claims for fraudulent conveyance." C.A. at 1646. Although this provision clearly includes the *Peterson I* fraudulent-conveyance claims among the *Peterson I* "Direct Claims," it also plainly requires that those causes of action concern the assets at issue in *Peterson I*. The fraudulent-conveyance claims brought against UBAE in this litigation of course do not satisfy that requirement.

For the foregoing reasons, we vacate the district court's conclusion that the UBAE settlement agreement released the plaintiffs' non-turnover claims brought against UBAE and remand the case to the district court for further proceedings with respect to those claims.[13]

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[13] The UBAE and Clearstream settlement agreements are distinguishable inasmuch as the latter is unambiguous with respect to its release of certain claims. While the UBAE settlement agreement nebulously limits the plaintiffs to undefined "turnover" claims, C.A. at 1648, the Clearstream settlement agreement limits the plaintiffs

3. *Application of the UBAE Settlement Agreement to Claims Brought Against Markazi*

The district court also determined that the UBAE settlement agreement also released the plaintiffs' non-turnover claims against Markazi. *Peterson II*, 2015 WL 731221, at *10, 2015 U.S. Dist. LEXIS 20640, at *30-32. We disagree. The UBAE settlement agreement released certain claims brought against UBAE and undefined UBAE "beneficiaries." C.A. at 1648. It made clear, however, that this release "does not impact the ability of any of the [p]arties to pursue claims against Clearstream, Citibank, Bank Markazi, [or] Iran." *Id.* at 1649. Whoever and whatever the parties meant to define as UBAE "beneficiaries," it seems clear that Markazi was not included.

The district court therefore erred by dismissing the plaintiffs' non-turnover claims, including the fraudulent-conveyance claims, brought against Markazi. Accordingly, we vacate that part of the district court's order and remand the case to the district court for further proceedings with respect to the plaintiffs' non-turnover claims brought against Markazi.

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to defined "[g]arnishee [a]ctions" against "Clearstream . . . solely in its capacity as a garnishee," *id.* at 905 (emphasis omitted). Unlike the term "turnover" as used in the UBAE settlement agreement, the term "[g]arnishee [a]ctions" is defined by the Clearstream settlement agreement and includes such actions only where "Clearstream . . . is named solely for the purpose of seeking an order directing that . . . Clearstream . . . perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer." *Id.* The plaintiffs' fraudulent-conveyance claims against Clearstream sought to accomplish more than permitted by the pertinent settlement agreement; the same cannot be said for the fraudulent-conveyance claims brought against UBAE.

C. The Turnover Claims

The plaintiffs seek to enforce their underlying judgments against Iran and MOIS by executing on $1.68 billion of Markazi-owned bond proceeds. The plaintiffs' claims seeking a turnover order to that effect rest, as an initial matter, on the nature and location of the bond proceeds. The plaintiffs contend that they are denominated as USD and held as cash in New York City at Clearstream's correspondent account at JPMorgan. The defendants argue that there is no cash; at most, Markazi owns, through UBAE, a right to payment from Clearstream in the amount of $1.68 billion as reflected on book entries located in Luxembourg. Whether the plaintiffs can obtain an order compelling one or several of the defendants to turn over the assets at issue depends first on the nature and location of the assets, and second on the court's jurisdiction for execution of those assets, whatever and wherever they are.

1. *The Nature and Location of the Assets*

The plaintiffs insist that Clearstream holds the bond proceeds in New York City as cash in its correspondent account at JPMorgan. The district court disagreed, finding sufficient record evidence that the bond proceeds are not held as cash in New York City but are recorded as a right to payment in Luxembourg. *Peterson II*, 2015 WL 731221, at *6, 2015 U.S. Dist. LEXIS 20640, at *20 ("[JPMorgan] received proceeds relating to the [bonds], which it credited to a Clearstream account at [JPMorgan]. Whether it should have or should not have, Clearstream in turn credited amounts attributable to the [bonds] to the UBAE/Bank Markazi account in Luxembourg. The [JPMorgan] records are clear that whatever happened to the proceeds, they are gone."). We agree.

It is undisputed that Clearstream's correspondent account at JPMorgan was a general "operating account," C.A. at 1863, used to service transactions on behalf of many customers who are not parties to this litigation, *id.* at 1973-74, 2541; see also *id.* at 2834-35. Although Clearstream received bond proceeds into this general account, *id.* at 685, the account's USD holdings were not segregated by customer, *id.* at 2537-39. Moreover, no cash attributable to the Markazi-owned bond proceeds was transferred from Clearstream's correspondent account at JPMorgan to Markazi or UBAE. *Id.* at 1976. Clearstream instead used its general pool of cash to meet other obligations. *Id.* at 1865-66. As a result, approximately seven to nine billion dollars flowed in and out of the Clearstream correspondent account each day. *Id.* at 1973. Indeed, JPMorgan records show that this account frequently had a near-zero or negative end-of-day balance.[14] *Id.* at 1864, 1959.

The plaintiffs' putative expert, Peter U. Vinella, attributed minuscule or negative end-of-day balances to industry-standard "[s]weeps." C.A. at 2422. Under this theory, JPMorgan commandeered the Clearstream correspondent account at the close of business, "invested [its

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[14] A footnote in the plaintiffs' brief challenges Jonckheere's declarations as hearsay. See Pls.' Br. at 49 n.4. Even ignoring the significant record evidence that is independent and corroborative of Jonckheere's statements, the plaintiffs' challenge is meritless. "[W]e afford district courts wide latitude in determining whether evidence is admissible," and "review . . . evidentiary rulings for abuse of discretion, reversing only if we find manifest error." *United States* v. *Miller*, 626 F.3d 682, 687-88 (2d Cir. 2010) (internal quotation marks and ellipsis omitted). The district court did not abuse its discretion by considering declarations executed by Jonckheere, the JPMorgan account manager who conducted a "regular[] review" of Clearstream's correspondent account. C.A. at 2535.

funds] in very short-dated USD investments[,] and subsequently redeposited . . . the USD [in the] JPMorgan [a]ccount the next day . . . , essentially refilling the bucket." *Id.* (internal quotation marks omitted). Vinella opined that these sweeps "are not generally reflected on the customer's statement" so that "the funds remain in the bank account from the customer's perspective." *Id.* JPMorgan acknowledged that it indeed "employ[ed] an investment sweep mechanism during the 2008-2012 period that enabled it to pay overnight interest to Clearstream." *Id.* at 2541.

We nonetheless agree with the district court that "Vinella's argument that the money is somehow still there [does not] really work[ ]." J.A. at 88 (raising this concern during the September 19, 2014 argument). Even assuming that JPMorgan's sweeps used all cash holdings in the Clearstream correspondent account, JPMorgan established through bank records that "the end-of-day balances in the account that were available for overnight investment were never more than a small fraction of the $1.68 billion that make up the [assets at issue]." C.A. at 2541. In fact, the Clearstream correspondent account rarely had an end-of-day balance greater than $300 million, far short of the $1.68 billion sought by the plaintiffs. See J.A. at 80. JPMorgan may have swept all cash in the Clearstream correspondent account, but the plaintiffs have offered no evidence that those sweeps were performed specifically with *Markazi's* cash.

Moreover, Jonckheere, the JPMorgan account manager for Clearstream, offered an undisputed explanation for Clearstream's near-zero end-of-day account balances: "[JPMorgan] and Clearstream have an arrangement under which [JPMorgan] will at its discretion advance a very significant amount of intra-day liquidity to Clear-

stream to allow Clearstream's [correspondent account] to be overdrawn and thereby ensure that the account operates smoothly at all times." C.A. at 2539. This explanation and Vinella's sweep theory are not mutually exclusive. And both are consistent with the district court's finding that $1.68 billion in cash attributable to Markazi's bond proceeds is not sitting in Clearstream's correspondent account at JPMorgan in New York City.

Vinella separately posited that "Clearstream cannot hold or process USD in Luxembourg in any material amount." *Id.* at 2408. Maybe so. But it does not follow that Clearstream must be holding $1.68 billion in cash in New York City. Vinella's observation is entirely consistent with the undisputed record evidence that Clearstream received cash payments into a general pool, which was drawn down on a daily basis to service many customers' demands. Clearstream then caused a corresponding credit to be reflected in the Markazi, and later UBAE, account in Luxembourg as a right to payment equivalent to the bond proceeds that Clearstream received and processed in New York.

The location of that right to payment is determined by state law. See *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002); see also *EM Ltd.* v. *Republic of Argentina*, 389 F. App'x 38, 44 (2d Cir. 2010) (summary order) (relying on state law to determine the location of property). Under New York law, the situs of an intangible property interest, such as the right to payment relevant here, is "the location of the party of whom performance is required by the terms of the contract." *ABKCO Indus., Inc.* v. *Apple Films, Inc.*, 39 N.Y.2d 670, 675, 350 N.E.2d 899, 902 (1976) (noting that where an intangible property interest is represented by a negotiable instru-

ment, the physical location of that instrument determines the location of the property interest); see also *Hotel 71 Mezz Lender LLC* v. *Falor*, 14 N.Y.3d 303, 315, 926 N.E.2d 1202, 1210 (2010) ("[W]here a creditor seeks to attach a debt (an intangible form of property) solely for security purposes (i.e., the debtor is subject to the court's personal jurisdiction), the situs of the debt is wherever the debtor is present."). In this case, the right to payment is reflected as a book entry or account balance maintained in Luxembourg by Clearstream, a Luxembourg entity. Thus, the asset the plaintiffs seek—a right to payment—is located in Luxembourg.

The plaintiffs advance several rebuttals, each presuming the validity of their position that Clearstream holds a segregated pool of $1.68 billion in cash traceable to the bond proceeds in New York. For example, the plaintiffs argue that "the empty act of making book entries to a Luxembourg account without an accompanying transfer did not alter the location of the Markazi-owned assets." Pls.' Br. at 49. That is neither controversial nor surprising: There was no accompanying transfer of cash to Markazi or UBAE. For similar reasons, the plaintiffs' contention that fraudulent conveyances have no legal effect is of no moment. This argument presumes "that [the] [d]efendants moved the [b]ond [p]roceeds to Luxembourg." *Id.* at 51. Not so. No bond proceeds were "moved," at least not as envisaged by the plaintiffs. Rather, cash flowed into the Clearstream correspondent account at JPMorgan, which was then used to meet other customers' demands. Markazi was made whole by its interest in the recordation of an equivalent right to payment in Luxembourg.

The plaintiffs argue that under the Uniform Commercial Code ("UCC"), Clearstream "must maintain a corre-

sponding financial asset (*i.e.*, USD) sufficient to satisfy . . . entitlements [owed to Markazi and UBAE]," and "those USD[ ] must be segregated from Clearstream's assets." *Id.* at 49. We need not, and therefore do not, comment on the propriety of Clearstream's banking practices under the UCC, assuming that it applies.[15] Even if the bond proceeds should have been segregated and held as cash, they were not; there is not, therefore, property in New York subject to turnover. Contrary to the plaintiffs' suggestion, see Pls.' Br. at 40, this position is not inconsistent with *Peterson I*, in which the district court concluded that a separate set of bond proceeds—held at a different bank that is not party to this litigation—were both located in New York and owned by Markazi for reasons wholly unrelated to the UCC. *Peterson I*, 2013 WL 1155576, at *30-31, 2013 U.S. Dist. LEXIS 40470, at *121-24. In any event, the question whether the UCC governs Markazi's ownership interest in and rights to the bond proceeds is unrelated to the nature and location of those assets.

The nature and location of the asset here—a right to payment located in Luxembourg—distinguishes this case from *Peterson I*, where it was "undisputed" that Clearstream held a segregated pool of "$1.75 billion in cash proceeds of the bonds . . . in an account at Citigroup in New York." *Id.* at *2, 2013 U.S. Dist. LEXIS 40470, at *42. Indeed, in *Peterson I* the district court specifically found that "nearly $2 billion in bond proceeds [traceable to Markazi] is sitting in an account in New York at Citibank," which the court determined was far from a "fleeting or ephemeral interest[ ]." *Id.* at *24, 2013 U.S. Dist. LEXIS 40470, at *103. Here, by contrast, there never

[15] Clearstream asserts that it does not. See Clearstream Br. at 34-37.

was a traceable or segregated pool of Markazi-owned bond proceeds held as cash in Clearstream's correspondent account at JPMorgan in New York City.

We conclude that the assets at issue are, therefore, represented by a right to payment in the possession of Clearstream located in Luxembourg. Accordingly, the district court properly granted JPMorgan's motion for partial summary judgment because JPMorgan is not in possession of any assets subject to turnover. Similarly, neither Markazi nor UBAE possesses any assets subject to turnover here because the asset at issue is in fact held by Clearstream and represented as a positive account balance in a "sundry blocked account" to which neither Markazi nor UBAE has access. C.A. at 684. We therefore turn to whether the principal asset at issue, a right to payment held by Clearstream and located in Luxembourg, is subject to execution.

2. *Jurisdiction for Execution*

The district court concluded that it lacked jurisdiction to order turnover because the principal asset at issue—a right to payment recorded and held in Luxembourg—is located outside the United States and, therefore, absolutely immune from execution under the FSIA. *Peterson II*, 2015 WL 731221, at *10, 2015 U.S. Dist. LEXIS 20640, at *31-32. Although the district court's assumption was reasonable in light of many judicial decisions suggesting as much, we think it was incorrect.

