INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

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

COUNTER-MEMORIAL
SUBMITTED BY
THE UNITED STATES OF AMERICA

OCTOBER 14, 2019

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PART I: INTRODUCTION

CHAPTER 1: INTRODUCTORY OBSERVATIONS

1.1 This case is an attempt by Iran to invoke the 1955 Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran (the "Treaty of Amity" or the "Treaty") to evade liability for and enforcement of judgments of U.S. courts finding Iran responsible for or complicit in terrorist attacks against U.S. nationals. At the core of these proceedings is the *Peterson* case before the U.S. courts, a claim by victims and family members of deceased U.S. service personnel on a peacekeeping mission in Lebanon who were targeted by a suicide bombing of the U.S. Marine barracks in October 1983, which killed 241 peacekeepers and injured many more.

1.2 In the decades since the Beirut Marine barracks bombing, Iran has persisted in supporting terrorist acts that target the United States and its nationals. In the face of these attacks, the United States has been left to determine an appropriate response to this violent conduct that holds Iran accountable and responds to the losses suffered by the victims of these attacks and their families. The United States response was to put in place a framework of measures that enable victims of Iranian-sponsored terrorism to sue Iran in U.S. courts and, where the courts find that Iran is responsible, to seek compensation for their injuries. It is this framework that Iran now challenges.

1.3 The critical question for the Court is not whether Iran has sponsored terrorist attacks. The evidence in support of this conclusion is overwhelming. Rather, the question is whether the U.S. measures taken in response to those attacks, and the efforts of the victims of those attacks and their families to obtain compensation for their suffering, are in breach of the Treaty of Amity. The answer to that question is no. The Treaty's provisions do not and were never intended to protect a party who sponsors terrorist attacks directed at the other party and its nationals.

1.4 The Court's February 13, 2019 judgment on the U.S. preliminary objections ("Preliminary Objections Judgment") significantly narrowed the case before the Court. Iran's original claims, set out in its Application and Memorial, were focused in material part on the allegation that certain of the U.S. measures improperly denied Iran and its Central Bank (Bank Markazi) sovereign immunity by, for example, creating an exception to the Foreign Sovereign Immunities Act for countries, like Iran, that the United States had designated as state sponsors of terrorism. The Preliminary Objections Judgment excluded all such claims from the case on

jurisdictional grounds, namely, that the Court does not have jurisdiction under the Treaty in respect of Iran's claims based on sovereign immunity.

1.5 The claims that remain are those based upon U.S. measures that allow victims of Iranian sponsored terrorism who hold judgments against Iran to enforce those judgments by attaching the assets of Iran's agencies and instrumentalities. These claims are meritless and should be dismissed, as Part IV of this Counter-Memorial explains. Before one gets to the article-by-article analysis, however, the United States advances four threshold defenses that, if sustained, would eliminate Iran's case entirely or at least narrow it further.

1.6 *First*, because the measures that are the subject of Iran's claims were themselves a response to Iran's sponsorship of terrorism, Iran comes to the Court with unclean hands. Its claims should accordingly be dismissed in their entirety. *Second*, applying the test set out by the Court in its Preliminary Objections Judgment, Iran cannot establish that its Central Bank, Bank Markazi, is a "company" within the meaning of the Treaty of Amity. However, Articles III, IV and V of the Treaty apply only to Iran's companies and nationals. Thus, Iran's claims alleging violations of those provisions of the Treaty regarding the treatment of Bank Markazi, including its largest claim for measures taken in connection with the *Peterson* litigation, must be dismissed. *Third*, Iran has failed to show that many of the entities on whose behalf it is asserting claims have satisfied the requirement to exhaust local remedies before it initiated this case. Where Iran has not shown that a company has exhausted local remedies, any claims on behalf of such a company are ineligible for the Court's consideration and must be dismissed. *Fourth*, Article XX(1) excludes certain measures from the Treaty's scope, including measures that regulate "the production of or traffic in arms" and measures "necessary to protect [a Party's] essential security interests." One of the measures that Iran has challenged, Executive Order 13599, falls into both categories, and Iran's claims with respect to this measure are therefore not properly before this Court and should be dismissed.

1.7 In the event the Court does not sustain these defenses, Iran's claims fail on the merits. For purposes of assessing the measures at issue, background and context are key, particularly in two respects. First, Iran chose not to appear in the proceedings in U.S. courts brought by victims of Iran's sponsorship of terrorist acts that led to the judgments awarding damages against Iran. Second, Iran refused to satisfy the judgments, which were based on a careful review of the evidence, as required to hold a defaulting State responsible under U.S. law. In doing so, Iran left the victims of its egregious misconduct without redress.

1.8 In response to Iran's actions sponsoring terrorism against the United States, its nationals, and its interests, the United States chose a series of legislative and executive measures that permit suits against state sponsors of terrorism, including Iran, and holders of judgments from such suits to execute those judgments against the assets of state agencies and instrumentalities. These measures are not, for the most part, unique to Iran, but are applicable to all state sponsors of terrorism.

1.9 These measures do not violate the Treaty of Amity. They are a reasonable response to a problem created by Iran's sponsorship of terrorism and by Iran's subsequent unwillingness to bear responsibility and compensate victims for the loss, pain, and suffering that such terrorism caused. Iran cannot rely on the Treaty of Amity to shield itself and various state-owned entities from the consequences of its bad acts. The Treaty of Amity does not preclude a party from taking peaceful, measured steps to enable victims of terrorist attacks to bring suit seeking compensation for such attacks.

1.10 Beginning with Article III(1), in an effort to shield Iran's agencies and instrumentalities from the enforcement of terrorism-related judgments, Iran attempts to twist a provision that requires each Party to recognize the "juridical status" of entities that meet the definition of "companies" into a guarantee that such companies will be treated separately from their shareholders, regardless of the circumstances. Iran's argument hinges on transforming the phrase "juridical status" into "*separate* juridical status," despite the word "separate" appearing nowhere in Article III(1).

1.11 Iran's reading of Article III(2) is equally problematic and contrary to the Court's conclusion in its Preliminary Objections Judgment that the provision only protects "access" to a Party's courts and "*does not seek to guarantee the substantive or even the procedural rights* that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party."[1]

1.12 Turning to Articles IV(1) and IV(2), Iran attempts to read into these provisions a host of treatment obligations that they do not provide, primarily in reliance on a handful of awards issued by investor-State arbitral tribunals decades after the Parties concluded the Treaty of Amity. Properly understood, these provisions require each Party to provide the minimum standard of treatment as it has crystallized in customary international law, which includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, the

[1] Preliminary Objections Judgment, ¶ 70 (emphases added).

obligation to provide "most constant protection and security," and the obligation not to expropriate the property of the other Party's companies and nationals except under certain conditions. Iran has not established a violation of these three obligations, nor has it established that any of the other obligations it seeks to impose on the United States under Article IV are part of the customary international law minimum standard of treatment.

1.13 Iran also invokes Article V(1)(c), which provides that a Party's nationals and companies "shall be permitted . . . to dispose of property of all kinds by sale, testament or otherwise" under a standard of most-favored-nation treatment. However, Iran has neither established that any of its companies attempted to dispose of property and were prevented from doing so by any of the challenged measures, nor has it established that comparable companies received more favorable treatment (and it has made no claims whatsoever on behalf of its nationals).

1.14 Finally, with respect to Articles VII(1) and X(1), Iran reads the provisions to cover measures to which they have no application. Article VII(1) applies to exchange restrictions alone, not all restrictions on the transfer of funds, and Article X(1) is a part of a navigation provision and contains a critical territorial limitation. Iran ignores these considerations, instead advancing an unbounded interpretation of the provisions.

1.15 Iran has therefore misinterpreted each of the Treaty articles on which it seeks to rely in this case. None of the Treaty's Articles bars the United States from implementing the challenged measures in response to Iran's sponsorship of terrorist attacks and its refusal to compensate the victims of those attacks.

1.16 Finally, even if the Court were to conclude that the challenged measure infringed on Iran's rights under the Treaty, Iran's invocation of those rights to shield itself and its agencies and instrumentalities from compensating victims of terrorist attacks that Iran has concededly sponsored would be an abuse. In the circumstances, the Court should preclude Iran from exercising its rights under the Treaty.

* * * *

1.17 The remainder of the Counter-Memorial is structured as follows. After the discussion of the Preliminary Objections Judgment in **Chapter 2,** the Counter-Memorial proceeds to **Part II**, which provides essential background and context for the United States' defenses. Following some introductory observations to this Part in **Chapter 3**, **Chapter 4** gives an overview of the Treaty of Amity, the basis on which Iran seeks to found jurisdiction in this case. **Chapter 5**

details Iran's long history of sponsoring terrorist acts against the United States and others, as well as Iran's use of money laundering and other financial improprieties to facilitate its illegal conduct. **Chapter 6** addresses the measures that Iran has challenged, which the United States adopted in response to Iran's sponsorship of terrorism.

1.18 **Part III** of the Counter-Memorial sets out four defenses, described briefly above, that each require the dismissal of some or all of Iran's claims. These defenses are introduced in **Chapter 7**. **Chapter 8** urges the Court to reject Iran's claims on the basis of its unclean hands, **Chapter 9** explains that Iran has failed to establish that Bank Markazi is a "company" under the Treaty, **Chapter 10** shows that Iran has not demonstrated that its companies exhausted local remedies and, finally, as demonstrated in **Chapter 11**, Article XX(1) excludes one of the challenged measures, Executive Order 13599, from the Treaty's scope.

1.19 Finally, **Part IV** of the Counter-Memorial responds to Iran's claims under each article of the Treaty. The United States identifies cross-cutting weaknesses in Iran's approach to the Treaty of Amity in **Chapter 12**. **Chapters 13 through 17** addresses the claims under Articles III, IV, V, VII, and X, respectively. The United States also shows, in **Chapter 18**, that Iran's abuse of rights bars its claims, regardless of the Court's findings on the specific Articles at issue, and, in **Chapter 19**, that Iran has failed to justify its requests for relief in this case.[2]

CHAPTER 2: THE PRELIMINARY OBJECTIONS JUDGMENT

2.1 The case that Iran brought to the Court – in its Application and its Memorial – asserted that the U.S. domestic legal framework providing for suits in U.S. courts against designated state sponsors of terrorism like Iran, including the provisions of U.S. law that facilitate the enforcement of terrorism-related judgments against assets of Iran, its Central Bank, and other Iranian state entities, violates various provisions of the Treaty of Amity. Under this umbrella, Iran claimed that the Treaty of Amity incorporated customary international law principles of sovereign immunity which, Iran claimed, protected Iran and its Central Bank (Bank Markazi), from both suit and attachment. Not content to rely on a claim of immunity in respect of Bank Markazi, Iran claimed also that Bank Markazi is a "company", within the meaning of this term in the Treaty, and in this guise able to avail itself of the protections afforded companies under the Treaty. A significant number of other claims were subsumed

[2] Documents annexed to this Counter-Memorial are rendered herein as "(U.S. Annex __)." Documents annexed to Iran's Memorial are rendered herein as "(IM Annex __)." Finally, documents annexed to the U.S. Preliminary Objections are rendered herein as "(U.S. P.O. Annex __)."

and advanced as part of Iran's case, although Iran fails to plead many of those claims with the specificity required to meet its burden as the complaining party.