Before the FSIA, foreign sovereigns were generally afforded broad immunity from the jurisdictional reach of American courts. *NML Capital*, 134 S. Ct. at 2255. Foreign sovereign immunity was offered as "a matter of grace and comity . . . not a restriction imposed by the Constitution." *Id.* (quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). Pursuant to this

discretionary practice, "the United States gave absolute immunity to foreign sovereigns from," in particular, "the execution of judgments."[16] *Autotech Techs.* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007). "This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State." *Id.*

The prevailing regime changed in 1976 with the enactment of the FSIA, a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488. Since its enactment, courts have held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); see also *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 47 (2d Cir. 2010) ("The [FSIA] 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

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[16] As Justice Scalia explained for the Court in *NML Capital*, this was long at the behest of the executive branch, "which typically requested immunity in all suits against friendly foreign states." *NML Capital*, 134 S. Ct. at 2255. That changed in 1952, when "the State Department embraced (in the so-called Tate Letter) the restrictive theory of sovereign immunity, which holds that immunity shields only a foreign sovereign's public, noncommercial acts." *Id.* (internal quotation marks omitted). It has been observed that this shift "thr[ew] immunity determinations into some disarray" because "political considerations sometimes led the [State] Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004) (internal quotation marks omitted). "Congress abated the bedlam in 1976" with the FSIA. *NML Capital*, 134 S. Ct. at 2255.

the FSIA's exceptions to foreign sovereign immunity." (citation omitted)).

Section 1604 of the FSIA provides in general terms for foreign sovereign immunity: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The law then subjects this limit on *in personam* jurisdiction to several exceptions. See *id.* §§ 1605-07. In this case, for example, the plaintiffs obtained their judgments against Iran and MOIS pursuant to § 1605A, C.A. at 1673-75,[17] which vitiates immunity "in any case . . . 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, . . . or the provision of material support or resources for such an act," 28 U.S.C. § 1605A(a)(1).

In addition to jurisdictional immunity, the FSIA also provides foreign sovereigns so-called "execution immunity": Section 1609 states that, generally, "the property in the United States of a foreign state shall be immune from attachment arrest and execution." *Id.* § 1609. Execution immunity is also subject to several exceptions, *id.* §§ 1610-11, three of which the plaintiffs argue permit execution here: first, § 1610(a), which permits execution against "property in the United States of a foreign state

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[17] The plaintiffs also obtained their underlying judgments pursuant to § 1605(a)(7), a since-repealed provision of the FSIA that similarly suspended jurisdictional immunity where "money damages [were] sought against a foreign state for personal injury or death that was caused by an act of torture [or] extrajudicial killing." 28 U.S.C. § 1605(a)(7) (2006); see also *Weinstein*, 609 F.3d at 48 n.4 ("In 2008, Congress repealed § 1605(a)(7) and created a new section [§ 1605A] specifically devoted to the terrorism exception to the jurisdictional immunity of a foreign state." (citing Pub. L. No. 110-181, § 1083, 122 Stat. 3, 341 (2008))). As relevant here, § 1605(a)(7) provided the same exception to jurisdictional immunity as does § 1605A.

. . . used for a commercial activity in the United States . . . if . . . the judgment relates to a claim for which the foreign state is not immune under [§1605A]," *id.* §1610(a)(7); second, §1610(g), which authorizes execution against "the property of a foreign state against which a judgment is entered under [§1605A] . . . upon that judgment as provided in this section," *id.* §1610(g)(1); and third, TRIA §201(a), codified as a note to FSIA §1610, which reads:

> 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 [28 U.S.C. §1605A], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA, Pub. L. No. 107-297, §201(a), 116 Stat. 2322, 2337-40 (2002) (codified at 28 U.S.C. §1610 note); see also *Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107, 131 (2d Cir. 2016) ("The TRIA provides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA if certain statutory elements are satisfied.").

The FSIA framework of immunities and exceptions is "comprehensive," *NML Capital*, 134 S. Ct. at 2255-56; see also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004); *Verlinden*, 461 U.S. at 493, and, therefore, supersedes the "pre-existing common law" of foreign sovereign immunity, *Samantar* v. *Yousuf*, 560 U.S. 305, 313

(2010). As the Supreme Court wrote in *NML Capital*, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." 134 S. Ct. at 2256.

Comprehensive though it may be with respect to immunities and exceptions, the FSIA does not specify "the circumstances and manner of attachment and execution proceedings." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 474 n.10 (2d Cir. 2007); see also *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) ("The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property.").[18] Accordingly, "[i]n attachment actions involving foreign states, federal courts . . . apply Fed. R. Civ. P. 69(a)." *Karaha Bodas Co.*, 313 F.3d at 83. Under that Rule, "a district court has the authority to enforce a judgment by attaching property in accordance with the law of the state in which the district court sits." *Koehler* v. *Bank of Berm. Ltd.*, 544 F.3d 78, 85 (2d Cir. 2008).

In New York, that law is C.P.L.R. § 5225,[19] which provides in pertinent part:

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[18] FSIA § 1610(c) does, however, enumerate broad limitations on "attachment or execution," viz., "[n]o attachment or execution . . . 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 [the FSIA]." 28 U.S.C. § 1610(c).

[19] The plaintiffs brought their state-law turnover claims under C.P.L.R. §§ 5225, 5227. The former concerns the turnover of "property," including "money or other personal property," N.Y. C.P.L.R. § 5225; the latter concerns the turnover of "debts owed to the judgment debtor," *id.* § 5227. Our analysis turns on § 5225. "Although New York law draws a line between a debt owed to a judgment debtor and property owned by the judgment debtor but in the possession

> Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest . . . where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment to a designated sheriff.

N.Y. C.P.L.R. § 5225(b).

Relying on this provision, the plaintiffs seek turnover of Iran's right to payment in the amount of $1.68 billion, represented as a positive account balance and recorded

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of another, that line can at times become too fine to distinguish." *Alliance Bond Fund, Inc.* v. *Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 21 (2d Cir. 1990) (internal quotation marks and alteration omitted). We think that Iran's right to payment, held by Clearstream, falls on the "property" side of that blurred line. In *ABKCO*, the Court of Appeals held that a judgment debtor's right to payment under a licensing agreement was "property" because, like Markazi's interest in the right to payment held by Clearstream, it was an assignable interest. *ABKCO*, 39 N.Y.2d at 674-75, 350 N.E.2d at 900-02. And at least one New York court has confirmed that a bank account—like the Markazi, UBAE, and blocked sundry accounts at Clearstream in Luxembourg—was subject to turnover because "[t]he property of the depositor is the indebtedness of the bank to it." *Gryphon Domestic VI, LLC* v. *APP Int'l Fin. Co., B.V.*, 41 A.D.3d 25, 36, 836 N.Y.S.2d 4, 12 (N.Y. App. Div. 1st Dep't 2007) (internal quotation marks omitted).

on the books of Clearstream in Luxembourg. The district court concluded that this asset's location in Luxembourg is fatal to the plaintiffs' turnover claims. *Peterson II*, 2015 WL 731221, at *10, 2015 U.S. Dist. LEXIS 20640, at *31 ("The FSIA does not allow for attachment of property outside of the United States."). We disagree.

The FSIA does not by its terms provide execution immunity to a foreign sovereign's extraterritorial assets. See 28 U.S.C. §1609 ("[T]he property *in the United States* of a foreign state shall be immune from attachment arrest and execution . . . ." (emphasis added)). In *NML Capital*, the Supreme Court squarely rejected the argument that any common law execution immunity afforded to "a foreign state's extraterritorial assets" survived the enactment of the FSIA:

> [We identify] no case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. No surprise there. Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen?

134 S. Ct. at 2257 (holding that §1609 does not immunize "a foreign sovereign's extraterritorial assets" from post-judgment discovery).

Notwithstanding the Supreme Court's rhetorical observation, the question whether courts sitting in New York have the authority to execute against property in other countries arose in *Koehler,* 544 F.3d 78, in which we were asked to decide whether C.P.L.R. §5225(b) applies extraterritorially. There, a judgment creditor sought to execute against stock certificates owned by a judgment debtor but held in Bermuda by a third-party garnishee. *Id.* at 80-81. "The district court concluded that stock cer-

tificates in general must be located within the state in order to be attached . . . ." *Id.* at 86. On appeal, however, we found that this raised an important and unsettled question of state law; accordingly, we certified the issue to the New York Court of Appeals. *Id.* at 87-88.

The Court of Appeals accepted certification and, closely divided, "h[e]ld that a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee." *Koehler* v. *Bank of Berm. Ltd.*, 12 N.Y.3d 533, 541, 911 N.E.2d 825, 831 (2009). The court observed that "CPLR article 52 contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country." *Id.* at 539, 911 N.E.2d at 829. Turning to recent legislative amendments, the court determined that the New York State "[l]egislature intended CPLR article 52 to have extraterritorial reach." *Id.* The court's holding turned on the exercise of *in personam* jurisdiction; a court sitting in New York with personal jurisdiction over a party may order that party "to bring property into the state." *Id.* at 540, 911 N.E.2d at 830 ("[T]he key to the reach of the turnover order is personal jurisdiction over a particular defendant.").

Following *NML Capital*, 134 S. Ct. at 2256-57, the FSIA appears to be no impediment to an order issued pursuant to *Koehler* directing Clearstream—should the court have personal jurisdiction over it—to bring the Markazi-owned asset held in Luxembourg to New York State. Section 1604's grant of jurisdictional immunity applies only to "a foreign state," which Clearstream of course is not. 28 U.S.C. §1604. Section 1609's grant of execution immunity applies only to assets located "in the

United States," which the Luxembourg right to payment is not. 28 U.S.C. §1609. And, as noted, the Supreme Court's view set forth in *NML Capital* appears unequivocal: "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." 134 S. Ct. at 2256.

Each of the many cases cited by the defendants for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution were decided before the Supreme Court's decision in *NML Capital*, which made clear that such cases predating *NML Capital* are no longer binding on this discrete point. See *EM Ltd.* v. *Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012) ("We recognize that a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries."); *Aurelius Capital Partners, LP* v. *Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("[T]he property that is subject to attachment and execution must be property in the United States of a foreign state . . . ." (internal quotation marks omitted)). Following *NML Capital*, this body of former case law is of no help to the defendants. As the Supreme Court instructed, "even if [the defendants] were right about the scope of the common-law execution-immunity rule, then it would be obvious that the terms of §1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property '*in the United States*.'" *NML Capital*, 134 S. Ct. at 2257 (emphasis in original).

NML Capital and *Koehler* do not, however, affect our long-standing view that "[t]he FSIA provides the exclusive basis for obtaining subject matter jurisdiction *over a foreign state*." *Kirschenbaum*, 830 F.3d at 122 (emphasis added); see also *NML Capital*, 134 S. Ct. at 2256-58 (con-

cerning execution jurisdiction). Here, though, the putative exercise of *in personam* jurisdiction concerns Clearstream—the party in possession of the asset at issue—which is not itself a sovereign and therefore does not possess sovereign immunity.

Nonetheless, *NML Capital* and *Koehler*, when combined, do authorize a court sitting in New York with personal jurisdiction over a non-sovereign third party to recall to New York extraterritorial assets owned by a foreign sovereign. Had *Koehler* arisen in the context of an exercise of *in personam* jurisdiction over a foreign sovereign—it did not—the FSIA's grant of jurisdictional immunity would supersede contrary state law. See *Peterson*, 627 F.3d at 1130 (applying state law "insofar as it does not conflict with the FSIA"). As it was decided, however, *Koehler* does not appear to us to be inconsistent with the FSIA as interpreted by the Supreme Court in *NML Capital*.

At least one of our sister circuits has, without considering the issue in any detail, suggested the contrary conclusion: that even after *NML Capital*, a foreign sovereign's extraterritorial assets remain absolutely immune from execution. In *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), the Seventh Circuit remarked that before a foreign sovereign's assets are "even potentially subject to attachment and execution," it must be shown that the assets are "within the territorial jurisdiction of the district court." *Id.* at 475 (citing *NML Capital*, 134 S. Ct. at 2257 ("Our courts generally lack authority in the first place to execute against property in other countries . . . ."). The Seventh Circuit's comment is unavailing to the defendants here. As an initial matter, it is not evident that an exercise of *in personam* jurisdiction over a non-sovereign pursuant to *Koehler* is incon-

sistent with the Seventh Circuit's statement concerning the exercise of "territorial jurisdiction" in the context of an *in rem* proceeding. *Id.*; see also *Rubin* v. *Islamic Republic of Iran,* 33 F. Supp. 3d 1003, 1006 (N.D. Ill. 2014) ("Plaintiffs now seek to collect on [judgments against Iran] *by attaching* alleged assets of Iran . . . ." (emphasis added)), aff'd, 830 F.3d 470 (7th Cir. 2016), cert. granted, 137 S. Ct. 2326 (2017).

Moreover, we do not understand the Supreme Court's observation that "[o]ur courts generally lack authority in the first place to execute against property in other countries," *NML Capital*, 134 S. Ct. at 2257, to foreclose that possibility.[20] Indeed, Justice Scalia's observation was made in the context of noting that no court had ever before held that "a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts." *Id.* And as we have noted, even if such a rule had existed at common law, "it would be obvious that the terms of §1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property 'in the United States.'" *Id.* (emphasis in original). "So . . . §1609 execution immunity . . . [does] not shield . . . a foreign sovereign's extraterritorial assets." *Id.*

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[20] The Supreme Court observed that "a writ of execution . . . can be served anywhere within the state in which the district court is held." *NML Capital*, 134 S. Ct. at 2257 (alteration omitted) (quoting 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure §3013, p. 156 (2d ed. 1997) [hereinafter "Wright & Miller"]). That statement of law pertains to service and is not a barrier to a court's exercise of jurisdiction in accordance with the jurisdictional boundaries established by the state in which the court resides. See Wright & Miller §3012 ("Many questions that arise in the enforcement of a money judgment will not be answered in the federal statutes and resort must be had to state law. The relevant law is that of the state in which the district court is held.").