2.2 The Court rendered its Preliminary Objections Judgment on Iran's case on February 13, 2019. As explained below, the Preliminary Objections Judgment significantly narrowed the scope of Iran's case. Most significantly, the Judgment excluded Iran's claims predicated on a denial of sovereign immunity protections to Iran, its Central Bank, and other Iranian state entities, as well as their property in lawsuits brought by U.S. victims of terrorism. The effect of this is to exclude from the scope of Iran's case going forward all claims advanced by Iran in its own right, as well as its sovereign immunity claims in respect of Bank Markazi and other state entities. Beyond this, the Preliminary Objections Judgment laid out a clear framework for deciding one of the key issues that remains, namely whether Bank Markazi is a "company" qualifying for protection under the Treaty. In its article-by-article analysis for purposes of its conclusions on the issues of sovereign immunity and the meaning of "company", the Preliminary Objections Judgment also provided material guidance to the interpretation of the provisions in question for purposes of addressing Iran's substantive treaty claims. What remains of Iran's case following the Court's Judgment is a narrower case than Iran brought to the Court. It is a case now about U.S. measures, including certain U.S. judicial decisions, that have facilitated the ability of victims holding terrorism-related judgments against Iran to enforce those judgments against Iran, its Central Bank, and other state-owned entities.

Section A: What Did the Court Decide?

2.3 As the Court considers the merits of Iran's claims, it is critical to understand which claims have been dismissed by the Court's Preliminary Objections Judgment, which U.S. measures are no longer under review, and consequently, what remains of Iran's case.

2.4 The decision of the Court that all of Iran's claims premised on the purported failure to accord sovereign immunity protections arising under customary international law to Iran, its central bank, and other state entities are outside the scope of the Treaty and therefore outside the jurisdiction of the Court has far-reaching consequences. As expressed by the Court, "in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them."[3]

[3] Preliminary Objections Judgment, ¶ 80.

2.5 It follows from this conclusion that Iran's claims under Article XI(4) of the Treaty, which was exclusively concerned with the denial of sovereign immunity, are fully dismissed from the case. In addition, Iran's claims under Articles III(1), III(2), IV(1), IV(2), and X(1) to the extent they are based on the denial of sovereign immunity protections are also dismissed.

2.6 A number of U.S. measures that were challenged exclusively on the basis that they improperly denied sovereign immunity protections are also no longer before the Court. Specifically, the Anti-terrorism and Effective Death Penalty Act of 1996, which provides an exception to sovereign immunity in lawsuits against designated state sponsors of terrorism cannot form the basis of any of Iran's claims that remain in the case.

2.7 A large number the U.S. judicial decisions that Iran has challenged are also outside the scope of the case following the Court's Judgment. These U.S. judicial decisions are set forth by Iran in Attachments 1-4 appended to its Memorial. As noted further below, these summary charts fall far short of presenting the information necessary for the Court to understand the listed decisions in detail or how they fit with Iran's case. In any event, a number of those charts and many of the decisions listed on them are now outside the Court's jurisdiction. *First*, the cases listed in Iran's Attachment 1 ("U.S. Court Judgments against Iran & Iranian State Entities as of 31 January 2017") are outside the scope of the case, as Iran's only claim with respect to these cases was that the courts did not recognize the sovereign immunity of the Government of Iran and other state entities in finding that Iran was responsible for sponsoring the underlying acts of terrorism. Similarly outside the Court's jurisdiction are the cases listed in Iran's Attachment 4 ("Claims Pending before U.S. Courts against Iran & Iranian State Entities as of 31 January 2017"). In these cases, U.S. victims of Iranian-sponsored terrorism are invoking the exception to immunity in the 1996 Act to pursue judgments against the Government of Iran and Iranian state entities for damages for their losses. As such, these cases concern sovereign immunity.[4]

2.8 *Second*, the cases in Attachment 2 ("Actions filed with U.S. Courts to Enforce Judgments against Assets of I.R. Iran & Iranian State Entities As of 31 January 2017") are also outside the Court's jurisdiction to the extent they are based on claims concerning a denial of

[4] In any event, these are pending cases that have not reached a final conclusion in U.S. courts, let alone been subject to efforts to enforce any judgments that may be issued. Thus, these cases are also not ripe for review before this Court.

sovereign immunity protections or where they involve entities that are not entitled to Treaty protections afforded only to "companies."

2.9 *Third*, and finally, any claims concerning the U.S. judicial decisions listed in Attachment 3 ("Actions filed in other Jurisdictions for Recognition & Enforcement of U.S. Judgments against Assets of Iran & Iranian State Entities as of 31 January 2017") are also excluded. These cases concern efforts to enforce U.S. judgments obtained against Iran and its state entities in courts outside of the United States. As discussed, because Iran's only basis for challenging the judgments concerns sovereign immunity, they are outside the Court's jurisdiction. Any resulting enforcement outside the United States, about which Iran has provided little to no evidence in any event, would be based on the law of those other jurisdictions, and not on U.S. law.

2.10 The Preliminary Objections Judgment eliminated certain claims pertaining to the treatment of Iran, its Central Bank, and other state entities based on sovereign immunity. The case that remains before the Court is a challenge to the legal framework put in place by the United States to allow victims of Iranian-sponsored terrorism who have lawfully-obtained judgments against Iran to enforce those judgments against Iranian state entities and obtain compensation for their losses.

2.11 Apart from its ruling on Iran's claims with respect to the alleged violation of its sovereign immunity, the Court also ruled on other matters in its Preliminary Objections Judgment that are of critical importance to Iran's case on the merits. The United States advanced a jurisdictional objection to Iran's claims as they relate to Iran's Central Bank, Bank Markazi, on the grounds that Bank Markazi is not eligible for the protections afforded to "companies" under the Treaty. The Court's Preliminary Objections Judgment held that "an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a 'company' within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections provided for in Articles III, IV, and V."[5] It follows from this that Iran's claims concerning sovereign entities which are based upon Treaty protections afforded only to "companies" within the meaning of the Treaty are excluded from the case before the Court. The first case listed in Attachment 2 is a case against Iran's Ministry of Defence and Support for Armed Forces of Iran (MODSAF), which is a governmental ministry and therefore does not qualify as a "company" under the Treaty.

[5] Preliminary Objections Judgment, ¶ 91.

For the reasons discussed in Chapter 9 below, Bank Markazi is also not a "company" under the Treaty. Iran's claims challenging the treatment of Bank Markazi under Article III, IV, and V of the Treaty, should, accordingly, be dismissed.

Section B: What Are the Implications of the Court's Interpretive Analysis?

2.12 In reaching the conclusion that Iran's claims premised on the denial of sovereign immunity were outside the scope of the Treaty, the Court examined each of the Treaty provisions invoked by Iran for this claim. Certain elements of the Court's article-by-article analysis, in particular as it relates to Article III(2) and Article IV of the Treaty, provide helpful guidance regarding the meaning and scope of these provisions more generally that bear on the Court's consideration of the merits of Iran's remaining claims.

- With respect to **Article III(2)** of the Treaty, which guarantees to nationals and companies of each Treaty Party access to courts in the other, the Court found that the provision "does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have."[6] As set forth in Chapter 13.B below, what Iran seeks under Article III(2) – to insulate its companies from judgment-enforcement actions – is precisely a guarantee of substantive and procedural rights. Iran does not – nor could it – establish that the U.S. measures in any way interfere with the "possibility" of Iranian companies accessing U.S. courts to pursue their rights. This is made clear by the active participation of Iranian companies in U.S. court proceedings including some that are at issue in this case.

- With respect to **Article IV**, the Court also noted that Article IV(1) and (2) must be viewed as a whole, and when read together, it is clear that "the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature."[7] In addition, in rejecting Iran's claim that Article IV incorporates international law protections of sovereign immunity, the Court observed that "[t]he 'international law' in question in

[6] *Id.*, ¶ 70.

[7] *Id.*, ¶ 58.

this provision is that which defines the minimum standard of protection for property belonging to 'nationals' and companies' of one Party engaging in economic activities within the territory of the other . . . ."[8] Chapter 14 of this Counter-Memorial, demonstrates that even with respect to those claims that remain in the case, there is a fatal disconnect between the scope of Article IV, as confirmed by a proper interpretation of that provision pursuant to customary rules of treaty interpretation, on the one hand and Iran's claims on the other.

2.13 The remainder of this submission relies where appropriate on these interpretive analyses as useful guiding principles in order to demonstrate that Iran's case is divorced from the Treaty's text and its object and purpose.

Section C: Iran's Case as It Now Stands

2.14 Iran's case must be understood in light of the rulings and analyses set out in the Court's Preliminary Objections Judgment, and the remainder of the U.S. Counter-Memorial responds to Iran's case through that lens. Before turning to the U.S. defenses, it is important to bear in mind an overarching defect in the way Iran has pleaded its case that has hampered the U.S. effort to respond. In particular, many of Iran's arguments are comprised of conclusory assertions supported only by generalized factual allegations or vague charts, neither of which are sufficient to substantiate Iran's claims.

2.15 The skeletal nature of Iran's pleading puts the United States in the awkward position of trying to respond without a clear understanding of what Iran is claiming, including because Iran has failed to precisely identify which measures it considers to be in violation of which Treaty provisions, or to analyze, with reference to the measures, how they allegedly violate the Treaty. The United States demonstrates in this Counter-Memorial why Iran's claims fail as they have been presented, but the United States has not attempted to fill in the precise contours of Iran's contentions where Iran has not done so itself. It is, of course, Iran's responsibility to adequately plead and prove its claims.

2.16 One example of Iran's vague pleading is that it has in a number of cases provided only an indicative list of the property that has allegedly been subject to treatment in violation of the Treaty of Amity[9] or has made vague references to the property of "Iranian companies"

[8] *Id.*, ¶ 57.

[9] *See, e.g.*, Iran's Memorial, ¶¶ 5.14(b), 5.44(b)-(c), 5.46(b)-(d), 5.49, 5.50(b), 5.59.

in general.[10] Neither approach is sufficient to identify for the United States or for the Court the specific universe of property that is the subject of each of Iran's specific claims or to link that property to a specific breach allegedly committed by the United States. Thus, Iran's allegations fall well short of what is required to establish a claim under the Treaty.

2.17 Another problem with Iran's Memorial is its reliance on the summary litigation charts that it has included as Attachments 1 to 4. Attachments 1, 3 and 4 are irrelevant to these proceedings, either because they relate to the sovereign immunity claims rejected by the Court in its Preliminary Objections Judgment (Attachments 1 and 4) or because they identify cases pending in jurisdictions outside the United States (Attachment 3), which are not subject to the challenged measures. Although Attachment 2 remains relevant because it lists enforcement actions in the United States, it provides only basic, and in most cases incomplete, information about the parties to and the procedural status of the 90 listed cases. Indeed, as shown in relevant sections of this submission, claims with respect to some of these cases may summarily be dismissed by the Court for reasons that are not evident from the Attachment itself, such as that the Iranian entity at issue has not exhausted local remedies, the Iranian entity subject to attachment is a governmental entity and therefore not a "company" entitled to protections under the Treaty, or the Iranian entity has in fact prevailed in avoiding attachment in the listed case. Without this context for the cases, Iran has not put before the Court the information necessary to understand Attachment 2 and how it fits with Iran's claims.

2.18 In the chapters that follow, the United States has attempted to respond to the case that Iran has put to it, but, again, this undertaking has been hampered for the reasons noted above. Should Iran seek an opportunity to elaborate on the inadequate factual support it has so far provided for its claims, the United States will respond as appropriate.

PART II: BACKGROUND AND CONTEXT

CHAPTER 3: INTRODUCTION

3.1 Part II of this Counter-Memorial addresses three issues that provide necessary factual background and context relevant to the substantive U.S. defenses addressed in Parts III and IV that follow.

3.2 First, Chapter 4 provides an overview of the Treaty of Amity, on which Iran relies to found jurisdiction in this case. The first section of this chapter provides a framing for all of

[10] *See, e.g.*, Iran's Memorial, ¶¶ 5.15, 5.18, 5.75.

Iran's claims by setting out the Treaty's object and purpose, which as described is divorced from the context in which Iran brings its case. Chapter 4 also puts the Treaty of Amity in the historical context of the U.S. program in the post-war period of negotiating and concluding treaties of Friendship, Commerce, and Navigation with a wide range of countries, including Iran.

3.3 Chapter 5 provides the factual background necessary to understand Iran's claims and the U.S. measures that Iran challenges. This chapter focuses on Iran's long history of sponsoring terrorist acts against the United States, which is the impetus for the measures about which Iran complains. This chapter also includes discussion of Iran's policy of supporting terrorism targeting other countries as well as Iran's other destabilizing conduct, which has drawn the attention of the international community.

3.4 Chapter 6 contains an overview of the U.S. measures that give rise to Iran's claims and contextualizes those measures in the broader U.S. effort to afford victims of Iranian-sponsored terrorism an avenue to hold Iran accountable and seek compensation for their losses.

CHAPTER 4: THE TREATY OF AMITY AND U.S.-IRANIAN RELATIONS THEREUNDER

4.1 The Treaty of Amity is well known to the Court. Nevertheless, because it is the basis on which Iran seeks to found jurisdiction it is important to begin any discussion of Iran's claims and the reasons they must fail with the Treaty, including certain foundational elements of the Treaty, its object and purpose, and the limits to its scope and breadth. In the Preliminary Objections phase, the United States put before the Court extensive background and argumentation regarding the Treaty of Amity, its origin and negotiating history, a general framing of its provisions, and the relevance – or lack thereof – of the Treaty to the U.S.-Iranian relationship in the last few decades.[11] Rather than repeat those arguments, this chapter, which is divided into two sections, highlights key points that should continue to bear on the Court's review of the case. The first section relates to the object and purpose of the Treaty of Amity and its place in the context of the broader U.S. program of concluding Friendship, Commerce, and Navigation treaties in the aftermath of World War II, and shows in general terms the disconnect between the purpose of such treaties and Iran's case. The second section summarizes the history of U.S.-Iran relations in relation to the Treaty since it was concluded

[11] Preliminary Objections Submitted by the United States of America, Part I, Chapter 2, *Certain Iranian Assets (Iran v. United States)* (May 1, 2017) (hereinafter "U.S. Preliminary Objections"); Verbatim Record of the Oral Hearing on U.S. Preliminary Objections 24-30, *Certain Iranian Assets (Iran v. United States)* (Oct. 8, 2018).

and shows that the Treaty has not been operating in a meaningful sense between the Parties for decades.

Section A: Treaty of Amity: Object and Purpose and U.S. FCN Program

4.2 The United States and Iran signed the Treaty of Amity on August 15, 1955.[12] At the time, the United States and Iran enjoyed friendly relations and sought to build on those relations by creating a framework for a more robust economic relationship. In the Preamble to the Treaty, the Parties provided that they were "desirous of emphasizing the friendly relations which have long prevailed between their peoples . . . of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations." The Parties, therefore, "resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights."

4.3 Article I of the Treaty also provides that: "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran." Thus, at the time the Treaty was concluded, the Parties had a shared goal of furthering their friendly relationship through a series of reciprocal commitments to engage in mutually beneficial trade and investment. By its terms, the Treaty advances this objective by providing protections for each Party's nationals and companies in respect of their ordinary commercial and investment activities within the territory of, or in trade between, the two Parties.

4.4 The Treaty, together with its object and purpose, is consistent with the broader context of U.S. FCN treaties in the post-World War II period. The Treaty of Amity was part of a series of post-World War II bilateral commercial and consular treaties between the United States and other friendly nations.[13] The U.S. commercial treaty program was one of the longest-running diplomatic initiatives of the United States. Early U.S. commercial treaties were primarily focused on simply establishing basic trade relations between two countries.[14] In the post-World War II era, the United States sought to update and modernize those early commercial agreements in certain respects, in what became known as treaties of "Friendship, Commerce and Navigation" ("FCN treaties"). These treaties were aimed at enabling commerce

[12] The Treaty entered into force on June 16, 1957.

[13] The Treaty of Amity was described in 1958 as an "abridged edition" of the standard U.S. FCN treaty. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 807 (1958) (U.S. P.O. Annex 1).

[14] *See generally* Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 57-58 (1958) (U.S. P.O. Annex 2); KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENTS TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 57-60 (2017) **(U.S. Annex 3)**.

with, and safeguarding U.S. investment in, nations with which the United States had friendly relations.[15] Each of these treaties operated on a reciprocal basis, providing protections to the other party to the treaty in respect of its commerce with, and investment in, the United States. In 1951, Assistant Secretary of State Willard Thorp described the FCN treaties as part of a "program of extending and modernizing the treaty protection of American citizens, corporations, capital, trade and shipping abroad, with special emphasis on establishing conditions favorable to private investment."[16] Similarly, in 1952, Deputy Assistant Secretary of State Harold F. Linder explained that the post-war FCNs were aimed at mitigating the risks to U.S. investors overseas by "establish[ing] mutually agreed standards of treatment for the citizens and enterprises of one country within the territories of another."[17]

4.5 Iran's case must be scrutinized through the lens of these principles that underpin the Treaty. Specifically, the Treaty was intended to rest on an edifice of "enduring peace and sincere friendship" and to facilitate increased and mutually beneficial commercial and consular relations between the two Parties. Iran's case, by contrast, addresses issues, in the form of underlying Iranian conduct and U.S. measures taken to address that conduct, that bears no relationship to the commercial and consular goals of the Treaty. It goes without saying that taking actions, such as support for acts of terrorism targeting the United States, its nationals and national security interests, is completely antithetical to the underlying principles set out in Article I of the Treaty and of the Treaty as a whole. The measures at issue were put in place by the United States to respond to these acts of terrorism against the United States and to allow

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[15] *See generally* Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 57-58 (1958) (U.S. P.O. Annex 2); Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956) (U.S. P.O. Annex 3) (stating that the FCN treaties "acquired in time a familiar and distinctive form and character, as a normal medium through which to provide extensively for the rights of each country's citizens, their property and other interests, *in the territories of the other,* and for rules to mutually govern their trade and shipping."). Herman Walker served as a State Department official between 1946 and 1962, and has been described as the "architect of the modern FCN treaty." *See* Wolfgang Saxon, "Herman Walker, 83, Professor and U.S. Foreign Officer, Dies," N.Y. Times (May 13, 1994) (U.S. P.O. Annex 4).

[16] Memorandum from Willard Thorp, Assistant Secretary for Economic Affairs, to Jack K. McFall, Assistant Secretary for Legislative Affairs (Dec. 29, 1951) (U.S. P.O. Annex 6). *See also Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 1-2 (1956) (statement of Thorsten V. Kalijarvi, Dep't of State) **(U.S. Annex 1)** (explaining that the Treaty of Amity, as well as FCN treaties with Nicaragua and the Netherlands, were negotiated in furtherance of Congress's directive in the Mutual Security Act of 1954 for the President to "accelerate a program of negotiating treaties for commerce and trade . . . which shall include provisions to encourage and facilitate the flow of private investment to nations participating in programs under this act").

[17] *Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcomm. of the S. Comm. On Foreign Relations*, 82d Cong. 4 (1952) (statement of Harold F. Linder, Deputy Assistant Sec'y for Economic Affairs) **(U.S. Annex 2)**.

enforcement of terrorism-related judgments against Iran to afford U.S. victims and their families much deserved redress.

4.6 To put it another way, while the Treaty sets up rules to govern the treatment afforded by one Party to the companies and nationals of the other Party in a context of increasing and mutually beneficial economic activity, the U.S. measures at issue in this case were enacted in the absence of economic engagement and friendship between Iran and the United States to address Iranian conduct outside the framework of the Treaty. Indeed, it is ironic that Iran, having adopted a policy of supporting terrorism that targets the United States and its nationals, and having not provided redress to the victims of those attacks for the resulting harms, now seeks to use a Treaty premised on mutual friendship and a growing commercial relationship to challenge these U.S. measures. In any event, as set forth in Part IV below, the Treaty's provisions nowhere address, let alone prohibit or circumscribe, rules that a Party can maintain to respond to terrorism, or to enable the enforcement of judgments, or to allow a corporate entity's veil to be pierced to reach its owners or its affiliated entities. In short, Iran's case bears no relationship to the Treaty's object and purpose or to the specific provisions that Iran has invoked.

Section B: U.S.-Iranian Relationship under the Treaty

4.7 In addition to the misfit between the Treaty and Iran's claims, it is important to understand Iran's claims in light of the history of the U.S.-Iranian relationship since the conclusion of the Treaty. Although Iran and the United States embarked on the negotiation and conclusion of the Treaty of Amity on the expectation of an enduring friendship with robust economic ties, the Parties' relationship was fundamentally ruptured when the Iranian government endorsed and supported the takeover of the U.S. Embassy in Tehran and held U.S. diplomatic personnel and others hostage.[18] Indeed, the Court found that Iran had committed "successive and continuing breaches of the obligations laid upon it by" the Vienna Conventions on Diplomatic and Consular Relations, the Treaty of Amity, "and the applicable rules of general international law."[19] Thus, the friendly relationship that underpinned the Treaty of Amity came to an abrupt halt on November 4, 1979.

[18] *See United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3, 12, ¶ 17 (May 24).

[19] *Id.*, 41, ¶ 90.

4.8 In the decades following the Iranian government's actions in 1979, the U.S.-Iranian relationship suffered further setbacks because Iran persisted on a path of violent and hostile conduct directed at the United States and its nationals, which it has maintained for nearly four decades. The reason that this case even exists is because of Iran's long-standing support for terrorist acts and related conduct specifically targeting U.S. persons and interests, and the peaceful measures taken by the United States to hold Iran accountable for such conduct. Thus, any consideration of Iran's claims under the various Treaty provisions it has invoked and the U.S. measures that Iran challenges under the Treaty must be carried out through the lens of Iran's malign conduct.

4.9 As a result of Iran's conduct over the last four decades, the Treaty of Amity has not been operating between the Parties in a meaningful sense during this period. While the Treaty sought to further closer economic relations, both Parties have taken measures over the years to discourage or prohibit economic activity between them. Moreover, in the absence of economic engagement, the Parties cannot be said to have been relying on the Treaty in the preceding decades to guarantee the protections to companies and nationals provided for therein. In recognition of this reality, the United States announced on October 3, 2018 that it was terminating the Treaty of Amity and notified Iran of the decision via diplomatic note.