We think that the Supreme Court's decision in *NML Capital* counsels in favor of part of the reasoning suggested by the Ninth Circuit's decision in *Peterson*, 627 F.3d 1117, itself a pre-*NML Capital* case. There, judgment creditors of Iran sought to execute against "Iran's rights to payment from CMA CGM," a French shipping company indebted to Iran. *Id.* at 1121. The Ninth Circuit held that the right to payment was not "property in the United States" within the meaning of § 1610(a) and was, therefore, "immune from execution." *Id.* at 1130. The court appeared to reach that conclusion based on the FSIA itself, see *id.* (citing 28 U.S.C. § 1610(a)), which reasoning, as explained, was vitiated by *NML Capital*.

But the Ninth Circuit also turned to state law as directed by Federal Rule of Civil Procedure 69(a). *Id.* at 1130-31 (noting that "California enforcement law authorizes a court to 'order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due'" (quoting Cal. Civ. Proc. Code § 708.510(a))). In particular, the Ninth Circuit relied on *Philippine Export & Foreign Loan Guar. Corp.* v. *Chuidian*, 218 Cal. App. 3d 1058, 267 Cal. Rptr. 457 (6th Dist. 1990), for the proposition that "the location of a right to payment . . . is the location of the debtor," *Peterson*, 627 F.3d at 1131 (citing *Philippine Export*, 218 Cal. App. 3d 1058, 267 Cal. Rptr. 457). The state appellate court's decision in *Philippine Export* also held that California's state execution law does not apply extraterritorially. *Philippine Export*, 218 Cal. App. 3d at 1099, 267 Cal. Rptr. at 481. Citing that decision, the Ninth Circuit concluded that "a foreign state defendant's rights to payment from third-party debtors are assignable only if those 'debtors [] reside in the United States.'" *Peterson*,

627 F.3d at 1131 (quoting *Philippine Export*, 218 Cal. App. 3d at 1099, 267 Cal. Rptr. at 481).

Although the Ninth Circuit's decision appears to have rested on its pre-*NML Capital* understanding of the FSIA, its decision and citation to *Philippine Export* suggest an alternative approach that is in step with our reconciliation of *NML Capital* and *Koehler*. Were one to except the part of the Ninth Circuit's opinion that did not survive *NML Capital*, the principal difference between the Ninth Circuit's decision in *Peterson* and our disposition of this case might be viewed as one of state law. Compare *Philippine Export*, 218 Cal. App. 3d at 1099, 267 Cal. Rptr. at 480 (declining to exercise extraterritorial personal jurisdiction because, under California law, "the limits which generally exist upon the right to execute . . . apply in a judgment debtor proceeding such as this" (citing Cal. Civ. Proc. Code § 708.510 cmt. (West 1987) (Legislative Committee Comments, Assembly, 1982 Addition))), with *Koehler*, 12 N.Y.3d at 539, 911 N.E.2d at 829 (determining that the New York State "[l]egislature intended CPLR article 52 to have extraterritorial reach").

On remand, the district court should determine in the first instance whether it has personal jurisdiction over Clearstream.[21] If it answers that question in the affirmative, then the court should determine if a barrier exists to an exercise of *in personam* jurisdiction to recall to New

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[21] Although the district court concluded in *Peterson I* that it had general personal jurisdiction over Clearstream, *Peterson I*, 2013 WL 1155576, at *18-19, 2013 U.S. Dist. LEXIS 40470, at *87-91 (finding both general and specific personal jurisdiction), the district court explicitly declined in *Peterson II* to decide whether it did here, *Peterson II*, 2015 WL 731221, at *1, 2015 U.S. Dist. LEXIS 20640, at *4. We think it prudent for the district court to decide in the first instance whether personal jurisdiction over Clearstream exists in the context of the events relevant to this case.

York State the right to payment held by Clearstream in Luxembourg, whether for reasons of, *inter alia*, state law,[22] federal law, international comity,[23] or for any other reason.

Should that asset be recalled, it may, upon being produced in New York, qualify as an asset "*in the United States* of a foreign state" and, if so, it would be afforded execution immunity as such. 28 U.S.C. §1609 (emphasis added). Accordingly, the district court will likely be required to determine, if and when it reaches that juncture, whether the asset that comes to be "in the United States" is subject to the execution-immunity exceptions relied on by the plaintiffs, 28 U.S.C. §1610(a)(7), (g)(1); TRIA §201(a). The defendants should, of course, be permitted to raise appropriate rebuttals at that time if they so choose.

We are cognizant of the conundrum apparently posed by *NML Capital* and *Koehler* when read in tandem. The FSIA "aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.

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[22] Such barriers might include the "separate entity" doctrine. See *Motorola Credit Corp.* v. *Standard Chartered Bank*, 24 N.Y.3d 149, 21 N.E.3d 223 (2014).

[23] For example, "in the event that the district court concludes [on remand] that the exercise of personal jurisdiction over [Clearstream] is appropriate," the court may "undertake a comity analysis before ordering [Clearstream] to comply with the [putative order]." *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 138 (2d Cir. 2010). Such an analysis would likely follow "the framework provided by . . . the Restatement (Third) of Foreign Relations Law." *Id.* at 139. We leave it to the parties to develop and the district court to review the requisite record indicating whether "a court order will infringe on sovereign interests of a foreign state." *Id.*

1993) (internal quotation marks omitted). We are not at all sure that *NML Capital* when read in light of the law established by *Koehler* furthers that goal. But if we are correct in our analysis, any such problem is one for the Supreme Court or the political branches—not this Court—to resolve.[24] Here, we attempt only to apply the law as we find it: The authority of courts sitting in New York with personal jurisdiction over a non-sovereign third party to order that third-party garnishee to produce in New York an extraterritorial asset seems clear enough. *Koehler*, 12 N.Y.3d at 540, 911 N.E.2d at 830. Whether that extraterritorial asset is owned by a foreign sovereign is of no moment, because the FSIA's grant of execution immunity does not extend to assets located abroad. *NML Capital*, 134 S. Ct. at 2257.

Moreover, we think that the two-step process called for by these cases—first recalling the asset at issue, and second, proceeding with a traditional FSIA analysis—is unlikely to open the proverbial floodgates to a wave of turnover claims seeking to execute against heretofore-unreachable extraterritorial assets. Even if those assets are in the possession of a third party over whom or which a court sitting in New York has personal jurisdiction, those assets still must not be subject to execution immunity upon being recalled to New York State. In that respect, the FSIA contains several limiting principles, such as the requirement that any asset subject to execution

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[24] The Supreme Court noted that its decision in *NML Capital* might present "worrisome international-relations consequences," "provoke reciprocal adverse treatment of the United States in foreign courts," or "threaten harm to the United States' foreign relations more generally." *NML Capital*, 134 S. Ct. at 2258 (internal quotation marks omitted). It nonetheless expressed the view that "[t]hese apprehensions are better directed to that branch of the government with authority to amend the Act." *Id.* We are similarly constrained.

must have been "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Similarly, the TRIA contains its own limiting provisions, including the requirement that any asset subject to turnover be "blocked," a term of art imbued with precise meaning. TRIA § 201(a); see also *Smith* v. *Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 267-69 (2d Cir. 2003) (defining "blocked" in the context of the TRIA). These and other constraints have frequently proven to be barriers to execution on foreign sovereign assets. See, *e.g.*, *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 999 (2d Cir. 2014) (holding that attachment was unavailable under the TRIA because North Korea was not "designated as a state sponsor of terrorism under . . . the Export Administration Act of 1979 . . . or . . . the Foreign Assistance Act of 1961" at the time of judgment (internal quotation marks omitted)); *Hausler* v. *JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014) (per curiam) (determining that the property at issue did not qualify as the "blocked asset of" a foreign sovereign); *Aurelius Capital Partners*, 584 F.3d at 130-31 (holding that assets were not subject to execution under the FSIA because the assets at issue were not "used for a commercial activity," as required by the Act); *Bank of N.Y.* v. *Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (per curiam) (concluding that the assets at issue were not "blocked assets" subject to turnover under the TRIA).

Indeed, these or other limitations may ultimately prevent the plaintiffs in this case from obtaining turnover of the asset at issue, should it be recalled to New York State pursuant to an exercise of the court's *in personam* jurisdiction. As but one example, one of the defendants argues on appeal that the asset at issue does not qualify for the execution-immunity exceptions enumerated in 28

U.S.C. § 1610(a) because it was not "used for a commercial activity in the United States." UBAE Br. at 37-39. Whether that is so is independent of whether the asset comes to be located "in the United States." See 28 U.S.C. § 1610(a) ("The property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, . . . if [additional specified requirements are satisfied]."). While we need not, and therefore do not, consider the applicability of these barriers at this time, we wish to make clear that the plaintiffs are by no means assured success upon remand.

CONCLUSION

To summarize, for the foregoing reasons, we conclude as follows:

1. Plain error as to the application of the Clearstream settlement agreement to those plaintiffs who were not parties to *Peterson I* requires vacatur of the judgment of dismissal and remand with respect to those plaintiffs' non-turnover claims brought against Clearstream.
2. Excepting those plaintiffs who were not parties to *Peterson I*, the Clearstream settlement agreement released the plaintiffs' non-turnover claims brought against Clearstream. The district court therefore properly dismissed those claims.
3. Whether the UBAE settlement agreement is applicable to the plaintiffs' non-turnover claims brought against UBAE is, under the language of the agreement, unclear. Those claims were, therefore, dismissed by the district court in error. Accordingly, we vacate and remand that part of the district court's judgment of dismissal.

4. The UBAE settlement agreement did not release the plaintiffs' non-turnover claims brought against Markazi. Accordingly, we vacate and remand that part of the district court's judgment of dismissal.

5. The district court correctly determined that the asset at issue is a right to payment held by Clearstream in Luxembourg. It also, therefore, properly dismissed JPMorgan from this action.

6. The district court prematurely dismissed the amended complaint for lack of subject-matter jurisdiction. *Cf. Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Koehler* v. *Bank of Berm. Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825 (2009). On remand the district court should consider whether it has personal jurisdiction over Clearstream. If the court answers that question in the affirmative, then it should determine whether any provision of state or federal law prevents the court from recalling, or the plaintiffs from receiving, the asset.

Accordingly, we AFFIRM the district court's judgment in part, VACATE it in part, and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NO. 13-CV-9195 (KBF)

DEBORAH D. PETERSON, *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN; BANK MARKAZI A/K/A CENTRAL BANK OF IRAN; BANCA UBAE SPA; CLEARSTREAM BANKING, S.A.; AND JP MORGAN CHASE BANK, N.A.,

Defendants.

OPINION & ORDER

FEBRUARY 19, 2015

KATHERINE B. FORREST, District Judge:

On December 30, 2013, plaintiffs—judgment-creditors of the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS")—commenced the instant action against Iran, Bank Markazi a/k/a Central Bank of Iran ("Bank Markazi" or "Markazi"), Banca UBAE S.p.A. ("UBAE"), Clearstream Banking, S.A. ("Clearstream"), and JP Morgan Chase Bank, N.A. ("JPM"). (ECF No. 1.)[1] Deborah Peterson, the

[1] Plaintiffs filed an amended complaint, dated April 25, 2014, on July 24, 2014. (ECF No. 104 ("Am. Compl.").)

first listed plaintiff, is just one of the numerous plaintiffs who were victims, or are family members of victims, of the 1983 bombing of the U.S. Marine Barracks in Beirut, Lebanon.[2] Each plaintiff group has obtained a judgment against Iran and MOIS as sponsors of the Beirut bombing, in amounts ranging from more than $800 million to over $2 billion. Each of the judgments has been duly registered in this district. (See Am. Compl. ¶¶39-43.)

Plaintiffs assert the following claims in the Amended Complaint:

- Count One: against Bank Markazi for a declaratory judgment;
- Counts Two and Three: against all defendants except for JPM for rescission of fraudulent conveyances;
- Counts Four, Five, and Six: against all defendants for turnover;
- Count Seven: against Clearstream and Bank Markazi for rescission of fraudulent conveyance; and
- Count Eight: against all defendants for equitable relief.

Plaintiffs allege that Clearstream is in possession of assets valued at over $1.6 billion, representing proceeds of bonds beneficially owned by Bank Markazi. (See Am. Compl. ¶3; Declaration of Liviu Vogel dated July 11, 2014 ("Vogel Decl.") ¶3.) According to plaintiffs, JPM in New York received the bond proceeds into one of its accounts, and these proceeds legally remain on deposit with JPM and are therefore subject to turnover. Defendant JPM

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[2] The full list of plaintiffs is set forth at Exhibit A to the Amended Complaint.

alleges that it never knew that any proceeds with which it credited Clearstream were connected to Bank Markazi, and that in any event the money is long gone and JPM has no role in this dispute. Clearstream argues that plaintiffs previously settled with Clearstream whatever claims they may have had as to these funds and the account against which they were credited, and that in all events, it does not maintain any of the funds with which JPM once credited it in New York—all funds have been transferred and all client transactions relating to the proceeds are on Clearstream's books in Luxembourg. Bank Markazi asserts that its account is with UBAE outside of the United States and that this Court therefore lacks jurisdiction over Bank Markazi under the Foreign Sovereign Immunities Act ("FSIA"). Finally, UBAE argues that it also previously entered into a settlement releasing the instant claims, and that while it holds an account for Bank Markazi's benefit with Clearstream, such account is maintained in Luxembourg, and this Court lacks any basis for personal jurisdiction over UBAE in this district.