4.10 Having set out an overview of the Treaty, which forms the sole basis for the Court's jurisdiction over Iran's claims, the next chapter provides the factual background concerning Iran's long-standing support for terrorism that is the impetus for the U.S. measures at issue in this case.

CHAPTER 5: IRAN'S SPONSORSHIP OF TERRORISM AND OTHER DESTABILIZING ACTS THREATENING U.S. NATIONAL SECURITY

5.1 Iran challenges measures taken by the United States in response to Iran's decades-long pattern of supporting and sponsoring acts of terrorism against the United States and its nationals, acts that have killed or injured hundreds of U.S. victims who, along with their families, suffered enormous losses as a result of those acts. This chapter details a number of these acts, as relevant to the United States submissions. It begins by setting out Iran's longstanding policy of sponsoring terrorism (in Section A), before discussing terrorist acts that Iran has directed specifically at the United States and its nationals (in Section B).

Section A: Iran Has Had a Longstanding Policy of Sponsoring Terrorism and Committing Other Destabilizing Acts

5.2 Iran is widely recognized as a global state sponsor of terrorism. It actively pursues a foreign policy that counts among its tools proxy actors such as Hezbollah, in Lebanon, to whom it provides direction, training, and material. Iran's proxies in turn have carried out, and continue to carry out, not only terrorist attacks, but also assassinations and kidnappings directed by the highest levels of the Iranian regime. As is apparent from the illustrative examples described below, virtually every region of the world has been affected by Iran's terrorism-based foreign policy. Governments and their courts have repeatedly recognized the responsibility of Iran's leadership for these acts.

5.3 The terror apparatus that guides the decision-making of the Iranian State is exemplified by the September 17, 1992 murder of four members of the Democratic Party of Kurdistan-Iran (DPK-I), a Kurdish opposition group, at the Mykonos Restaurant in Berlin.[20] The perpetrators of this attack – at least two of whom were members of Hezbollah – were subsequently convicted by the Berlin Superior Court of Justice on charges of murder or complicity to murder.[21] German authorities also issued an arrest warrant for Ali Fallahian, the Iranian Minister of Information and Security, for his involvement in the assassinations.[22] During the related criminal trial, the Berlin Superior Court of Justice confirmed the Iranian government's responsibility for the killing of the four DPK-I members. In its Judgment, the Berlin Superior Court explained that:

> [T]he attack on the leadership of the [DPK-I] is neither a crime committed by lone gunmen, nor is it caused by differences among opposition groups. On the contrary, *the attack was organized by the Iranian regime*.[23]

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[20] *See* Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* 28 (1996) **(U.S. Annex 4)**. As noted in the report, "the Parliamentary Human Rights Group was founded in 1976 as an independent forum in the British Parliament concerned with the defense of international human rights." *Id.*, at i.

[21] Summary of Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial, at 1, 4 (U.S. P.O. Annex 33); *see also* Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial [Kammergericht: Urteil im 'Mykonos' – Prozess], at 23 (Apr. 10, 1997) **(U.S. Annex 5)** (hereinafter "*Mykonos* Judgment").

[22] *See* Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* 33 (1996) **(U.S. Annex 4)**.

[23] *Mykonos* Judgment 188 **(U.S. Annex 5)** (emphasis added); *see id.* ("[T]he evidence has shown that Iranian leaders not only approve of terrorist attacks abroad and heap honors on their perpetrators, but that they themselves organize such attacks against people who displease them simply because of the political convictions."). The court also found the Iranian government responsible for the July 13, 1989, murder of three other DPK-I leaders in

5.4 The court described in detail the decision-making process of Iran's Committee for Special Affairs, which is tasked with deciding on important security matters, including "cases involving the killing of regime opponents abroad."

> The decisions made by the official Committee for Special Affairs were prerequisites for carrying out operations, particularly those involving activities abroad. If such an operation involved killing people, the leader of the revolution, acting as the political authority, confirmed the death order. For the leader of the revolution it is a matter of issuing a liquidation order, in secret and without a sentence having been passed, against persons who stood in the way of the Iranian regimes political interests or against others who for other reasons particularly displeased him. As a rule, it was directed against leading personalities of opposition groups or parties.[24]

5.5 The court also described Iran's relationship with Hezbollah. In particular, the court found that Hezbollah acted as "an arm of Iranian policy," was "established by Iran and . . . largely financed, armed, and trained by Iran. . . . not only to spread the Islamic Revolution in Lebanon, but also to fight the opponents of Iran's Islamic regime with militant means.[25]

5.6 The Mykonos Restaurant atrocity of 1992 is brought into contemporary focus by a foiled bomb attack on a rally in Paris in July 2018, directed by an Iranian diplomat.[26] On January 8, 2019, the European Union also sanctioned Iran over allegations that Iran's intelligence service orchestrated a series of assassination plots in Europe in recent years, including the killing of two Iranians in the Netherlands, and other plotted attacks in France and Denmark.[27]

Vienna. Summary of Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial, at 2 (U.S. P.O. Annex 33); *see Mykonos* Judgment 177-78 **(U.S. Annex 5)**.

[24] *Mykonos* Judgment 21 **(U.S. Annex 5)**.

[25] *Id.* 22. Following this judgment, virtually all member States of the European Union (EU) recalled their ambassadors to Iran. "EU Members Urged Not to Send Ambassadors Back to Iran," RadioFreeEurope/RadioLiberty (May 9, 1997) (U.S. P.O. Annex 48). The EU Presidency issued a Declaration in April 1997 stating that "[i]n the findings of the Superior Court of Justice in Berlin in the so-called Mykonos case the involvement of the Iranian authorities at the highest levels was established." Declaration by the Presidency on behalf of the European Union on Iran (Apr. 10, 1997) (U.S. P.O. Annex 49); *see also* EU Press Release No. 26/97, "European Union Declaration on Iran" (Apr. 29, 1997) (U.S. P.O. Annex 50).

[26] *See* "France expels Iranian diplomat over failed bomb plot: sources," Reuters, Oct. 26, 2018 **(U.S. Annex 6)**; "Exclusive: France restricts travel by diplomats to Iran," Reuters (Aug. 28, 2018) **(U.S. Annex 7)**; "Iranian Diplomat Extradited to Belgium to Face Charges in Bomb-Plot Case," RadioFreeEurope, Oct. 10, 2018 **(U.S. Annex 8)**.

[27] *See, e.g.*, Letter from Stef Blok, the Minister of Foreign Affairs, and Kajsa Ollongren, the Minister of the Interior and Kingdom Relations, to the President of the House of Representatives on sanctions against Iran on the grounds of undesirable interference (Jan. 8, 2019) **(U.S. Annex 9)**; "E.U. Imposes Sanctions on Iran Over Assassination Plots," N.Y. Times, Jan. 8, 2019 **(U.S. Annex 10)**; "In shift, EU sanctions Iran over planned Europe attacks,"

5.7 These Iran-sponsored assassination attempts exemplify a long-standing Iranian policy. This policy has been documented extensively. In its 1996 report, the U.K. Parliamentary Human Rights Group stated that, since the revolution, Iran has been tied to over 150 assassination attempts against Iranian dissidents living in other countries, terrorist acts committed in 21 countries, and the deaths of or injuries to 350 people in those attacks.[28] Noting that Iran's "use of terrorism as an adjunct to foreign policy has developed into an organised and professional activity over the last 15 years," the report stated the problem in stark terms:

> The international community has to confront the unthinkable: that a member state of the United Nations is dedicated to subverting international law, and carrying the infection of its own brand of religious terrorism into the four quarters of the globe. . . . *the Iranian government is indeed organising an international murder machine*.[29]

5.8 Iran's regional neighbors have also suffered because of Iran's support for terrorism. As discussed in Section B below, Iran was responsible for the attempted assassination of Saudi Arabia's Ambassador to the United States. Iran was also responsible for airplane hijackings by its proxy, Hezbollah.[30] The Kingdom of Bahrain, in particular, has been a target of Iran's campaign of terror, and has repeatedly discovered terrorist cells, financed and directed by the Islamic Revolutionary Guard Corps ("IRGC"). In October 2015, Bahrain transmitted to the

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Reuters, Jan. 8, 2019 **(U.S. Annex 11)**; *see also* "Read statement by foreign Minister Samuelsen on Illegal Iranian intelligence activities in Denmark," Ministry of Foreign Affairs of Denmark (Oct. 31, 2018) **(U.S. Annex 12)**; "Netherlands recalls ambassador to Iran," Deutsche Welle, Mar. 4, 2019 **(U.S. Annex 13)**.

[28] Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* 3 (1996) **(U.S. Annex 4)**.

[29] *Id.* at 5-6 **(U.S. Annex 4)** (emphasis added). Other bodies have echoed this assessment. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, demanded that Iran "cease forthwith any involvement in or toleration of murder and State-sponsored terrorism against Iranians living abroad and the nationals of other States." UN Econ. & Soc. Council, Comm. On Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 55 (Oct. 28, 1994) (U.S. P.O. Annex 80). One of the most infamous examples of Iran's policy of targeted assassinations, was the fatwa issued by Ayatollah Khomeini in 1989, calling for the murder of British novelist Salman Rushdie and of those who facilitated the publication and distribution of his novel, "The Satanic Verses." "[Khomeini] Exhorts Muslims to 'Execute' Rushdie," Tehran Radio Domestic Service, *in* Foreign Broadcast Information Service Daily Rep., FBIS-NES-89-029 (Feb. 14, 1989) (U.S. P.O. Annex 75); *see also* Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* 85 (1996) **(U.S. Annex 4)**; U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Situation of human rights in the Islamic Republic of Iran* 275, E/CN.4/1996/177 (Mar. 18 – Apr. 26, 1996) (U.S. P.O. Annex 60); Robert Tait, "Iran resurrects Salman Rushdie threat," The Telegraph, Sept. 16, 2012 (U.S. P.O. Annex 76).

[30] *See* "Chronology of Events in Hijacking of Kuwait Airways Flight 422," Associated Press, Apr. 12, 1988 (U.S. P.O. Annex 58) (discussing Hezbollah's April 1988 hijacking of Kuwait Airways Flight 422, which included 112 passengers and three members of the Kuwaiti royal family, on board); U.S. DEP'T OF DEFENSE, TERRORIST GROUP PROFILES 18 (1988) (U.S. P.O. Annex 19).