Before the Court are motions by each defendant for dismissal. While the parties raise numerous arguments, there is really little complexity to this matter: plaintiffs released the instant claims against Clearstream and UBAE, there is nothing left in the Clearstream account at JPM for JPM to "turn over," and this Court lacks subject-matter jurisdiction over Bank Markazi as to assets located abroad. Accordingly, as set forth below, defendants' motions are GRANTED.

I. FACTUAL BACKGROUND

Plaintiffs have substantial outstanding judgments against Iran and MOIS. They have been pursuing collection on those judgments in this and other courts in vari-

ous jurisdictions since those judgments were obtained. This action arises from these ongoing collection efforts.

In June 2008, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") responded to a subpoena served in connection with plaintiffs' efforts to collect on their judgments against Iran. (Am. Compl. ¶46.) OFAC's response indicated that "an Iranian government client" maintained an interest in bonds with a face amount of $2,003,000,000. (*Id.*) Referred to as the "Original Assets" in this litigation, the subject bonds were held on Clearstream's books and records and maintained in a sub-custodial account with Citibank.[3] (See *id.*) Subsequent information provided by OFAC in April 2010 indicated that the subject bonds were "apparently owned by the Central Bank of Iran." (*Id.* ¶47.) Plaintiffs sought and obtained turnover of the Original Assets (amounting to approximately $1.75 billion) in a judgment entered by this Court on July 9, 2013, and affirmed by the Second Circuit on July 9, 2014.

The instant lawsuit relates specifically to additional assets plaintiffs allege are also present in New York, re-

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[3] The Peterson Judgment Creditors immediately sought and obtained issuance of an Execution upon these bonds (the "First Execution"); a Second Execution was served on Clearstream on October 27, 2008. (See Am. Compl. ¶¶48, 50.) Plaintiffs served Clearstream with a restraining notice in June 2008; that restraining notice was extended in July 2009 and remains in effect. (See *id.* ¶¶51, 52.) The effect of the First and Second Executions and restraining notices was to restrain the Original Assets. (See *id.* ¶53.) Plaintiffs obtained a turnover order as to the Original Assets in 2013, affirmed by the Second Circuit on July 9, 2014. See *Peterson* v. *Islamic Republic of Iran*, No. 10 CIV. 4518 KBF, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013) ("*Peterson I*"), recons. denied, 2013 WL 2246790 (S.D.N.Y. May 20, 2013); *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185 (2d Cir. 2014).

ferred to here as the "Remaining Assets." Plaintiffs assert that the Remaining Assets amount to over $1.6 billion in proceeds attributable to bonds (the "Remaining Bonds") which Bank Markazi maintained with Clearstream and which Clearstream had in turn sub-custodized with JPM in New York. (See Am. Compl. ¶3.) The parties do not contest that the Remaining Assets exist in approximately the amount alleged, that Bank Markazi is the Central Bank of Iran, that it was also the beneficial owner of the Remaining Bonds and is now the beneficial owner of the Remaining Assets. Finally, the parties do not dispute that UBAE has an account with Clearstream in Luxembourg which it maintains for Bank Markazi.[4] The parties vigorously dispute whether the Remaining Assets are in a Clearstream account maintained by JPM in New York; whether the Remaining Assets are anything more than book entries maintained by Clearstream in Luxembourg; and finally, whether if, once JPM credited Clearstream with the Remaining Assets (which occurred at various times) Clearstream did in fact manage to transfer them from New York to Luxembourg via book entry, it should now be required to reverse those entries. The mechanics of the actions relating to the Remaining Assets are as follows:

Prior to February 2012, approximately $1.4 billion in proceeds relating to the Remaining Bonds was paid to JPM and JPM in turn credited that amount to Clearstream. Approximately $104 million was later also trans-

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[4] Plaintiffs allege that Clearstream, Bank Markazi, and UBAE agreed to transfer the Remaining Assets from Bank Markazi to UBAE prior to changes in U.S. law which restricted the movement and transfer of Iranian assets. According to plaintiffs, Clearstream opened an account for UBAE in Luxembourg for this purpose. (See Am. Compl. ¶¶ 10-11.)

ferred in the same manner. (See Vogel Decl. ¶12.) The banking transactions occurred in various steps. As an initial matter, the Remaining Bonds were issued by sovereigns such as the European Investment Bank. (Am. Compl. ¶137.) Owners of beneficial interests in the types of bonds that constituted the Remaining Assets generally do not receive physical certificates evidencing their interest. (*Id.* ¶139.) Rather, the owner's interest is reflected in book-entry form. (*Id.*)

The prospectuses for the Remaining Bonds required Clearstream, as custodian for its customers who held the beneficial interests in those bonds, to accept payment of interest and redemption proceeds into an account at a bank located in New York. (Vogel Decl. ¶3(a).) The prospectus for one of the Remaining Bonds states:

> Beneficial interests in the Global Notes will be shown on, and transfers thereof will be effected only through, records maintained in book-entry form by . . . Clearstream, Luxembourg . . . .
>
> Payments shall be made in U.S. dollars by cheque drawn on a bank in New York City and mailed to the holder . . . .
>
> Each of the persons in the records of . . . Clearstream, Luxembourg . . . as the holder of a Note represented by a Global Note must look solely to . . . Clearstream, Luxembourg . . . for his share of each payment made by H.M. Treasury to the holder of such Global Note and in relation to all other rights arising under the Global Note . . . .

(*Id.* ¶38.)

Clearstream maintains an account at JPM into which it receives funds on behalf of numerous clients; over the course of a four-year period spanning from 2008 into

2012, proceeds relating to the Remaining Bonds went into this account. (See Declaration of Gauthier Jonckheere dated August 5, 2014 ("Jonckheere Decl.") ¶4.)

On January 17, 2008, Markazi opened an account with UBAE to act as its custodial bank in connection with its securities positions at Clearstream. (See Vogel Decl. ¶19.) The next day, UBAE sent an "URGENT" electronic message to Clearstream instructing it to open a new account in UBAE's name.[5] (*Id.*) Clearstream opened account no. 13061 for UBAE that same day. (*Id.*) Thereafter, Markazi instructed Clearstream to transfer $4.6 billion in securities from its account at Clearstream to UBAE's 13061 account.[6] (*Id.*) Among the assets transferred in this manner were those which are the subject of the instant lawsuit. (*Id.*)

On June 16, 2008, plaintiffs served a restraining notice on Clearstream, which should have had the effect of preventing Clearstream from transferring any property in which Bank Markazi had an interest out of the United States. (See Am. Compl. ¶¶51, 53.)

On June 5, 2009, Clearstream informed UBAE that, due to laws passed in the United States, it could no longer process transactions for bonds held on behalf of Iran using the services of a U.S. person—that is, JPM. (Vogel Decl. ¶29.) Clearstream stated that, as a result, it had

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[5] Prior to this instruction, UBAE had maintained a single account with Clearstream which it had opened in 1973. (Vogel Decl. ¶19.)

[6] Plaintiffs assert that such transfer was made free of any payment by UBAE. (See Am. Compl. ¶11; Vogel Decl. ¶19.) As UBAE does not contest that the securities in the UBAE account are held for Markazi's benefit (see UBAE's Objections and Responses to Plaintiffs' Interrogatories ¶8, Vogel Decl. Ex. 25), the existence of payment or other form of consideration is irrelevant to the instant motions.

opened up a "sundry blocked account 13675" and that this account would hold cash payments received by Clearstream in connection with the Markazi securities it held. (See *id.*)

Thereafter, Clearstream credited the 13675 account with proceeds relating to the Remaining Bonds—totaling $1,683,184,679.47 as of May 2013. (See *id.* ¶32.) It is evident from records produced by Clearstream that these proceeds are denominated in U.S. dollars. (See *id.*) No party disputes that in the absence of the block that Clearstream had imposed, Clearstream would have credited UBAE's 13061 account with the same proceeds. But nor can any party dispute that this is counterfactual; proceeds from the Remaining Bonds were never credited to the 13061 account and were instead credited and blocked in the 13675 account. No party disputes that neither UBAE nor Markazi has received any of these funds and that Clearstream's obligation with respect to the underlying financial assets associated with the Remaining Bonds remains outstanding. (See *id.* ¶42.)

UBAE is organized under the laws of Italy and operates principally as a trade bank. (Declaration of Mario Sabato dated July 18, 2014 ("Sabato Decl.") ¶2.) As of December 2013, when this lawsuit was first filed,[7] UBAE did not transact business, have customers, advertise, solicit business, or market services in New York or any-

[7] Personal jurisdiction is determined as of the date the original complaint was served. See *Indymac Mortgage Holdings, Inc.* v. *Reyad*, 167 F. Supp. 2d 222, 232 (D. Conn. 2001) ("It is well established that jurisdiction is to be determined by examining the conduct of the defendants as of the time of service of the complaint." (quoting *Greene* v. *Sha-Na-Na*, 637 F. Supp. 591, 595 (D. Conn. 1986)) (internal quotation marks omitted)); see also *Ginsberg* v. *Gov't Properties Trust, Inc.*, No. 07 CIV. 365 CSHECF, 2007 WL 2981683, at *6 (S.D.N.Y. Oct. 11, 2007).

where else in the United States. (*Id.* ¶3.) As of that date, it did not have any employees, officers, or directors in the United States. (*Id.*) UBAE was not listed on any U.S. stock exchange. (*Id.*) Until 2009, UBAE had maintained an account with HSBC in New York and used that account to facilitate international transactions or money transfers for itself and its customers. (*Id.* ¶5.) This HSBC account was one of the bases for this Court's determination in *Peterson I* that UBAE was amenable to jurisdiction. See *Peterson*, 2013 WL 1155576, at *16-18; *Peterson*, 2013 WL 2246790, at *6. The HSBC account was closed on September 25, 2009. (Sabato Decl. ¶6.) None of the transactions at issue in the Amended Complaint occurred via the HSBC account. (*Id.* ¶5.) All of UBAE's acts in relation to the Remaining Bonds and Remaining Assets have occurred with Clearstream in Luxembourg. (*Id.*)

On January 23, 2012, UBAE opened a correspondent account with JPM in New York. (*Id.* ¶6.) None of the transactions at issue in the instant lawsuit went through that account. (*Id.*)

II. DISCUSSION

Clearstream and UBAE seek dismissal on the basis that plaintiffs' claims were released as part of separate settlements in connection the *Peterson I* litigation. They are correct. While the settlement agreements entered into between plaintiffs and these two parties differ in certain respects, the ultimate result is the same: plaintiffs' claims here are foreclosed. As to UBAE, plaintiffs released it from any action save a turnover action. Since the Remaining Assets are no longer in this district, turnover is not an available remedy. As to Clearstream, plaintiffs entered into a covenant not to sue with regard to any assets in the 13675 account; they may only sue for

turnover and a ministerial action in connection therewith—which is far from the claims pursued here.

A. Clearstream

On October 23, 2013,[8] Clearstream and the plaintiffs settled all claims, with a limited exception discussed below. The Clearstream Settlement Agreement contains the following WHEREAS clauses:

> WHEREAS, on June 16, 2008, Citibank moved for an order to show cause why the Restraints should not be vacated, and on June 27, 2008, the Court vacated the Restraints with respect to certain Assets nominally valued at approximately $250,000,000 that were no longer in the possession of Citibank (the "Transferred Assets"), but left the Restraints in place with respect to assets valued at approximately $1,750,000,000 (the "Restrained Assets"); and
>
> . . .
>
> WHEREAS, on June 8, 2010, the Peterson Plaintiffs filed a complaint . . . seeking, *inter alia*, turnover of the Restrained Assets . . .
>
> . . .
>
> WHEREAS, certain Plaintiffs have asserted claims in Peterson for avoidance or damages against Clearstream with regard to the Transferred Assets, including, but not limited to, claims for fraudulent conveyance, tortious interference with the collec-

[8] The Clearstream Settlement Agreement was signed earlier, but it became effective on October 23, 2013, after being ratified by a specified number of plaintiffs. (Memorandum of Law in Support of Clearstream's Motion to Dismiss the Amended Complaint at 2 n.1, ECF No. 98.)

> tion of a money judgment, and prima facie tort (the "Peterson Direct Claims"); and
>
> . . .
>
> WHEREAS, on February 28, 2013, the Court issued an Opinion and Order that, *inter alia*, granted the Turnover Motion . . .

(See Settlement Agreement ("Clearstream Agr.") at 1-2, Vogel Decl. Ex. 6.)

The Clearstream Settlement Agreement also recited the then-pending appeal to the Second Circuit of the Court's February 28 Opinion & Order (as well the Court's denial of a motion for reconsideration). (*Id.* at 2-3.) The final WHEREAS clause states:

> WHEREAS, Plaintiffs and Clearstream wish to resolve all of the disputes and claims between them for good and valuable consideration
>
> . . .

(*Id.* at 3.)