UN General Assembly a letter to the UN Secretary-General explaining its decision to withdraw its ambassador to Iran. The letter stated:

> Iran has allowed its territory and state resources to be used by terrorist groups to carry out armed attacks in Bahrain. The Government of the Islamic Republic of Iran is actively engaged in spreading weapons, such as assault rifles, grenades, improvised explosive devices (IEDs), explosively formed projectiles (EFPs) and associated technologies, to terrorist groups, including those operating in Bahrain.[31]

5.9 Iran's reach has also extended to South America, where Argentina has been the site of several Iran-sponsored attacks. On March 17, 1992, the Israeli embassy in Buenos Aires was attacked by a Hezbollah suicide bomber driving a truck laden with explosives through the front of the embassy building. The subsequent explosion destroyed the embassy, a nearby church, and a school building. Twenty-nine individuals lost their lives, including three Israeli embassy personnel and six local embassy employees, and 242 other individuals were injured.[32]

5.10 Two years later, on July 18, 1994, members of Hezbollah drove a van loaded with high explosives into the Argentine Jewish Center, known as the Asociación Mutual Israelita Argentina ("AMIA") building in Buenos Aires, Argentina. The resulting explosion killed 85 individuals and wounded at least 151 more. On October 25, 2006, Argentine prosecutors Alberto Nisman and Marcelo Martinez Burgos published a *Report and Request for Arrests* concluding that:

> [I]n our view it has been proven that the decision to carry out the attack was made not by a small, isolated group of extremist Islamic officials, but was instead *a decision that was extensively discussed and was ultimately adopted by a consensus of the highest representatives of the Iranian government* at the time within the context of a foreign policy that did not rule out

[31] UN GAOR, 70th Sess., Agenda items 85 and 108, Letter from the Permanent Mission of Bahrain to the UN addressed to the Secretary General, U.N. Doc. A/70/445 (Oct. 26, 2015) (U.S. P.O. Annex 42). Since the letter, similar reports indicating Iranian support for terrorism have continued unabated. *See, e.g.*, "Bahrain court overturns stripping of 92 Shiites' citizenship: judicial source," Business Standard, June 30, 2019 **(U.S. Annex 14)**; "Bahrain arrests 116 on charges of terrorism, Iran collusion," Deutsche Welle, Mar. 3, 2018 **(U.S. Annex 15)**; "Bahrain arrests four linked to pipeline blast: ministry," Reuters, Feb. 7, 2018 **(U.S. Annex 16)**; "Bahrain says deadly bus attack engineered by Iran," Reuters, Nov. 15, 2017 **(U.S. Annex 17)**; "Bahrain accuses Iran of harboring 160 'terrorists'," Times of Israel, Oct. 18, 2017 **(U.S. Annex 18)**.

[32] Subsequent investigations by Argentina, the United States, and Israel revealed Iranian complicity in the attack. RONEN BERGMAN, THE SECRET WAR IN IRAN: THE 30-YEAR CLANDESTINE STRUGGLE AGAINST THE WORLD'S MOST DANGEROUS TERRORIST POWER 171-72 (2008) **(U.S. Annex 19)**; *see also* "Hezbollah's 1992 Attack in Argentina Is a Warning for Modern-Day Europe," The Atlantic, Mar. 19, 2013 **(U.S. Annex 20)**; MARK SULLIVAN & JUNE BEITEL, CONG. RESEARCH SERV., RS21049, LATIN AMERICA: TERRORISM ISSUES (2016) **(U.S. Annex 21)**; Israel Ministry of Foreign Affairs, Report: Hizbullah and Iran behind Buenos Aires bombings (Oct. 26, 2006) **(U.S. Annex 22)**.

> resorting to violence in order to achieve the goals [that] are inherent to the Islamic republic that was established by the revolution of February 1979.[33]

5.11 Over Iranian objections, Interpol Red Notices were issued for six individuals, including five of the Iranian government officials, in connection with the bombing.[34] Twenty-five years later, Argentina continues to seek justice for the Iranian-supported bombing of the AMIA building.[35]

5.12 Iran has also engaged in a multitude of other destabilizing acts that threaten the national security interests of the United States and others, in particular acts related to the development of its ballistic missile program and arms trafficking. In adopting UN Security Council resolution 1929 (2010), the Security Council "decide[d] that Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology" and prohibited the transfer to Iran of a broad range of arms and related materiel.[36] The Security Council further requested that the Secretary-

[33] Investigations Unit of the Office of the Attorney General, *Report; Request for Arrests* 13-14 (Oct. 25, 2006) **(U.S. Annex 23)** (emphasis added); *see also id.* at 781-95 (reviewing and summarizing evidence). The report continued: "We show in the present report that the decision to carry out the attack . . . was made, and the attack was orchestrated, by the highest officials of the Islamic Republic of Iran at the time, and that these officials instructed Lebanese terrorist group Hezbollah (Party of God) – a group that has historically been subordinated to the economic and political interests of the Teheran regime – to carry out the attack." *Id.* at 16 **(U.S. Annex 23)**.

[34] INTERPOL Media Release, INTERPOL General Assembly upholds Executive Committee decision on AMIA Red Notice dispute (Nov. 7, 2007) (U.S. P.O. Annex 32). Red Notices were issued for, among others, Ahmad Vahidi, former Iranian defense minister and member of the IRGC-QF; Ali Fallahian, a former Iranian intelligence minister who was also found by the Berlin court in the *Mykonos* case to have been responsible for carrying out the instruction to kill Kurdish leader Sharafkandi, *see Mykonos* Judgment 22 **(U.S. Annex 5)**; Mohsen Rabbani, the former Iranian cultural attaché in Argentina, who was to meet with Abdul Kadir, one of the defendants convicted in the 2007 plot to bomb John F. Kennedy International Airport, *see* Federal Bureau of Investigation Press Release, Imam from Trinidad Convicted of Conspiracy to Launch Terrorist Attack at JFK Airport (May 26, 2011) (U.S. P.O. Annex 34); and Mohsen Rezaee, former IRGC commander and member of Iran's Supreme Defense Council.

[35] On July 19, 2019, Argentina's President Mauricio Macri stated that "[w]e will continue to look for those accused of these acts to be tried in Argentine territory and we will keep the red alerts (from Interpol) on them, and we ask the Islamic Republic of Iran to collaborate in the investigation." "Argentina: Macri Wants Those Behind AMIA Attack To Be Tried in Argentina," MercoPress, July 19, 2019 **(U.S. Annex 24)**. Iran, however, has refused repeated requests by Argentina to cooperate with the Red Notices. *See, e.g.*, UN GAOR, 64th Sess., Agenda item 8, Letter from the Permanent Representative of Argentina to the UN addressed to the President of the General Assembly, U.N. Doc. A/64/505 (Oct. 28, 2009) (U.S. P.O. Annex 41); UN GAOR, 64th Sess., 5th plen. Mtg., Address by Cristina Fernandez de Kirchner, President of the Argentine Republic, U.N. Doc. A/64/PV.5, at 2-3 (Sept. 23, 2009) (U.S. P.O. Annex 38). Of further relevance, Argentine prosecutor Nisman also produced a report on Iranian terror networks throughout Latin America in May 2013. *See* Attorney General's Unit, "Opinion," at 252 (May 29, 2013) **(U.S. Annex 107)** ("[T]he attack against the Jewish community . . . is part of an extensive regional strategy reflected in the establishment in certain countries of intelligence bases which, through the dual use of political, religious and cultural institutions, were positioned to provide, if needed, essential support for committing acts of terrorism.").

[36] S.C. Res. 1929, ¶ 9, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110).

General create a panel of experts to review incidents of non-compliance by Iran in connection with these prohibitions. That Panel issued numerous reports detailing Iran's continued acts in contravention of resolution 1929.[37] Following the dissolution of the panel of experts upon adoption of UN Security Council resolution 2231, the Secretary-General's six-month reports on implementation of the resolution likewise have continued to report on acts demonstrating Iran's ongoing non-compliance with these restrictions.[38]

5.13 As part of its broader campaign of supporting terrorism, Iran has also supplied weapons and training to terrorist groups actively carrying out attacks on U.S. military forces, and those of partner States. This activity has been in contravention of UN Security Council resolution 1373 (2001), which was adopted following the attacks on the United States on September 11, 2001, and requires all States to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts."[39] For example, Iran provided training and material for the Taliban to carry out attacks on Coalition Forces in Afghanistan, including those of the United States, as well as the Afghani government.[40] In April 2011, Afghan forces intercepted a shipment of ammunition supplied by Iran to the Taliban[41] and

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[37] *See, e.g.*, Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), at 2, 30 (2011) (U.S. P.O. Annex 115); Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2012/395, at 3-4 (June 4, 2012) (U.S. P.O. Annex 114); Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2013/331, at 5, 32 (June 3, 2013) (U.S. P.O. Annex 117); Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2014/394, at 3, 9 (June 5, 2014) (U.S. P.O. Annex 118); Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2015/401, at 3 (June 1, 2015) (U.S. P.O. Annex 119).

[38] *See, e.g.*, Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2016/589, at 3, 8-10 (July 12, 2016) (U.S. P.O. Annex 123); Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2016/1136, at 5-7. (Dec. 30, 2016) (U.S. P.O. Annex 125); Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2017/515, at 2, 5-8 (June 20, 2017) **(U.S. Annex 25)**; Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2017/1030, at 4-5 (December 8, 2017) **(U.S. Annex 26)**; Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2018/602, at 5-6, 8-11 (June 12, 2018) **(U.S. Annex 27)**; Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2018/1089, at 6-7 (Dec. 6, 2018) **(U.S. Annex 28)**; Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2019/492, at 4-6, 8-11 (June 13, 2019) **(U.S. Annex 29)**.

[39] S.C. Res. 1373, U.N. Doc. S/RES/1373, Preamble, ¶ 2(a) (Sept. 28, 2001) (U.S. P.O. Annex 81).

[40] "Iranian support of Afghan Taliban targeted by new US sanctions," Deutsche Welle, Oct. 25, 2018 **(U.S. Annex 30)**. The United States has determined that "from at least 2006 . . . Iran has arranged frequent shipments to the Taliban of small arms and associated ammunition, rocket propelled grenades, mortar rounds, 107 mm rockets, and plastic explosives." Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 18, 2011) (U.S. P.O. Annex 152).

[41] *See* Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2012/395, at 27 (June 4, 2012) (U.S. P.O. Annex 114) (noting the shipment of 48 122mm rockets and 1,000 rounds of ammunition). Recently, an unmanned aerial system of Iranian design was also recovered by coalition forces in Afghanistan. Brian H. Hook, "The Iranian Regime's Transfer of Arms to Proxy Groups and Ongoing Missile Development," U.S Dep't of State, Nov. 29, 2018 **(U.S. Annex 31)**.

commanders of the Taliban have also confirmed that Iranian officials paid them to attend training courses in Iran devoted to teaching them how to attack NATO troops and convoys.[42]

5.14 Iran's arms trafficking and other malign activities have been made possible in part through its use of money laundering practices, which permit the clandestine movement of arms and material to actors posing a direct danger to U.S. national security interests, as confirmed by both U.S. and international sources.

5.15 The multilateral Financial Action Task Force (FATF) has repeatedly issued warnings concerning the terrorism-finance and money-laundering risks posed by Iran.[43] Since 2007, the FATF has advised financial institutions to use "enhanced due diligence" in dealings with Iran given Iran's failure to implement a comprehensive anti-money laundering or anti-terrorist financing regime, which represented "a significant vulnerability within the international financial system." Subsequently, the FATF also began urging States to apply "[e]ffective counter-measures to protect their financial sectors from money laundering and financing of terrorism . . . risks emanating from Iran."[44]

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[42] "Iranians train Taliban to use roadside bombs: report," The Nation, Mar. 21, 2010 (U.S. P.O. Annex 88); "Captured Taliban Commander: 'I received Iranian Training,'" RadioFreeEurope/RadioLiberty, Aug. 23, 2011 (U.S. P.O. Annex 89). Member States of the Terrorist Financing Targeting Center likewise have recognized Iran's support for the Taliban, notably in the form of, for example, agreements between the IRGC-QF and the Taliban to provide training to Taliban forces in exchange for them attacking specific targets, including through the use of suicide bombers. "Treasury and the Terrorist Financing Targeting Center Partners Sanction Taliban Facilitators and their Iranian Supporters," U.S. Dep't of Treasury, Oct. 23, 2018 **(U.S. Annex 32)**. In addition, in a televised speech in May 2019, Hamas's political leader in the Gaza Strip, Yahya Sinwar, admitted that Iran had provided arms to Hamas, stating that "rockets launched at Tel Aviv in 2014 were either "provided by Iran" or "locally made, with financial and technical support from Iran." He also stated that, in case of another conflict, "Tel Aviv will be struck with several times the number of [missiles] than in 2014." He further stressed that "if not for the support of Iran for the resistance in Palestine, we would not have obtained these capabilities." Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2019/492, at 11 (June 13, 2019) **(U.S. Annex 29)**.