Paragraph 1 of the Agreement contains provisions relating to the termination of the litigation to which the Agreement referred in the WHEREAS clauses. (See *id.* ¶1.) Paragraph 2 of the Agreement is entitled "Ratification By Plaintiffs and Covenant Not To Sue." (See *id.* ¶2.) This section consists of a series of provisions reciting that each plaintiff is to execute a "Ratification Agreement." By executing a Ratification Agreement, each plaintiff "ratifies and agrees to be legally bound by the terms" of the Clearstream Settlement Agreement. (*Id.* ¶2(i).) (The UBAE Settlement Agreement contains no equivalent procedure.[9]) In addition, each plaintiff agrees

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[9] The UBAE Settlement Agreement states that it "is entered into by and among the judgment creditors in the actions listed on Annex A

not to sue Clearstream in law or in equity for any claims other than certain defined "Direct Claims." (See *id.* ¶2(ii).) The covenant not to sue concerns enumerated "Covered Subjects." The Covered Subjects include claims in the *Peterson I* litigation, and:

> (b) any account maintained at Clearstream . . . by or in the name of or under the control of any Iranian Entity . . . or any account maintained at Clearstream or at any Clearstream Affiliate by or in the name of or under the control of UBAE, including but not limited to, accounts numbered . . . 13061 . . . 13675 . . . (each an "Account") or any asset or interest held in an Account in the name of an Iranian Entity (an "Iranian Asset"); [as well as]
>
> (c) any transfer or other action taken by or at the direction of any Clearstream Party, Citibank, or any Iranian Entity, including any transfer or other action in any account, including a securities account or cash account or omnibus account or correspondent account maintained in Clearstream's name or under its control, that in any way relates to any Account or any Iranian Asset.

(*Id.* ¶2(ii)(b), (c).) Paragraph 2 further provides that each plaintiff, independently or through counsel, performed "an independent inquiry as to the facts and law upon which the Actions are based" and "nevertheless wishes to resolve any dispute or claim with the Clearstream Parties," and such resolution will be unaffected by later discovery of any new facts. (*Id.* ¶2(iii).) The key issue here is whether this broad covenant encompasses

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(the 'Plaintiffs'), by their attorneys." (Confidential Settlement Agreement ("UBAE Agr.") at 1, Declaration of John J. Zefutie, Jr. dated July 22, 2014 ("Zefutie Decl.") Ex. 2.)

the claims in the instant action. This is resolved by reference to the carve-out provision contained in paragraph 4 of the Agreement. That paragraph provides:

> **Garnishee Actions**. Notwithstanding the provisions of paragraph 2 of this Agreement, the Covenant shall not bar any action or proceeding regarding (a) the rights and obligations arising under this Agreement, or (b) efforts to recover any asset or property of any kind, including proceeds thereof, that is held by or in the name, or under the control, or for the benefit of, Bank Markazi or Iran . . . in an action against a Clearstream Party **solely** in its capacity as a garnishee (a "Garnishee Action.") Such a Garnishee Action may include, without limitation, an action in which a Clearstream Party is named solely for the purpose of seeking an order directing that a Clearstream Party perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer under any legal or equitable theory, **provided however** that such a Garnishee Action shall not seek an award of damages against a Clearstream Party.

(*Id.* ¶4 (emphasis in original).)

Plaintiffs argue that the Clearstream Settlement Agreement specifically carves the claims against Clearstream in the instant action out of the settlement. Paragraph 4 carves out one type of claim—a "Garnishee Action." As defined in that Agreement, such an action could include a request for an order that Clearstream take an action to reverse a transfer between other parties that is found to have been a fraudulent conveyance. This provision does not allow plaintiffs to bring a fraudulent con-

veyance or equitable action.[10] Indeed, the wording with respect to the fraudulent conveyance action is in the past tense—indicating that a Garnishee Action, with the requested order, would follow a prior determination of fraudulent conveyance. Accordingly, the claims plaintiffs assert against Clearstream in Counts Two, Three, Seven, and Eight must be dismissed for this reason alone.[11]

The turnover claims against Clearstream—asserted in Counts Four, Five, and Six—also fail. As a matter of law, a turnover action must be brought against a party who is "in possession or custody" of money or other personal property in which a creditor has an interest. See N.Y. C.P.L.R. § 5225; *Commonwealth of N. Mariana Islands* v. *Canadian Imperial Bank of Commerce*, 990 N.E.2d 114, 116-17 (N.Y. 2013). It is a classic *in rem* action. See *RCA Corp.* v. *Tucker*, 696 F. Supp. 845, 851 n.4 (E.D.N.Y. 1988) ("[T]urnover proceedings . . . are in fact actions *in rem*."). The Court may not direct an entity to "turn over" assets that are not in its actual possession or custody, even if the assets may be said to be within its "control." See *Commonwealth of N. Mariana Islands*, 990 N.E.2d at 116-17. An action which seeks an order granting relief with regard to *potential* assets, including to reverse transfers which would result in the presence of assets, is not a turnover action.

In the instant case, the records before the Court are clear: JPM received proceeds relating to the Remaining Bonds, which it credited to a Clearstream account at

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[10] Count Eight asserts a claim for equitable relief.

[11] Notably, the language regarding plaintiffs' ability to seek an order directing Clearstream to reverse a transfer refers to a fraudulent conveyance found between "other parties." In the instant lawsuit, plaintiffs seek to assert fraudulent conveyance claims against Clearstream itself.

JPM. Whether it should have or should not have, Clearstream in turn credited amounts attributable to the Remaining Bonds to the UBAE/Bank Markazi account in Luxembourg. The JPM records are clear that whatever happened to the proceeds, they are gone. There are numerous days in which the Clearstream account at JPM showed a zero or a negative balance. (See Jonckheere Decl. ¶5.) As a matter of law, there is no asset in this jurisdiction to "turn over." Could this Court require Clearstream to reverse its own transfer? Not under the Settlement Agreement; such an action is not the type of action as to "others" anticipated by paragraph 4 of the Clearstream Settlement Agreement.

Plaintiffs have a slightly more nuanced argument with regard to proceeds which JPM received on Clearstream's behalf subsequent to issuance of Executive Order ("E.O.") 13599 on February 5, 2012.[12] Section 1 of that E.O. states, in relevant part:

> (a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.
>
> (b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign

[12] The E.O. went into effect on February 6, 2012.

> branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order. No. 13599, 77 Fed. Reg. 6659, 6659 (2012).

There is no dispute that $104 million of the Remaining Proceeds was credited by JPM to Clearstream subsequent to the issuance of this Executive Order. It may be, therefore, that when Clearstream received that $104 million, which related to interests of Iran (via its central bank, Bank Markazi), it should not have credited account 13675 outside of the United States, and that in so doing it violated this Executive Order. However, plaintiffs have no private right of action for a violation of this Executive Order. Section 12 of the E.O. explicitly states that it does not "create any right or benefit, substantive or procedural, enforceable at law or in equity" against any person. Exec. Order. No. 13599, 77 Fed. Reg. at 6661. The Second Circuit has also held that "Executive Orders cannot be enforced privately unless they were intended by the executive to create a private right of action." *Zhang* v. *Slattery*, 55 F.3d 732, 748 (2d Cir. 1995) (citations omitted). In any event, an action to enforce E.O. 13599 is not a type of action anticipated by paragraph 4 of the Clearstream Settlement Agreement. The Agreement is unambiguous that plaintiffs released all claims to accounts 13061 and 13675 except for a Garnishee Action. A claim as to a violation of the E.O. is not that.

Plaintiffs also assert that because of the existence of E.O. 13599, the book entries Clearstream made on its Luxembourg books for the benefit of UBAE and Bank Markazi are void; and—the argument goes—since they are "void," that $104 million is, as a matter of law, deemed to be within Clearstream's JPM account in New York. Plaintiffs refer to 31 C.F.R. §560.212(a), which provides that transfers of blocked property shall be

deemed null and void.[13] However, if a transferor meets certain requirements set forth in subpart (d) of that section, they are not null and void. See *id.* § 560.212(d).[14]

Whether plaintiffs may sue for a declaration that such transfers are void, or sue based on the assumption that such transfers are void, is irrelevant to the outcome of this motion because the covenant not to sue encompasses such claims. In effect, plaintiffs want to assert an action against Clearstream in two steps: (1) seek a declaration that any transfer made to UBAE's account in Luxembourg is void, and (2) once the transfer is deemed void, the assets would revert to the United States and be subject to turnover. The first of these two steps is necessary—and it is foreclosed by the covenant not to sue. The first step directly implicates the transfer into account 13675—the very account as to which plaintiffs agreed not to sue. (See Clearstream Agr. ¶ 2(ii)(b).) The Direct Claims which are released are those concerning account 13675. Moreover, paragraph 2(ii)(c) of the Clearstream Settlement Agreement explicitly grants a release

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[13] 31 C.F.R. § 560.212(a) states:

> Any transfer after the effective date that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 560.211, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests.

[14] In accordance with § 560.212(d), JPM sent a letter to OFAC "reporting its limited knowledge of the circumstances underlying the transfer of the Blocked Proceeds out of Clearstream's operating account on October 15, 2012, and explaining why [JPM] could not have known that that transfer may have been subject to Iranian sanctions regulations." (Jonckheere Decl. ¶ 14.) As of December 12, 2014, OFAC has not responded to JPM's letter.

concerning "any transfer or other action taken by or at the direction of any Clearstream Party . . . including any transfer or other action in any account . . . maintained in Clearstream's name or under its control, that in any way relates to any Account or any Iranian Asset." (*Id.* ¶2(ii)(c).)

To the extent plaintiffs seek to simply assert, without any legal declaration, that a Clearstream transfer violated §560.212 and the Court may assume that is correct, that is wishful thinking. To establish how the transfer occurred, to what it related and where it occurred as a matter of law, are all aspects of what would need to be reviewed in connection with such a legal/judicial determination. Plaintiffs released their right to seek such a declaration. Only after a legal determination has been made that Clearstream in fact violated E.O. 13599 could such a Garnishee Action be ripe. As it stands, the number of steps to arrive at the point at which Clearstream would have to unwind—or be deemed to unwind—any transfer are many and are outside of the scope of the carve-out provision.

In addition, insofar as plaintiffs' claim would then be one for damages against Clearstream—for violating the E.O. and removing the $104 million from this jurisdiction—plaintiffs specifically settled that claim as well. In this regard, paragraph 4 of the Clearstream Settlement Agreement states, "provided however that such a Garnishee Action shall not seek an award of damages against a Clearstream Party." (Clearstream Agr. ¶4.)

Following full briefing and oral argument on this motion, plaintiffs raised a new argument with regard to the Clearstream Settlement Agreement: that certain plaintiffs herein have not signed the required Ratification Agreements. This argument is clearly an afterthought

and is without merit. Counsel for all plaintiffs signed the Clearstream Settlement Agreement. As of the date of this Opinion & Order, plaintiffs have informed Clearstream that they have received Ratification Agreements from 93% of all plaintiffs. (See Letter from Liviu Vogel dated October 2, 2014, ECF No. 150.) Counsel for plaintiffs and Clearstream have both represented to the Court that while all plaintiffs have not yet executed the Ratification Agreements, none of them has declined to do so. (See Letter from Karen E. Wagner dated September 29, 2014, ECF No. 140; Stipulation and Order at 3 ("[C]ounsel for plaintiffs has represented and warranted to Clearstream that no Plaintiff . . . has indicated that he or she does not intend to execute a Ratification Agreement."), ECF No. 552 in 10-cv-4518.) Several months have passed since the last letter on this subject, and the Court has not received any different information. Receipt of fully executed Ratification Agreements appears to be a matter of logistics. It is clear is that the parties to the Clearstream Settlement Agreement are proceeding on the assumption that the Agreement is binding—though the instant dispute indicates a difference of view as to scope. Plaintiffs have not so much as suggested that a single plaintiff has refused to sign the Ratification Agreement, and it is undisputed that the percentage of Ratification Agreements which needed to have been received in order for the settlement to become effective has been received.

B. UBAE

Plaintiffs settled with UBAE on November 28, 2013. The UBAE Settlement Agreement does not contain a provision for separate ratification; it was entered into by counsel on behalf of their respective clients. The Agreement was effective upon execution.

The UBAE Settlement Agreement also contains a series of WHEREAS clauses. Importantly, it specifically acknowledges that "the Parties agree that certain assets remain in an account at Clearstream in a UBAE customer account, that are beneficially owned by Bank Markazi (the 'Remaining Assets')." (UBAE Agr. at 2.) In this Agreement, plaintiffs agreed to release:

> UBAE and all of its past, present, and future affiliates, owners, directors, members, officers, employees, law firms, attorneys, predecessors, successors, beneficiaries, assigns, agents, and representatives from any and all liability, claims, causes of action, suits, judgments, costs, expenses, attorneys' fees, or other incidental or consequential damages of any kind, whether known or unknown, arising out of or related to the Plaintiffs' Direct Claims against UBAE, except for the obligations stated in this Settlement Agreement.

(*Id.* ¶1.) There is no dispute that Bank Markazi constitutes a "beneficiary" of UBAE. Plaintiffs have made that assertion repeatedly. (See, *e.g.*, Am. Compl. ¶12 ("UBAE's sole value was its willingness to serve as a front for Markazi."); *id.* ¶33 ("UBAE opened [the UBAE/Markazi Account] exclusively for Markazi's benefit and at the direction of Markazi and Iran.").) Thus, the release encompasses Bank Markazi to the same extent that it does UBAE. Moreover, in the UBAE Settlement Agreement, plaintiffs further agreed that "any future claim against UBAE for the Remaining Assets shall be limited to turnover only, and Plaintiffs waive all other claims against UBAE for any damages regarding the Remaining Assets whether arising in contract, tort, equity, or otherwise." (UBAE Agr. ¶5.)

The instant lawsuit contains numerous claims not purporting to be turnover: Count One seeks a declaratory judgment; Counts Two, Three, and Seven seek rescission of fraudulent conveyances;[15] Count Eight seeks equitable relief. These counts are explicitly barred by the UBAE Settlement Agreement. Only Counts Four through Six are denominated as turnover claims.

As a matter of law, a turnover action is one in which an asset is both within the jurisdiction of the Court[16] and in the possession or custody of the party against whom turnover is sought. There is no assertion that UBAE

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[15] Plaintiffs have entitled these counts as claims for "rescission" for fraudulent conveyance, presumably to try and fit within paragraph 4 of the Clearstream Settlement Agreement (which allows for a claim that Clearstream take an action to reverse a transfer). Rescission is a remedy, not an independent cause of action. See *Zola* v. *Gordon*, 685 F. Supp. 354, 374 (S.D.N.Y. 1988). Read liberally, these counts instead assert claims for fraudulent conveyance. Such an action is not a "Garnishee Action" as defined in paragraph 4. As explained above, the "action" that plaintiffs may seek to require Clearstream to take under paragraph 4 must follow a separate judicial determination of fraudulent conveyance. (See Clearstream Agr. ¶ 4 (permitting an action to direct a Clearstream Party to "perform an act that will have the effect of reversing a transfer between other parties that is found to have been a fraudulent transfer").)

[16] The fact that "turnover actions" are carved out of the UBAE Settlement Agreement cannot eliminate the requirement that sufficient facts support this Court's subject-matter jurisdiction. As discussed in Section II.C *infra* with regard to the FSIA, the fact that the Remaining Assets are credited to an account located in Luxembourg places those assets outside of the reach of the FSIA. See 28 U.S.C. § 1609; *EM Ltd.* v. *Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012), aff'd *sub nom. Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Aurelius Capital Partners, LP* v. *Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). The same fact—a lack of assets in this jurisdiction—is a basis for dismissal of the turnover claims against UBAE.

maintains any bank account within this Court's jurisdiction into which any of the Remaining Assets were deposited or against which they were credited. The facts in this regard are quite clear: whatever account UBAE maintains for Bank Markazi is in Luxembourg. Thus, any Remaining Assets which it may possess or as to which it has rights or an interest, are in Luxembourg. Plaintiffs' assertions to the contrary are without merit and without basis in fact. Thus, on this basis alone, UBAE is dismissed from this lawsuit.

C. Bank Markazi

Plaintiffs seek a variety of relief against Bank Markazi. As discussed above, the release that plaintiffs provided to UBAE covers Bank Markazi (as UBAE's beneficiary). Thus, plaintiffs' claims must be dismissed as to Bank Markazi for this reason alone.

But perhaps more importantly, this Court lacks subject-matter jurisdiction over Bank Markazi. It is undisputed that Bank Markazi is the Central Bank of Iran. Thus, the Court's subject-matter jurisdiction must be found within the FSIA. One fact alone disposes of claims against Bank Markazi: it does not maintain the assets that plaintiffs seek in the United States. The evidence in the record is clear that any assets in which Bank Markazi has an interest, and which are at issue in this action, are in Luxembourg. The FSIA does not allow for attachment of property outside of the United States. See 28 U.S.C. § 1609 ("[T]he property *in the United States* of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." (emphasis added)); *Republic of Argentina*, 695 F.3d at 208 ("We recognize that a district court sitting in Manhattan does not have the power to attach Argentinian property in foreign countries."); *Aurelius*, 584 F.3d at

130 ("[T]he property that is subject to attachment and execution must be property in the United States of a foreign state." (internal quotation marks omitted)). Accordingly, the Court cannot entertain the instant claims against Bank Markazi.

D. JPM

Plaintiffs assert claims against JPM in Counts Four through Six for turnover and in Count Eight for equitable relief. JPM has proffered records which make it clear that it has no assets in which Bank Markazi has an interest. (See Jonckheere Decl. ¶¶5-11, 13 & Exs. A, B, C.) Indeed, in their complaint, plaintiffs acknowledge this fact in all practical respects by referring to the fact that Clearstream credited the 13675 account with the Remaining Assets. (See Am. Compl. ¶61, 66.) Plaintiffs assert that if one accepts the legal proposition that Clearstream's transfer of such proceeds out of its account with JPM was in violation of E.O. 13599, then any such transfer is void, and therefore JPM still has the assets. This is fiction. If the transaction is ever, in some other action, found to be void, that will be at some future point in time. As matters stand now, there is simply nothing for JPM to turn over.

Plaintiffs spend a significant amount of briefing on whether, as a matter of law, Clearstream's account at JPM must be deemed to have within it the Remaining Assets. The rather intricate way in which plaintiffs assert this could be so is creative—but mind numbing. The reality is far simpler: JPM simply lacks that as to which plaintiffs seek turnover. JPM must therefore be dismissed—and this Court need not reach the series of

banking law and U.C.C.-related questions which plaintiffs raise.[17]

III. CONCLUSION

For the reasons set forth above, defendants' motions are GRANTED. Plaintiffs' motion for writs of execution is DENIED as moot, and this action is dismissed. The Clerk of Court is directed to terminate the motions at ECF Nos. 97, 109, and 116, and to terminate this action.

SO ORDERED.

Dated: New York, New York
February 19, 2015

/s/Katherine B. Forrest
Katherine B. Forrest
United States District Judge

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[17] Further, it is undisputed that JPM does not have an account for UBAE or Bank Markazi. The account at issue is in Clearstream's name and the evidence is unrebutted that Clearstream uses the account into which the Remaining Assets were credited in its own name as a general-purpose account. So far as JPM is concerned, as a matter of law, any assets it may have in an account for Clearstream are Clearstream's and no one else's. See *NML Capital, Ltd.* v. *Banco Cent. de la República Argentina*, 652 F.3d 172, 192 (2d Cir. 2011) ("'[U]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor' and no one else." (citation omitted)). Further, for funds to be considered those of a foreign central bank, they must be in the name of the foreign central bank. *Cf. id.* Finally, the law is clear that a judgment creditor may not reach assets in which a judgment debtor has no legal interest. See *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002). If a judgment debtor cannot assign or transfer an asset, then a creditor of the judgment debtor may not enforce a judgment against such asset. See *Bass* v. *Bass*, 140 A.D.2d 251, 253 (N.Y. App. Div. 1988).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 15-0690

DEBORAH D. PETERSON, *et al.*,
Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI, AKA CENTRAL BANK OF IRAN, BANCA UBAE, S.P.A., CLEARSTREAM BANKING, S.A., JPMORGAN CHASE BANK, N.A.,
Defendants-Appellees.

ORDER

FEBRUARY 7, 2018

Before: Rosemary S. Pooler,
Robert D. Sack,
Raymond J. Lohier, Jr.,
Circuit Judges.

Appellees Banca UBAE, S.p.A., and Clearstream Banking, S.A., each filed a petition for panel rehearing. The panel that determined the appeal has considered the requests for panel rehearing.

IT IS HEREBY ORDERED that the petitions for panel rehearing are denied. As to UBAE's petition, the District Court is instructed to decide the personal jurisdiction issue in the first instance on remand.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 15-0690

DEBORAH D. PETERSON, *et al.*,
Plaintiff-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, BANK MARKAZI, AKA CENTRAL BANK OF IRAN, BANCA UBAE S.P.A., CLEARSTREAM BANKING, S.A., JP MORGAN CHASE BANK, N.A.,
Defendants-Appellants.

ORDER

FEBRUARY 7, 2018

Appellees Banca UBAE, S.p.A., and Clearstream Banking, S.A., each filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel rehearings were denied by order filed February 7, 2018. The active members of the Court have considered the requests for rehearing *en banc*.

IT IS HEREBY ORDERED that the petitions are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bank Markazi, the Central Bank of Iran, was a defendant in the district court and appellee in the court of appeals.

Clearstream Banking, S.A., Banca UBAE S.p.A., and JP Morgan Chase Bank, N.A. were defendants in the district court and appellees in the court of appeals.

The following respondents were plaintiffs in the district court and appellants in the court of appeals: Deborah D. Peterson, personal representative of the Estate of James C. Knipple, Terry Abbott, John Robert Allman, Ronny Kent Bates, James Baynard, Jess W. Beamon, Alvin Burton Belmer, Richard D. Blankenship, John W. Blocker, Joseph John Boccia, Jr., Leon Bohannon, John Bonk, Jr., Jeffrey Joseph Boulos, John Norman Boyett, William Burley, Paul Callahan, Mecot Camara, Bradley Campus, Johnnie Ceasar, Robert Allen Conley, Charles Dennis Cook, Jolumy Len Copeland, David Cosner, Kevin Coulman, Rick Crudale, Russell Cyzick, Michael Devlin, Nathaniel Dorsey, Timothy Dunnigan, Bryan Earle, Danny R. Estes, Richard Andrew Fluegel, Michael D. Fulcher, Sean Gallagher, George Gangur, Randall Garcia, Harold Ghumm, Timothy Giblin, Michael Gorchinski, Richard Gordon, Davin M. Green, Thomas Hairston, Michael Haskell, Mark Anthony Helms, Stanley G. Hester, Donald Wayne Hildreth, Richard Holberton, Dr. John Hudson, Maurice Edward Hukill, Edward Iacovino, Jr., Paul Innocenzi, III, James Jackowski, Jeffrey Wilbur James, Nathaniel Walter Jenkins, Edward Anthony Johnston, Steven Jones, Thomas Adrian Julian, Thomas Keown, Daniel Kluck, Freas H. Kreischer, III, Keith Laise, James Langon, IV, Steven LaRiviere, Richard Lemnah, Paul D. Lyon, Jr., John Macroglou, Charlie

Robert Martin, Michael Scott LaRiviere, Joseph R. Livingston, III, Samuel Maitland, Jr., David Massa, John McCall, James E. McDonough, Timothy R. McMahon, Richard Menkins, II, Ronald Meurer, Joseph Peter Milano, Joseph Moore, Harry Douglas Myers, David Nairn, John Arne Olson, Joseph Albert Owens, Connie Ray Page, Ulysses Gregory Parker, Olson J. Ronald, (Estate of) Sigurd Olson, David Owens, Deanna Owens, Frances Owens, James Owens, Steven Owens, Connie Mack Page, Judith K. Page, Lisa Menkins Palmer, Geraldine Paolozzi, Maureen Pare, (Estate of) Mary A. Cook, Alan Tracy Copeland, Betty Copeland, Donald Copeland, Blanche Corry, Harold Cosner, Jeffrey Cosner, Leanna Cosner, (Estate of) Marva Lynn Cosner, Cheryl Cossaboom, Bryan Thomas Coulman, Christopher J. Coulman, Dennis P. Coulman, Lorraine M. Coulman, Robert D. Coulman, Robert Louis Coulman, (Estate of) Angela Josephine Smith, Bobbie Ann Smith, Cynthia Smith, Donna Marie Smith, Erma Smith, Holly Smith, Ian Smith, Janet Smith, Joseph K. Smith, III, Joseph K. Smith, Jr., Keith Smith, Shirley L. Smith, Tadgh Smith, Terrence Smith, Timothy B. Smith, Jocelyn J. Sommerhof, John Sommerhof, William J. Sommerhof, Douglas Spencer, Christy Williford Stelpflug, Joseph Stelpflug, Kathy Nathan Stelpflug, Laura Barfield Stelpflug, Peggy Stelpflug, William Stelpflug, Horace Stephens, Sr., Joyce Stephens, Keith Stephens, Dona Stockton, (Estate of) Donald Stockton, Richard Stockton, Irene Stokes, Nelson Stokes, Jr., (Estate of) Nelson Stokes, Sr., Robert Stokes, Gwenn Stokes-Graham, Marcus D. Sturghill, Marcus L. Sturghill, Jr., NaKeisha Lynn Sturghill, Doreen Sundar, Margaret Tella, Susan L. Terlson, Mary Ellen Thompson, Adam Thorstad, Barbara Thorstad, James Thorstad, Jr., James Thorstad, Sr., John Thorstad, Ryan Thorstad, Charlita Martin Covington, Amanda Crouch, Marie Cru-

dale, Eugene Cyzick, Lynn Dallachie, Anne Deal, Lynn Smith Derbyshire, Theresa Desjardins, Christine Devlin, Daniel Devlin, Gabrielle Devlin, Richard Devlin, Sean Devlin, Rosalie Donahue (Milano), Ashley Doray, Rebecca Doss, Chester Dmmigan, Elizabeth Ann Dunnigan, Michael Dunnigan, William Dunnigan, Claudine Dunnigan, Pedro Alvarado, Jr., Dennis Jack Anderson, Timothy Brooks, Michael Harris, Donald R. Pontillo, John E. Selbe, Willy G. Thomson, Terance J. Valore, (Estate of) David L. Battle, (Estate of) Matilde Hernandez, Jr., (Estate of) John Muffler, (Estate of) John Jay Tishmack, (Estate of) Leonard Warren Walker, (Estate of) Walter Emerson Wint, Jr., (Estate of) James Yarber, Angel Alvarado, Geraldo Alvarado, Grisselle Alvarado, Luis Alvarado, Luisa Alvarado, Maria Alvarado, Marta Alvarado, Minerva Alvarado, Yolanda Alvarado, Arlington Ferguson, Janet Williams, Orlando M. Valore, Jr., Bill Macroglou, Thomas D. Brown, Jr., Gwen Woodcock, (Estate of) Warner Gibbs, Jr., Zoraida Alvarado, Hilton Ferguson, Johnny Williams, Neale Scott Bolen, Faith Albright, Jeanette Odom, Lisa Burleyson, Freda Gibbs Hutcherson, Tull Andres Alvarado, Linda Sandback Fish, Rhonda Williams, (Estate of) Moses Arnold, Jr., Gary Wayne Allison, Deborah Vogt, Mecot Echo Camara, Larry Gibbs, Cheryl Bass, Nancy Brocksbank Fox, Ronald Williams, Lolita M. Arnold, C. Keith Bailey, Christopher Burnette, Dale Comes, Marcus A. Lewis, Edward J. Brooks, Tia Fox, Ruth Williams, Lisa Ann Beck, Vina S. Bailey, Connie Decker, Tommy Comes, (Estate of) Warner Gibbs, Sr., Patricia A. Brooks, Tammy Freshour, Scipio J. Williams, Betty J. Bolen, Charles E. Bailey, Gwen Burnette, (Estate of) Bert Daniel Corcoran, (Estate of) Janet Yvonne Lewis, Wanda Ford, Ruby Fulcher, Wesley Williams, Keith Edwin Bolen, Karen L. Cooper, Kathleen Collins, Earl Guy, Bennie Harris, Bar-