[43] The FATF is an inter-governmental body with representatives from many regions of the world (including the United States), whose purpose is to set standards and promote the effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and related threats to the integrity of the international financial system.

[44] Financial Action Task Force Statement (Feb. 25, 2009) (U.S. PO Annex 146). While Iran has pledged that it would implement an action plan to address deficiencies in its anti-money laundering provisions and actions to combat the financing of terrorism, it has failed to do so to date. As recently as June 2019, the FATF noted that Iran still had not fully addressed the issues identified by FATF as necessary for a comprehensive anti-terrorist financing regime. FATF, Public Statement – June 2019 (June 21, 2019) **(U.S. Annex 34)**. FATF continues to "call upon members and urging all jurisdictions to require increased supervisory examination for branches and subsidiaries of financial institutions based in Iran." FATF also stated that "[u]ntil Iran implements the measures required to address the deficiencies identified with respect to countering terrorism-financing in the Action Plan, the FATF will remain concerned with the terrorist financing risk emanating from Iran and the threat this poses to the international financial system." *Id.*; *see also* "UPDATE 1-SWIFT says suspending some Iranian banks' access to messaging system," Reuters, Nov. 5, 2018 **(U.S. Annex 35)** (reporting that in November 5, 2018, Belgium-based SWIFT financial messaging service suspended unspecified Iranian banks' access to messaging system in interest of stability and integrity of global financial system).

5.16 The UN Security Council has likewise recognized the danger posed by Iran's financial system. The Security Council, in resolution 1803 (2008), "[c]all[ed] upon all States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation of sensitive nuclear activities, or to the development of nuclear weapon delivery systems."[45] In resolution 1929 (2010), the Security Council also "recall[ed] in particular the need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran, so as to prevent such transactions contributing to proliferation-sensitive activities, or to the development of nuclear weapon delivery systems."[46]

5.17 In recognition of this growing concern, in November 2011, the U.S. Treasury Department issued a finding concluding that Iran was a "jurisdiction of primary money laundering concern,"[47] and that Iran "used deceptive financial practices to disguise both the nature of transactions and its involvement in them in an effort to circumvent sanctions."[48] The U.S. Treasury Department further found that "Iranian financial institutions, including the Central Bank of Iran (Bank Markazi), and other state-controlled entities, willingly engage in deceptive practices to disguise illicit conduct, evade international sanctions, and undermine the efforts of responsible regulatory agencies around the world."[49]

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[45] S.C. Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102).

[46] S.C. Res. 1929, prmbl., U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110).

[47] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72756 (Nov. 18, 2011) (U.S. P.O. Annex 152).

[48] *Id.* at 72760 (U.S. P.O. Annex 152).

[49] *Id.* at 72760 (U.S. P.O. Annex 152). The U.S. determination noted many of the kinds of deceptive practices utilized by Iranian financial institutions to disguise the Iranian origin of transactions, as well as identifying the array of agencies, instrumentalities, and financial institutions through which Iran sought to evade sanctions and further its support for terrorism abroad and its pursuit of ballistic missiles domestically. These included the transfer of funds to exchange houses outside Iran, including transferring funds to local banks in the same jurisdiction for onward payments; the use of back-to-back letters of credit; removing the names of Iranian banks from financial transactions; using front companies and complex corporate ownership structures to disguise Iranian control; and collusion with exporters to enter fictitious end-user names on export forms. *Id.* at 72760-63 (U.S. P.O. Annex 152); *see also* Press Release, U.S. Dep't of Treasury, Treasury Sanctions Iran's Central Bank and National Development Fund (Sept. 20, 2019) **(U.S. Annex 33)** (quoting Treasury Secretary Steven T. Mnuchin as stating that "Iran's Central Bank and the National Development Fund were ostensibly intended to safeguard the welfare of the Iranian people, but have been used instead by this corrupt regime to move Iran's foreign currency reserves for terrorist proxies."); *id.* (quoting Under Secretary for Terrorism and Financial Intelligence Sigal Mandelker as stating "[w]e are putting governments on notice that they are risking the integrity of their financial systems by continuing to work with the Iranian regime's arm of terror finance, its Central Bank").

Section B: Iran's Support of Terrorist Acts Directed at the United States

5.18 Against the background of the preceding discussion of malign Iranian conduct around the world, this section addresses, by way of example, the numerous instances of Iran's support for terrorist acts targeted directly at the United States and its nationals.

i. The Marine Barracks Bombing and Other Terrorist Bombings Targeting U.S. Interests in Lebanon

5.19 Less than two years after the release of 52 U.S. diplomats and citizens and the conclusion of the Iran hostage crisis, Iran defined the shape of its future relations with the United States when Hezbollah—a group founded, supported and that has been directed by Iran—attacked the U.S. Embassy in Beirut on April 18, 1983. The attack by a Hezbollah suicide bomber, driving a truck with over 2,000 pounds of explosives, destroyed the embassy building and killed 63 people, including 17 U.S. diplomats and military personnel, while wounding many more.[50]

5.20 The embassy bombing was followed in October of that same year by another attack aimed at the U.S. and French peacekeeping forces stationed in Beirut at the request of the Lebanese government as part of a multilateral peacekeeping contingent.[51] As part of the agreement between the U.S. and Lebanese governments, U.S. forces were not engaged in combat and were equipped only with weapons consistent with that non-combat role.[52]

5.21 The attack occurred on the morning of October 23, 1983, beginning when a Hezbollah member and Iranian citizen drove a 19-ton truck loaded with over 18,000 pounds of high explosives through a wire fence and a wall of sandbags, into the U.S. Marine barracks.[53]

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[50] *See* Thomas L. Friedman, "U.S. Beirut Embassy Bombed; 33 Reported Killed, 80 Hurt; Pro-Iran Sect Admits Action," N.Y. Times, Apr. 19, 1983 (U.S. P.O. Annex 28); Matthew Levitt, *The Origins of Hezbollah*, The Atlantic, Oct. 23, 2013, at 3 (U.S. P.O. Annex 23). The Islamic Jihad Organization claimed responsibility for the attack; analysts have determined that this was a cover name or earlier iteration of Hezbollah. *See, e.g.*, U.S. DEP'T OF DEFENSE, TERRORIST GROUP PROFILES 15-16 (1988) (U.S. P.O. Annex 19); Matthew Levitt, *The Origins of Hezbollah*, The Atlantic, Oct. 23, 2013, at 4 (U.S. P.O. Annex 23).

[51] *See* Letter from Luc de La Barre de Nanteuil, Permanent Representative of France to the United Nations, to the Secretary-General of the United Nations, U.N. Doc. S/15420 (Sept. 21, 1982) (U.S. P.O. Annex 20); Letter from Charles M. Lichenstein, Acting Permanent Representative of the United States of America to the United Nations, to the Secretary-General of the United Nations, U.N. Doc. S/15435 (Sept. 24, 1982) (U.S. P.O. Annex 21). Italian military personnel also participated in the multinational force.

[52] *See* Exchange of Notes Constituting an Agreement Between the United States of America and Lebanon on United States Participation in a Multinational Force in Beirut (Aug. 20, 1982), 1751 U.N.T.S. 4, 21 I.L.M. 1196 (1982) (U.S. P.O. Annex 22).

[53] *See* Matthew Levitt, *The Origins of Hezbollah*, The Atlantic, Oct. 23, 2013, at 4 (U.S. P.O. Annex 23) (U.S. P.O. Annex 23); Thomas L. Friedman, "Beirut Death Toll at 161 Americans; French Casualties Rise in Bombings;

The explosives' detonation destroyed the four-story barracks, killed 241 U.S. service members and gravely wounded many others. A few minutes afterwards, a similar attack on the French barracks killed 58 French peacekeepers and five Lebanese civilians.[54]

5.22 Less than a year later, Iran's proxy Hezbollah again attacked the U.S. Embassy in Lebanon, which had relocated to East Beirut following the attack in April 1983. On September 20, 1984, a suicide bomber crashed a van filled with explosives through the security checkpoint at the embassy, killing 24 individuals, both U.S. and Lebanese civilians, and again wounding many others.

5.23 Iran has admitted to – even boasted about – its involvement in the Marine barracks bombing. Following that attack, the Iranian Minister of the IRGC stated:

> With the victory of the Iranian Revolution, America deeply felt the effect of our hard blow to its corrupt body in Lebanon and other parts of the world. [America] knows that both the TNT and the ideology which in one blast sent to hell 400 officers, NCOs and soldiers of the Marine Headquarters have been provided by Iran.[55]

5.24 Other Iranian officials, including then-Speaker of the Majlis (the Iranian Parliament) and, later, President of Iran, Akbar Hashemi Rafsanjani, also acknowledged Iran's responsibility for the Marine barracks bombing. In a speech marking the seventh anniversary of the seizure of the U.S. Embassy and hostages, Rafsanjani stated that:

> The Americans put the blame for the blow that was delivered to the United States in Lebanon and the disgrace the Americans suffered there on us; and, in fact, they should blame us for it. If the U.S. Marines had to flee Lebanon and if a group of them also went to their graves under those circumstances, all this was part of the influence of the Islamic Revolution.[56]

5.25 Iran has also made no secret of its support for and close operational ties with Hezbollah, its Lebanon-based proxy. A book published by the Iranian Ministry of Foreign

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Reagan Insists Marines Will Remain; Buildings Blasted," N.Y. Times, Oct. 24, 1983 (U.S. P.O. Annex 24); "Beirut Death Toll Is 241," N.Y. Times, Dec. 15, 1983 (U.S. P.O. Annex 25).

[54] *See* Thomas L. Friedman, "Beirut Death Toll at 161 Americans; French Casualties Rise in Bombings; Reagan Insists Marines Will Remain; Buildings Blasted," N.Y. Times, Oct. 24, 1983 (U.S. P.O. Annex 24); Matthew Levitt, *The Origins of Hezbollah*, The Atlantic, Oct. 23, 2013, at 4 (U.S. P.O. Annex 23).

[55] "Speech of Our Brother Rafiqdoust at One of the Country's Factories for Defense," Ressalat, July 20, 1987 (U.S. P.O. Annex 27).

[56] "Hashemi-Rafsanjani on Alleged McFarlane Visit," Tehran Radio Domestic Service, *in* VII Foreign Broadcast Information Service Daily Rep. 11 (Nov. 5, 1986) (U.S. P.O. Annex 26).