bara Gallagher, Delma Williams-Edwards, Sheldon H. Bolen, Mark Bartholomew, Catherine Corcoran, Joan M. Crawford, Rose Harris, Brian Gallagher, Tony Williamson, Sharla M. Korz, Teresa Bartholomew, (Estate of) Robert Alton Corcoran, Ian Guy, Marcy Lynn Parson, (Estate of) James Gallagher, Jewelene Williamson, (Estate of) James Silvia, Crystal Bartholomew, (Estate of) Keith Alton Corcoran, Eddie Guy, Jr., Douglas Pontillo, James Gallagher, Jr., Michael Winter, Lynne Michol Spencer, Jerry Bartholomew, Robert Brian Corcoran, Adam Guy, Don Selbe, Kevin Gallagher, Barbara Wiseman, Catherine Bonk, Joyce Bartholomew, Elizabeth Ann Ortiz, (Estate of) Douglas Held, Eloise F. Selbe, Michael Gallagher, Phyllis Woodford, Kevin Bonk, Arthur Johnson, Michael Corrigan, (Estate of) Sondra Lou Held, James Selbe, Dimitri Gangur, Kelly B. Smith, Thomas Bonk, Robert Bragg, (Estate of) Andrew Davis, Patrick Held, Belinda Skarka, Mary Gangur, Keysha Tollivel, John Bonk, Sr., Carolyn Davis, Thomas Held, Allison Thomson, Jess Garcia, Ronald Garcia, Marion DiGiovanni, Jennifer Davis, Thomas Hoke, Johnny Thompson, Betty Ann Thurman, Roxanne Garcia, Sherry Lynn Fiedler, (Estate of) Frederick Douglass, Glenn W. Hollis, Deborah True, Barbara Tingley, Russell Garcia, Marilou Fluegel, Shirley Douglass Miller, Jane Costa, Janice Valore, Richard L. Tingley, Violet Garcia, Robert Fluegel, Susan Baker, (Estate of) Ann Hollis, Janice Thorstad Edquist, Russell Tingley, Suzanne Perron Garza, Thomas A. Fluegel, Regina Periera, Jack Darrell Hunt, Mary Ruth Ervin, Mary Ann Turek, Jeanne Gattegno, Evans Hairston, Richard Dudley, Mendy Leight Hunt, Barbara Estes, Karen Valenti, Arlene Ghumm, Felicia Hairston, Toledo Dudley, Molly Fay Hunt, Charles Estes, Anthony Vallone, Ashley Ghumm, Julia Bell Hairston, Sherry Latoz, (Estate of) John Ingalls, Frank Estes, Bill Ghumm,

Henry Durban Hukill, Cynthia Blankenship, James Ingalls, Lori Fansler, Donald H. Vallone, Edward Ghumm, Mark Andrew Hukill, Ginger Tuton, Joseph Ingalls, Angela Dawn Farthing, Timothy Vallone, Hildegard Ghumm, Matthew Scott Hukill, Scott Dudley, Kevin Jiggetts, Leona Mae Vargas, (Estate of) Jedaiah Ghumm, Melissa Hukill, David Eaves, Donald Long, Denise Voyles, Jesse Ghumm, Meredith Ann Hukill, (Estate of) Roy Edwards, Robert Lynch, Ila Wallace, Leroy Ghumm, Mitchell Charles Hukill, Cindy Colasanti, (Estate of) Manual Massa, Sr., Kathryn Thorstad Wallace, Moronica Ghumm, Monte Hukill, (Estate of) Barbara Edwards, Tim McCoskey, Barbara Thorstad Warwick, Donald Giblin, Virginia Ellen Hukill, (Estate of) Penny Garner, Ronald L. Moore, Linda Washington, Jeanne Giblin, Catherine Bonk Hunt, (Estate of) David D. Gay, Alan C. Anderson, Vancine Washington, Michael Giblin, Storm Jones, Gail Black, Thelma Anderson, Kenneth Watson, Tiffany Giblin, Penni Joyce, (Estate of) Neva Jean Gay, (Estate of) Stephen B. Bland, Diane Whitener, Valerie Giblin, Jeff Kirkwood, Ronald Gay, (Estate of) Frank Bland, Daryl Wigglesworth, William Giblin, Shirley Kirkwood, Timothy Gay, James Bland, Darren A. Wigglesworth, Thad Gilford-Smith, Carl A. Kirkwood, Jr., Rebecca Cordell, Ruth Ann Bland, Henry Wigglesworth, Rebecca Gintonio, Carl Kirkwood, Sr., (Estate of) David D. Gay, Sr., (Estate of) Laura V. Copeland, Mark Wigglesworth, Dawn Goff, Patricia Kronenbitter, Ronald Duplanty, Robyn Wigglesworth, Christina Gorchinski, Bill Laise, (Estate of) Sean F. Estler, Sandra Wigglesworth, Judy Gorchinski, Betty Laise, Keith Estler, Shawn Wigglesworth, Kevin Gorchinski, Kris Laise, Mary Ellen Estler, Dianne Stokes Williams, Valerie Gorchinski, Louis C. Estler, Jr., Gussie Martin Williams, Alice Gordon, (Estate of) Benjamin E. Fuller, Joseph Gordon, Elaine Allen, Linda Gordon, Ern-

est C. Fuller, (Estate of) Norris Gordon, John Gibson, Holly Gibson, Maurice Gibson, (Estate of) Michael Hastings, Joyce Hastings, (Estate of) Paul Hein, Christopher Hein, Jo Ann Hein, Karen Hein, Victor Hein, Jacqueline M. Kuncyz, (Estate of) John Hendrickson, John Hendrickson, Tyson Hendrickson, Deborah Ryan, (Estate of) Bruce Hollingshead, Melinda Hollingshead, Renard Manley, James Macroglou, Lorraine Macroglou, Kathy McDonald, Edward J. McDonough, Edward W. McDonough, Sean McDonough, Deborah Rhosto, (Estate of) Luis Rotondo, (Estate of) Rose Rotondo, (Estate of) Phyllis Santoserre, Anna Marie Simpson, Renee Eileen Simpson, Robert Simpson, Larry Simpson, Sr., Sally Jo Wirick, (Estate of) Michael R. Massman, Angela Massman, Kristopher Massman, Lydia Massman, Nicole Gomez, Patricia Lou Smith, (Estate of) Louis Melendez, Douglas J. Melendez, Johnny Melendez, Zaida Melendez, Johnny Melendez, Jr., (Estate of) Michael D. Mercer, Sarah Mercer, Samuel Palmer, Robin Nicely, (Estate of) Juan Rodriguez, Louisa Puntonet, Robert Rucker, (Estate of) Billy San Pedro, Cesar San Pedro, Guillermo San Pedro, Javier San Pedro, Sila San Pedro, Thurnell Shields, Emmanuel Simmons, (Estate of) James Surch, Will Surch, Patty Barnett, Bradley Ulich, Jeanette Dougherty, Marilyn Peterson, (Estate of) Eric Walker, Tena Walker-Jones, Ronald E. Walker, Ronnie Walker, Galen Weber, (Estate of) Obrian Weekes, Ianthe Weekes, Keith Weekes, Meta Weekes, Anson Edmond, Arnold Edmond, Hazel Edmond, Wendy Edmond, (Estate of) Dennis Lloyd West, Kathy West, (Estate of) John Weyl, Sharon Rowan, Kelly Bachlor, Robin Brock, Morgan W. Rowan, Nelson Weyl, Joseph A. Barile, Angela E. Barile, Michael Barile, Andrea Ciarla, Ann Marie Moore, Angela Yoak, John Becker, (Estate of) Anthony Brown, John Brown, Rowel Brown, Sulba Brown, Vara Brown, Mar-

vine McBride, LaJuana Smith, Rodney E. Burns, Eugene Burns, David Burns, Jeannie Scaggs, Daniel Cuddeback, Jr., Barbara Cuddeback, Daniel Cuddeback, Sr., Michael Episcopo, Randy Gaddo, Louise Gaddo Blattler, Peter Gaddo, Timothy Gaddo, (Estate of) William R. Gaines, Jr., Michael A. Gaines, William R. Gaines, Sr., Carolyn Spears, Carole Weaver, (Estate of) Virgel Hamilton, Gloria Hamilton, Bruce S. Hastings, Maynard Hodges, Mary Jean Hodges, Kathy Hodges, Loretta Brown, Cindy Holmes, Shana Saul, Daniel Joy, Daniel Kremer, (Estate of) Thomas Kremer, (Estate of) Christine Kremer, Joseph T. Kremer, Jacqueline Stahrr, (Estate of) David A. Lewis, Betty Lewis, Jerry L. Lewis, Scott M. Lewis, Paul Martinez, Sr., Teresa Gunther, Alphonso Martinez, Daniel L. Martinez, Michael Martinez, Paul Martinez, Jr., Tomasita L. Martinez, Esther Martinez-Parks, Susanne Yeoman, (Estate of) Jeffrey B. Owen, Jean G. Owen, Steven Owen, (Estate of) Michael L. Page, Albert Page, Janet Page, Joyce Clifford, David Penosky, Joseph Penosky, Christian R. Rauch, Leonard Paul Tice, (Estate of) Burton Wherland, Gregory Wherland, Sarah Wherland, Sharon Davis, Charles F. West, Charles H. West, Rick West, Kimmy Wherland, Janet LaRiviere, John M. LaRiviere, Lesley LaRiviere, Michael LaRiviere, Nancy LaRiviere, Richard LaRiviere, (Estate of) Richard G. Lariviere, Robert LaRiviere, William LaRiviere, Cathy L. Lawton, Heidi Crudale LeGault, (Estate of) Clarence Lemnah, Etta Lemnah, Fay Lemnah, Harold Lemnah, Marlys Lemnah, Robert Lemnah, Ronald Lemnah, Annette R. Livingston, Joseph R. Livingston, IV, (Estate of) Joseph R. Livingston, Jr., Robin M. Lynch, Earl Lyon, Francisco Lyon, June Lyon, Maria Lyon, Paul D. Lyon, Sr., Valerie Lyon, Heather Macroglou, Kathleen Devlin Mahoney, Kenty Maitland, Leysnal Maitland, Samuel Maitland, Sr., Shirla Maitland, Virginia Boccia

Marshall, John Martin, Pacita Martin, Renerio Martin, Ruby Martin, Shirley Martin, Mary Mason, Christina Massa, Edmund Massa, Joao "John" Massa, Jose "Joe" Massa, Manuel Massa, Jr., Ramiro Massa, Mary McCall, (Estate of) Thomas McCall, Valerie McCall, Gail McDermott, Julia A. McFarlin, George McMahon, Michael McMahon, Patty McPhee, Darren Menkins, Gregory Menkins, Margaret Menkins, Richard H. Menkins, Jay T. Meurer, John Meurer, John Thomas Meurer, Mary Lou Meurer, Michael Meurer, Penny Meyer, Angela Milano, Peter Milano, Jr., Earline Miller, Henry Miller, Patricia Miller, Helen Montgomery, Betty Moore, Harry Moore, Kimberly Moore, Mary Moore, Melissa Lea Moore, (Estate of) Michael Moore, Elizabeth Phillips Moy, Debra Myers, Geneva Myers, Harry A. Myers, Billie Ann Nairn, Campbell J. Nairn, III, (Estate of) Campbell J. Nairn, Jr., William P. Nairn, Richard Norfleet, Deborah O'Connor, Pearl Olaniji, (Estate of) Bertha Olson, Karen L. Olson, Randal D. Olson, Roger S. Olson, John W. Nash, Rose Ann Nash, (Estate of) Frank E. Nash, William H. Nash, Mark S. Nash, Frank E. Nash, Jr., Jaklyn Milliken, Rosemarie Vliet, Cataldo Anthony Nashton, Claudio Comino, Mark Nashton, Myles Nashton, Jennifer Page Nelson, Timothy Price, (Estate of) Betty Lou Price, James M. Puckett, Ronald Putnam, Bruce H. Richardson, Bernice Rivers, Barbara Ann Russell, Robert Emmett Russell, Glenn Edward Russell, Charles Edward Russell, Jr., Jean Louis Brown, Nancy MacDonald, Diane Carol Higgins, (Estate of) Thomas Russell, Thomas Rutter, John Santos, Raoul Santos (father), Mary Santos, Donna Duffy, Mary Cropper, Doreen Callanan, Jean Winner, Kevin Santos, Raoul Santos (brother), Joseph Richard Schneider, Morris Schneider, Jacqueline Gibson, Paul Segarra, Steven Shapuras, David W. Sharp, Charles Simmons, (Estate of) Thomas D. Stowe, David Stowe,