Affairs in 2000 brazenly proclaimed that the "alliance between Hezbollah and the Islamic Republic of Iran is *deep, strategic, and unbreakable*."[57] Hezbollah likewise has publicly confirmed that "the Islamic Revolutionary Guards help us and train us,"[58] and that it receives from Iran missiles with "pinpoint accuracy."[59] As recently as 2016, Hezbollah's leader, Sheikh Hassan Nasrallah, confirmed publicly that Hezbollah receives full financial and arms support from Iran: "[W]e are open about the fact that *Hezbollah's budget, its income, its expenses, everything it eats and drinks, its weapons and rockets, come from the Islamic Republic of Iran*."[60]

5.26 The 1983 Marine barracks bombing, "the most deadly state-sponsored terrorist attack made against American citizens prior to September 11, 2001,"[61] resulted in multiple claims brought against Iran in U.S. courts by U.S. Marines who were injured in the attack and by the family members of the Marines who were killed. Central to Iran's claims before the Court is the judgment resulting from the claims made by the U.S. victims in the *Peterson* litigation. While the *Peterson* judgment features prominently in the relief Iran seeks, Iran has assiduously avoided discussion of its role and responsibility in the underlying facts giving rise to that litigation.

5.27 In awarding compensatory damages for the deaths, injuries and suffering endured by these members of the U.S. armed forces and their families, the U.S. court ultimately found that the facts showed that Iranian Ministry of Information and Security ("MOIS"), "acting as an agent of the Islamic Republic of Iran, performed acts on or about October 23, 1983 . . . which acts caused the deaths of over 241 peacekeeping servicemen at the Marine barracks in Beirut, Lebanon."[62] As the court explained, "the deaths of these servicemen were the direct result of

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[57] IRANIAN MINISTRY OF FOREIGN AFFAIRS, PLAYERS IN THE MIDDLE EAST PEACE PROCESS 235-36 (2000) (U.S. P.O. Annex 84) (emphasis added); *see also* A. Savyon et al., "Iranian IRGC Missile Unit Commanders: We've Developed 2,000-km Range Missiles And Equipped [Hezbollah] With 300-km Range Missiles; Fars News Agency: Israel's Illusions About Its Natural Gas Fields Will Be Buried In The Mediterranean," Middle East Media Research Institute, at 5 (Dec. 3, 2014) (U.S. P.O. Annex 85) (quoting head of the IRGC Aerospace Force as stating that "[i]n effect, the IRGC and [Hezbollah] are a single apparatus joined together").

[58] Frontline, "Target America," program 2001 transcript, Oct. 4, 2001, at 7 (U.S. P.O. Annex 57).

[59] Nicholas Blanford, "Hezbollah claims 'pinpoint' Iranian missiles added to its arsenal," Christian Science Monitor, Nov. 23, 2014 (U.S. P.O. Annex 86).

[60] "In first, Hezbollah confirms all financial support comes from Iran," Al Arabiya English, June 25, 2016 (US P.O. Annex 87) (emphasis added).

[61] *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 47-48 (D.D.C. 2003) **(U.S. Annex 36)**.

[62] *Id.* at 61 **(U.S. Annex 36)**.

an explosion of material that was transported into the headquarters of the 24th MAU [(the 24th Marine Amphibious Unit)] and intentionally detonated . . . by an Iranian MOIS operative."[63]

5.28 Iran chose not to participate in the proceeding. The U.S. court nonetheless reviewed extensive evidence of Iran's responsibility for the attack. By way of example, the U.S. court relied, *inter alia*, on the testimony of former U.S. Admiral James Lyons. As set out in the court's judgment:

> On October 25, 1983, the chief of naval intelligence notified Admiral [James] Lyons of an intercept of a message between Tehran and Damascus that had been made on or about September 26, 1983. The message had been sent from [the Ministry of Information and Security] to the Iranian ambassador to Syria, Ali Akbar Mohtashemi . . . . The message directed the Iranian ambassador to contact Hussein Musawi, the leader of the terrorist group Islamic Amal, and to instruct him to have his group instigate attacks against the multinational coalition in Lebanon, and "to take a spectacular action against the United States Marines."[64]

5.29 Admiral Lyons, who received the intercept, testified at trial that the message was "the only one I've seen of that quality," and stated "if there was ever a 24-karat gold document, this was it."[65] While the court found that "the complicity of Iran in the 1983 attack was established conclusively by the testimony" about the intercept, it also heard other evidence.[66] For example, a member of the group that carried out the October 23 attack testified that "[Iranian] Ambassador Mohtashemi contacted a man named Kanani, the leader of the Lebanese headquarters of the [Iranian Revolutionary Guard]. Mohtashemi instructed Kanani to go forward with attacks that had been planned against the [Marines] and the French paratroopers."[67]

5.30 Another U.S. court proceeding concerning the Marine barracks bombing reached the same conclusion, finding that the facts showed that the "formation and emergence of Hezbollah as a major terrorist organization was due to the government of Iran."[68] Citing Dr. Bruce Tefft,

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[63] *Id.* **(U.S. Annex 36)**.

[64] *Id.* at 54 **(U.S. Annex 36)**; *see* Transcript of Trial at 54:22-55:5, *Peterson v. Islamic Republic of Iran*, No. CA 01-2094 (D.D.C. Mar. 17, 2003), ECF No. 23 **(U.S. Annex 37)**.

[65] Transcript of Trial at 55:8-9, 56:12, *Peterson v. Islamic Republic of Iran*, No. CA 01-2094 (D.D.C. Mar. 17, 2003), ECF No. 23 **(U.S. Annex 37)**.

[66] *Peterson*, 264 F. Supp. 2d at 55 **(U.S. Annex 36)**.

[67] *Id.* at 54-55 **(U.S. Annex 36)**.

[68] *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 4, 8 (D.D.C. 2005) **(U.S. Annex 38)**.

one of the founding members of the CIA's counterterrorism bureau and an expert witness on terrorism, the court stated that:

> [t]he Iranian government has provided Hezbollah with roughly $100 million per annum in financing, and has also provided it with arms, training, and strategic planning in its operations against the United States and Israel. [. . .] The primary agency through which the Iranian government established and exercised operational control over Hezbollah was through the MOIS. . . . The engagement with and promotion of Hezbollah marked a profound shift for the MOIS [. . .] from 1983 forward, Iran and the MOIS would look to employ international terrorism against non-Iranians.[69]

5.31 Further, the court concluded that "the MOIS was a vital conduit for Iran's provision of funds to Hezbollah, providing explosives to Hezbollah, and—at all times relevant to these proceedings—exercising near-complete operational control over Hezbollah."[70] In particular, the court stated that the plaintiffs had conclusively established the connection between Iran, the MOIS, the IRGC, and Hezbollah that culminated in the Marine barracks attack. It noted:

> During the months immediately preceding the October attack, there was a great deal of communication between the Iranian ambassador to Syria, Ali Akbar Mohtashemi, and various Iranian officials connected with the MOIS such as Sheik Ol–Islam–Zadi, who closely monitored the whole progress of the operation, frequently met with the heads of Hezbollah, and traveled between Damascus and Tehran. . . . Indeed, on September 26, 1983, MOIS sent a message to Ambassador Mohtashemi, directing that he contact Hussein Musawi, the leader of the terrorist group Islamic Amal, and to instruct him to have his group investigate attacks against the multinational coalition in Lebanon, and "to take a spectacular action against the United States Marines" in order to force the United States to withdraw militarily from the region.[71]

5.32 The U.S. court also considered that, in addition to ordering Hezbollah to undertake attacks against the American and French barracks, Iran "provided substantial support for the operation in other ways," including because (1) the explosives that were to be used in the operation were actually purchased by Iran from the government of Bulgaria, and then provided

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[69] *Id.* at 8 **(U.S. Annex 38)**. *See also* Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism, U.S. Dep't of Treasury (Oct. 25, 2007) **(U.S. Annex 39)**.

[70] *Holland v. Islamic Republic of Iran*, 496 F. Supp.2d 1, 8 (D.D.C. 2005) **(U.S. Annex 38)**.

[71] *Id.* at 9 **(U.S. Annex 38)**.

to Hezbollah;[72] (2) Iran provided complete financial support for the operation, going so far as to use the Iranian embassy in Damascus to cash various checks to provide funding for Hezbollah;[73] and (3) Iran provided Hezbollah with virtually all of its operational training in various terrorist camps located in Lebanon, Syria, and Iran.[74] As the court explained:

> [T]he MOIS was directly involved in the preparations for the attack, conducting the relevant surveillance and intelligence, coordinating with Syrian officials for safe passage for the trucks and materials used in the attacks, and paving the way for the operation through a variety of liaising activity. The IRGC was the primary mover behind the attack itself, acting as the authorizing agent for the Iranian government in Tehran in addition to recruiting the individuals involved, training the suicide bombers, preparing the explosives, and installing the explosives in the trucks in camps located in the Beka'a Valley.[75]

5.33 None of the victims of the U.S. Marine barracks bombing received any compensation from Iran until decades after the attack, and that compensation was a result of the U.S. measures Iran has challenged in this case.

ii. The Khobar Towers Bombing

5.34 In 1996, in an attack that was reminiscent of the 1983 Marine barracks bombing, Iran supported a terrorist attack carried out by Hezbollah on a housing complex in Saudi Arabia known as the Khobar Towers. A truck bomb close to the building detonated, destroying much of the eight-story structure. At the time, the Khobar Towers were housing U.S. military forces who were part of the Coalition forces monitoring Iraqi implementation of UN Security Council resolution 688 (1991) by enforcing a no-fly zone over southern Iraq. The bombing killed 19 U.S. service personnel. A four-year investigation by the U.S. Federal Bureau of Investigation concluded that Iran provided key support for the attack.

5.35 In a civil case brought by a surviving U.S. Air Force service member, Paul Blais, who suffered severe brain trauma as a result of the attack, the U.S. court found that the attack had been:

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[72] *Id.* at 9-10 **(U.S. Annex 38)**.

[73] *Id.* **(U.S. Annex 38)**. The court noted that "even at its inception during the 1982–83 period, Hezbollah was provided $50 million or more by Iran; as Dr. Tefft noted, 'economically Hezbollah would not have existed or been able to be formed without the Iranian financial support.'" *Id.*

[74] *Id.* **(U.S. Annex 38)**.

[75] *Id.* at 10 **(U.S. Annex 38)**.

> [c]arried out by individuals recruited principally by a senior official of the IRGC [i.e., the Islamic Revolutionary Guard Corps], Brigadier General Ahmed Sharifi. Sharifi, who was the operational commander, planned the operation and recruited individuals for the operation at the Iranian embassy in Damascus, Syria. . . . The truck bomb was assembled at a terrorist base in the Bekaa Valley which was jointly operated by the IRGC and by the terrorist organization known as Hezbollah. The individuals recruited to carry out the bombing referred to themselves as 'Saudi Hezbollah,' and they drove the truck bomb from its assembly point in the Bekaa Valley to Dhahran, Saudi Arabia.[76]

5.36 The court also determined that the Khobar Towers attack was:

> [a]pproved by Ayatollah Khameini, the Supreme leader of Iran at the time. It was also approved and supported by the Iranian Minister of Intelligence and Security ("MOIS") at the time, Ali Fallahian, who was involved in providing intelligence security support for the operation. Fallahian's representative in Damascus, a man named Nurani, also provided support for the operation.[77]

5.37 In reaching this determination, the court cited testimony from Louis Freeh, then-Director of the Federal Bureau of Investigation (FBI), who oversaw the U.S. investigation into the attack, which included more than 250 FBI agents, leading to an indictment by a grand jury that outlined "direction and assistance from Iranian government officials" provided to the individuals responsible for the attack.[78]

5.38 Dale Watson, the deputy counterterrorism chief of the FBI at the time of the attack, also gave "sworn testimony that information uncovered in the investigation, 'clearly pointed to the fact that there was Iran MOIS and IRGC involvement in the bombing.'" Expert witness Dr. Tefft testified that there was "no question" that the attack "wouldn't have happened without Iranian support."[79]

5.39 In another civil case brought by the families of victims of the attack, *Heiser v. Islamic Republic of Iran*, the court concluded that

> [t]he totality of the evidence at trial, combined with the findings and conclusions entered by this Court in [the case brought by

[76] *Blais v. Islamic Republic of Iran,* 459 F. Supp. 2d 40, 48 (D.D.C. 2006) **(U.S. Annex 40)**.