Barbara Stowe, Priscilla Stowe, Samantha Stowe, Donna Baloga, Edward J. Streker, (Estate of) Henry Townsend, Jr., Lillian Townsend, Henry Townsend, Marcia C. Townsend-Tippett, Valerie Tatum, Cynthia Green, Kawanna Duncan, John Turner, Judith Turner, Thomas Andrew Walsh, Charles Walsh, Ruth Walsh, Pat Campbell, Rachel Walsh, Timothy Walsh, Michael Walsh, (Estate of) Sean Walsh, Patricia Fitzgerald Washington, Gerald Foister, (Estate of) Tandy W. Wells, Danny Holland Wells, Edith Holland Wells, (Estate of) Harold Dean Wells, Frances Mangrum, Stella Wells George, Cleta Wells, Timothy Shon Wells, Michael Shane Wells, Perry Glenn Wells, Bryan K. Westrick, John Westrick, Patricia Westrick, Whitney R. Westrick, Gerald Wilkes, Jr., Gerald Wilkes, Sr., (Estate of) Peggy Wilkes, (Estate of) Dorothy Williams, Bill Williamson, Deborah Wise, Michael Zilka, Sue Zilka, John L. Pearson, Thomas S. Perron, John Arthur Phillips, Jr., William Roy Pollard, Victor Mark Prevatt, James Price, Patrick Kerry Prindeville, Diomedes J. Quirante, Warren Richardson, Louis J. Rotondo, Michael Caleb Sauls, Charles Jeffrey Schnorf, Scott Lee Schultz, Peter Scialabba, Gary Randall Scott, Thomas Alan Shipp, Jerryl Shropshire, Larry H. Simpson, Jr., Kirk Hall Smith, Frederick Daniel Eaves, Thomas Gerard Smith, Charles Frye, Vincent Smith, Truman Dale Garner, William Scott Sommerhof, Larry Gerlach, Stephen Eugene Spencer, John Hlywiak, Horace Renardo Stephens, Jr., Orval Hunt, Craig Stockton, Joseph Jacobs, Jeffrey Stokes, Brian Kirkpatrick, Eric D. Sturghill, Burnham Matthews, Devon Sundar, Timothy Mitchell, Thomas Paul Thorstad, Lovelle Darrell Moore, Stephen Tingley, Jeffrey Nashton, Donald H. Vallone, Jr., Jolm Oliver, Eric Glenn Washington, Paul Rivers, Dwayne Wigglesworth, Stephen Russell, Rodney J. Williams, Dana Spaulding, Scipio Williams, Jr., Craig

Joseph Swinson, Johnny Adam Williamson, Michael Toma, William Ellis Winter, Danny Wheeler, Donald Elberan Woollett, Thomas D. Young, Craig Wyche, Lilla Woollett Abbey, Jeffrey D. Young, James Abbott, Marvin Albright, (Estate of) Mary Abbott, Pablo Arroyo, Elizabeth Adams, Anthony Banks, Eileen Prindeville Ahlquist, Rodney Darrell Burnette, Anne Allman, Paul Gordon, Robert Allman, Andrea Grant, (Estate of) Theodore Allman, Deborah Green, DiAnne Margaret Allman, Liberty Quirante Gregg, Margaret E. Alvarez, Alex Griffin, Kimberly F. Angus, Catherine E. Grimsley, Donnie Bates, Megan Gummer, Johnny Bates, Lyda Woollett Guz, Laura Bates, Darlene Hairston, Margie Bates, Tara Hanrahan, Monty Bates, Mary Clyde Hart, Thomas Bates, Jr., Brenda Haskill, Thomas C. Bates, Sr., Jeffrey Haskell, Mary E. Baumgartner, Kathleen S. Hedge, Anthony Baynard, Christopher Todd Helms, Bany Baynard, Marvin R. Helms, Emerson Baynard, Doris Hester, Philip Baynard, Clifton Hildreth, Henry James Parker, Julia Hildreth, Sharon Parker, Mary Ann Hildreth, Helen M. Pearson, Michael Wayne Hildreth, John L. Pearson, Jr., Frank Comes, Jr., Sonia Pearson, Glenn Dolphin, Brett Perron, Deborah Jean Perron, Michelle Perron, Ronald R. Perron, Muriel Persky, Deborah D. Peterson, Sharon Conley Petry, Sandra Petrick, Donna Vallone Phelps, Harold Phillips, John Arthur Phillips, Sr., Donna Tingley Plickys, Margaret Aileen Pollard, Stacey Yvonne Pollard, Lee Holland Prevatt, Victor Thornton Prevatt, John Price, Joseph Price, (Estate of) Barbara D. Prindeville, Kathleen Tara Prindeville, Michael Prindeville, Paul Prindeville, Sean Prindeville, Belinda J. Quirante, Edgar Quirante, (Estate of) Godofredo Quirante, Milton Quirante, Sabrina Quirante, Susan Ray, Deborah Graves, Sharon A. Hilton, Donald Holberton, Patricia Lee Holberton, Thomas Holberton, Tangie Hollifield, Debra Hor-

ner, Elizabeth House, Joyce A. Houston, Tammy Camara Howell, Lisa H. Hudson, Lorenzo Hudson, Lucy Hudson, Ruth Hudson, William J. Hudson, Nancy Tingley Hurlburt, Cynthia Perron Hurston, Elizabeth Iacovino, Deborah Innocenzi, Kristin Innocenzi, Mark Innocenzi, Paul Innocenzi, IV, Laura M. Reininger, Alan Richardson, Beatrice Richardson, Clarence Richardson, Eric Richardson, Lynette Richardson, Vanessa Richardson, Philiece Richardson-Mills, Melrose Ricks, Belinda Quirante Riva, Barbara Rockwell, Linda Rose Rooney, Tara Smith, Tammi Ruark, Juliana Rudkowski, Marie McMahon Russell, Alicia Lynn Sanchez, Andrew Sauls, Henry Caleb Sauls, Riley A. Sauls, Margaret Medler Schnorf, Richard Schnorf (brother), Richard Schnorf (father), Robert Schnorf, Beverly Schultz, Dennis James Schultz, Dennis Ray Schultz, Frank Scialabba, Jacqueline Scialabba, Samuel Scott Scialabba, Jon Christopher Scott, Kevin James Scott, (Estate of) Larry L. Scott, Mary Ann Scott, Sheria Scott, Stephen Allen Scott, Jacklyn Seguerra, Bryan Richard Shipp, James David Shipp, Janice Shipp, Maurice Shipp, Pauline Shipp, Raymond Dennis Shipp, Russell Shipp, Susan J. Sinsioco, Ana Smith-Ward, Thomasine Baynard, Timothy Baynard, Wayne Baynard, Stephen Baynard, Anna Beard, Mary Ann Beck, Alue Belmer, Annette Belmer, Clarence Belmer, Colby Keith Belmer, Denise Belmer, Donna Belmer, Faye Belmer, Kenneth Belmer, Luddie Belmer, Shawn Biellow, Mary Frances Black, Donald Blankenship, Jr., Donald Blankenship, Sr., (Estate of) Mary Blankenship, Alice Blocker, Douglas Blocker, John R. Blocker, Robert Blocker, James Boccia, Joseph Boccia, Sr., Patricia Boccia, Raymond Boccia, Richard Boccia, Ronnie Veronica Boccia, Leticia Boddie, Angela Bohannon, Anthony Bohannon, Carrie Bohannon, David Bohannon, Edna Bohannon, Leon Bohannon, Sr., Ricki Bo-

hannon, Billie Jean Bolinger, Joseph Boulos, Lydia Boulos, Marie Boulos, Rebecca Bowler, Lavon Boyett, (Estate of) Norman E. Boyett, Jr., Theresa U. Roth Boyett, William A. Boyett, Susan Schnorf Breeden, Damian Briscoe, Christine Brown, Rosanne Brunette, Mary Lynn Buckner, (Estate of) Claude Burley, (Estate of) William Douglas Burley, Myra Burley, Kathleen Calabro, Rachel Caldera, Avenell Callahan, Michael Callahan, Patrica Patsy Ann Calloway, Elisa Rock Camara, Theresa Riggs Camara, Candace Campbell, Clare Campus, Elaine Capobianco, Florene Martin Carter, Phyllis A. Cash, Theresa Catano, Bruce Ceasar, Franklin Ceasar, Fredrick Ceasar, Robbie Nell Ceasar, Sybil Ceasar, Christine Devlin Cecca, Tammy Chapman, James Cherry, Sonia Cherry, Adele H. Chios, Jana M. Christian, Sharon Rose Christian, Susan Ciupaska, Leshune Stokes Clark, Rosemary Clark, Mary Ann Cobble, Karen Shipp Collard, Jennifer Collier, Melia Winter Collier, Deborah M. Coltrane, Roberta Li Conley, Charles F. Cook, Elizabeth A. Cook, Bernadette Jaccom, John Jackowski, Jr., John Jackowski, Sr., Victoria Jacobus, Elaine James, Nathalie C. Jenkins, Stephen Jenkins, Rebecca Jewett, Linda Martin Johnson, Ray Johnson, Rennitta Stokes Johnson, Sherry Johnson, Charles Johnston, Edwin Johnston, Mary Ann Johnston, Zandra LaRiviere Johnston, Alicia Jones, Corene Martin Jones, Kia Briscoe Jones, Mark Jones, Ollie Jones, Sandra D. Jones, (Estate of) Synovure Jones, Robin Copeland Jordan, Susan Scott Jordan, Joyce Julian, Karl Julian, Nada Jurist, Adam Keown, Bobby Keown, Jr., Bobby Keown, Sr., Darren Keown, William Keown, Mary Joe Kirker, Kelly Kluck, Michael Kluck, (Estate of) John D. Knipple, John R. Knipple, (Estate of) Pauline Knipple, Shirley L. Knox, Doreen Kreischer, Freas H. Kreischer, Jr., Cynthia D. Lake, Wendy L. Lange, James Langon, III, Eugene LaRiviere,

Joyce Woodle, Beverly Woollett, Paul Woollett, Melvina Stokes Wright, Patricia Wright, Glenn Wyche, John Wyche, John F. Young, John W. Young, Judith Carol Young, Sandra Rhodes Young, Joanne Zimmerman, Stephen Thomas Zone, Patricia Thorstad Zosso, Jarnaal Muata Ali, Margaret Angeloni, Jesus Arroyo, Milagros Arroyo, Olympia Carletta, Kimberly Carpenter, Joan Comes, Patrick Comes, Christopher Comes, Frank Comes, Sr., Deborah Crawford, Barbara Davis, Alice Warren Franklin, Patricia Gerlach, Travis Gerlach, Megan Gerlach, Arminda Hernandez, Margaret Hlywiak, Peter Hlywiak, Jr., Peter Hlywiak, Sr., Paul Hlywiak, Joseph Hlywiak, Cynthia Lou Hunt, Rosa Ibarro, Andrew Scott Jacobs, Daniel Joseph Jacobs, Danita Jacobs, Kathleen Kirkpatrick, Grace Lewis, Lisa Magnotti, Wendy Mitchell, (Estate of) James Otis Moore, (Estate of) Johnney S. Moore, Marvin S. Moore, Alie Mae Moore, Jonnie Mae Moore-Jones, (Estate of) Alex W. Nashton, Paul Oliver, Riley Oliver, Michael John Oliver, Ashley E. Oliver, Patrick S. Oliver, Kayley Oliver, Tanya Russell, Wanda Russell, Jason Russell, Clydia Shaver, Mary Stilpen, Kelly Swank, (Estate of) Kenneth J. Swinson, (Estate of) Ingrid M. Swinson, Daniel Swinson, William Swinson, Dawn Swinson, Teresa Swinson, Bronzell Warren, Jessica Watson, Audrey Webb, Jonathan Wheeler, Benjamin Wheeler, (Estate of) Marlis Molly Wheeler, Kerry Wheeler, Andrew Wheeler, Brenda June Wheeler, Jill Wold, (Estate of) Nora Young, James Young, (Estate of) Robert Young, Scott Spaulding, Cecilia Stanley, Miralda, (Judith Maitla Alarcon), (Estate of) Samuel Hudson, (Estate of) Susan Thorstad Hudson, and (Estate of) Edward Iacovino, Sr.

APPENDIX F

RELEVANT STATUTORY PROVISIONS

The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides as follows:

§ 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 nature 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; or

(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 arbitration 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.

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

(e), (f) Repealed.

(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 section 1605A or section 1605B, 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 investiga-

tion 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 protec-

tive orders or asserting privileges ordinarily available to the United States.

(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—

(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) EXCEPTIONS.—

(A) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) OTHER CULTURALLY SIGNIFICANT WORKS.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term 'work' means a work of art or other object of cultural significance;

(B) the term 'covered government' means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term 'covered period' means the period beginning on January 30, 1933, and ending on May 8, 1945.

§ 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).

§ 1605B. Responsibility of foreign states for international terrorism against the United States

(a) DEFINITION.—In this section, the term 'international terrorism'—

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in that section).

(b) RESPONSIBILITY OF FOREIGN STATES.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

(c) CLAIMS BY NATIONALS OF THE UNITED STATES.—Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

(d) RULE OF CONSTRUCTION.—A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

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

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

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

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

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

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

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

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

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

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

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

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 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 1605A or section 1605(a)(7) (as such was in effect on January 27, 2008), 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), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based; or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), 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) (as in effect before the enactment of section 1605A) or section 1605A.

(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.

(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.

* * * * *

[NOTE]

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

Pub. L. No. 107-297, § 201(a), (b), (d), 116 Stat. 2337 (2002), as amended, provides 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 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) 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. No. 107-297, § 102(1), 116 Stat. 2323 (2002), which is set out in a note under 15 U.S.C. § 6701]; 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)) [now 50 U.S.C. § 4305(b)] or under sections 202 and 203 of the In-

ternational 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 Na-

tionality 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)) [now 50 U.S.C. §4605(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.