[77] *Id.* **(U.S. Annex 40)**.

[78] *Id.* **(U.S. Annex 40)**.

[79] *Id.* **(U.S. Annex40)**.

> Paul Blais], firmly establishes that 'the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the government of the Islamic Republic of Iran; the IRGC had the responsibility and worked with Saudi Hizbollah to execute the plan, and the MOIS participated in the planning and funding of the attack.[80]

5.40 In reaching this decision, the court considered the fact that captured Hezbollah agents questioned by the FBI were able to detail the role of Iranian intelligence and military officials in providing money, explosives, and weapons.[81] During the hearing, the court also heard testimony from FBI Director Freeh, who testified and summarized the statements of the suspects with regard to Iranian involvement in the plot as follows:

> The information we learned based on those interviews was that the attack was organized and sponsored by the [Islamic Revolutionary Guard Corps], which is one of the Iranian intelligence and security services, and that there was participation in the planning, in the funding of that attack by the MOIS, which is the Ministry of Intelligence and Security, as well as senior elements of the government that they provided the funding, they provided the training, they provided the travel, as well as the other support that was necessary to organize the attack.[82]

5.41 Director Freeh further testified that "several of the witnesses . . . told us that they would prepare surveillance reports of Khobar Towers and send those to IRGC officials for their review."[83] He also provided a breakdown of the roles of various parts of the Iranian government in planning and carrying out the bombing.

> The target selection and the authorization to conduct the attack, based on this witness's descriptions, was an agreed-upon course of action by civilian members of the government, senior members of the Iranian government, as well as the leadership of the IRGC and the MOIS.
>
> So the authorization to proceed, the selection of the targets, was done collectively by all three elements. The actual preparation

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[80] *Heiser v. Islamic Republican of Iran*, 466 F. Supp. 2d 229, 265 (D.D.C. 2006) **(U.S. Annex 41)**. As the court noted, "[t]he truck bomb was assembled at a terrorist base in the Bekaa Valley which was jointly operated by the IRGC and by the terrorist organization known as Hezbollah. The individuals recruited to carry out the bombing referred to themselves as 'Saudi Hezbollah,' and they drove the truck bomb from its assembly point in the Bekaa Valley to Dhahran, Saudi Arabia." *Id.* at 252.

[81] *Id.* at 261-62 **(U.S. Annex 41)**.

[82] Transcript of Trial at 14:3-11, *Heiser v. Islamic Republic of Iran*, Nos. 00-2329, 01-2104 (D.D.C. Dec. 18, 2003) **(U.S. Annex 42)**.

[83] *Id.* at 24:9-20 **(U.S. Annex 42)**.

> and carrying out of the attack, according to the witness, was a function that was delegated to the IRGC.[84]

5.42 Later in his testimony, the court asked Director Freeh whether "any of the six individuals implicate[d] any person or entity other than a senior Iranian official, an official of the MOIS, or an official of the IRGC." Director Freeh answered: "No, they did not."[85] Asked by the court about the reliability of these suspects' statements, Director Freeh testified that the suspects' statements were consistent with admissions previously made to Saudi authorities, and corroborated each other. Freeh also noted that the FBI was able to corroborate many of the statements themselves through other evidence.[86]

5.43 The court also heard testimony from expert witness Patrick Clawson, who testified as to the importance of Iranian support to the individuals implicated in the Khobar Towers attack. In addition, the court considered the testimony of Dr. Tefft in the case brought by Paul Blais, that the bombing would not have happened without Iranian support.[87]

iii. Other Acts Targeted Against the United States and Its Nationals

5.44 Iran's support for terrorism and terrorist organizations is not limited to the Beirut and Khobar Towers bombings. It has led to numerous other attacks that have killed or injured large numbers of U.S. nationals.[88] As discussed in subsection (a) below, Iran has utilized proxies like Hezbollah to carry out other violent acts including kidnappings and assassinations of U.S. government officials, university personnel, journalists and other U.S. citizens, as well as hijackings of U.S. airlines. In addition, as discussed in subsection (b) below, Iran has facilitated the planning of many attacks targeting U.S. facilities, personnel, or territory that have fortunately been thwarted by U.S. and foreign authorities. All of these acts are further evidence of Iran's use of terrorism as a foreign policy tool, specifically with respect to the United States.

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[84] *Id.* at 25:10-18 **(U.S. Annex 42)**.

[85] *Id.* at 30:2-5 **(U.S. Annex 42)**.

[86] *Id.* at 21:7-22:14 **(U.S. Annex 42)**.

[87] *Heiser*, 466 F. Supp. 2d at 254 **(U.S. Annex 41)** (quoting *Blais*, 459 F. Supp. 2d at 49).

[88] *See, e.g.*, *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002) **(U.S. Annex 53)** (attack on a bus in Jerusalem); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 289 (D.D.C. 2003) **(U.S. Annex 54)** (attack on a market in Jerusalem); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 139 (D.D.C. 2011) **(U.S. Annex 52)** (bombings at the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania).

(a) Kidnappings, Assassinations, and Aircraft Hijackings

5.45 With Iran's support, during the period between 1982 and 1989, Hezbollah kidnapped dozens of foreign hostages. The victims included both U.S. government personnel and other U.S. citizens. These victims were tortured and held for months, or even years, before being either released, or executed.

5.46 Among the U.S. victims was William Buckley, the CIA station chief in Beirut. Buckley was abducted on March 16, 1984. Following his abduction, three videos were released by his captors showing Buckley being subjected to torture. Puncture wounds and Buckley's behavior showed that he had been drugged. U.S. intelligence believed "that he would be blindfolded and chained at the ankles and wrists and kept in a cell little bigger than a coffin."[89] In the final video Buckley's appearance was described as follows: "Buckley was close to a gibbering wretch. His words were often incoherent; he slobbered and drooled and, most unnerving of all, he would suddenly scream in terror, his eyes rolling helplessly and his body shaking."[90] Buckley's dead body was found dumped near the Beirut airport in December 1991, over seven years after his abduction.[91]

5.47 U.S. Marine Lt. Col. Richard Higgins, a military observer with the UN Truce Supervision Organization in Lebanon, was abducted on February 17, 1988. Following his abduction, the Security Council adopted resolution 618 (1988) calling for his immediate release.[92] A year later, Higgins' captors released videotape images showing Higgins' dead body, hanged by the neck and badly beaten.[93]

5.48 Other U.S. victims included Father Lawrence Jenco who, while serving as director of Catholic Relief Services in Beirut, was abducted on January 8, 1985, and not released until 18 months later on July 26, 1986.[94] While held captive, Father Jenco was chained, beaten, and

[89] Gordon Thomas, "William Buckley: The Spy who never came in from the cold," Canada Free Press, Oct. 25, 2006 **(U.S. Annex 43)**.

[90] *Id.* **(U.S. Annex 43)**.

[91] *See* Marilyn Raschka, "Body Dumped in Beirut Identified as Buckley's: Hostage: Former senior CIA official, kidnapped in 1984, was reported slain in 1985," L.A. Times, Dec. 28, 1991 (U.S. P.O. Annex 51).

[92] *See* S.C. Res. 618, U.N. Doc. S/RES/618 (July 29, 1988) (U.S. P.O. Annex 52).

[93] *See* Timothy McNulty, "FBI: Higgins Most Likely Is Hanged Man," Chicago Tribune, Aug. 8, 1989 (U.S. P.O. Annex 53).

[94] *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 31 (D.D.C. 2001) **(U.S. Annex 44)**.

almost constantly blindfolded.[95] His access to toilet facilities was limited, if permitted at all.[96] He also suffered psychological torture – his captors would hold a gun to his head that he believed to be loaded and pull the trigger, only then revealing that it had no bullets, or fool him into believing he was about to be released.[97] Terry Anderson, a U.S. journalist, was abducted on March 16, 1985, and only released over six years later on December 4, 1991.[98]

5.49 In the course of the court cases brought by victims and their families for these acts, the courts heard expert testimony establishing Iran's complicity in these kidnappings. Former ambassador Robert Oakley, who served in Beirut and went on to become the Director of the State Department Office for Combatting Terrorism, and a leading National Security Council adviser on terrorism issues, testified that "radical elements highly placed within the government of Iran [were] giving operational policy advice to terrorists in Iran, specifically terrorists operating under the name Islamic Jihad or Hesbollah."[99] A former U.S. National Security Advisor on Middle East affairs also testified that Hezbollah was a "terrorist group . . . formed in the early 1980s under the sponsorship of the government of Iran" and included "Iranian personnel."[100] The court summarized the testimony of Terry Anderson, one of the victims, regarding Iran's involvement as follows:

> Anderson himself could identify them as such, based upon his intimate familiarity with the warring factions in Lebanon during the 1980s. He had observed, prior to his captivity, Iranian troops in uniform training Hezbollah recruits in the Bekaa Valley [in eastern Lebanon]. The mullahs who directed Hezbollah operations, Anderson knew, had received their religious instruction in Iran. While imprisoned, Anderson was once visited by an Iranian national who formally identified himself to Anderson as the liaison between Hezbollah and Iran. Anderson also became aware, at one point, that his place of confinement at the moment was a sub-basement of barracks occupied by troops of the Iranian Revolutionary Guard.[101]

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[95] *Id.* at 29 **(U.S. Annex 44)**.

[96] *Id.* **(U.S. Annex 44)**.

[97] *Id.* **(U.S. Annex 44)**.

[98] *See* Chris Hedges, "The Last U.S. Hostage; Anderson, Last U.S. Hostage, Is Freed By Captors in Beirut," N.Y. Times, Dec. 5, 1991 (U.S. P.O. Annex 54).

[99] *Jenco*, 154 F. Supp. 2d at 31 **(U.S. Annex 44)**.

[100] *Id.* **(U.S. Annex 44)**.

[101] *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 112 (D.D.C. 2000) **(U.S. Annex 45)**.

5.50 Ambassador Oakley also testified and identified the Iranian Ministry of Information and Security as responsible for causing the seizure of hostages in Lebanon by Hezbollah.[102]

5.51 Hezbollah, with support from Iran, was also responsible for the June 1985 hijacking of a flight operated by Trans World Airlines (TWA), a U.S.-based airline. Thirty-nine passengers were held hostage for seventeen days. One passenger, U.S. Navy diver Robert Stehem, was murdered.[103]

5.52 Iran's support for these acts came from the very highest levels of its government. In 1989, then-Majlis Speaker, subsequently President, Rafsanjani called for hijacking airplanes and blowing up factories in Western countries: "Now they will start saying that so and so, as a man in charge, and as the speaker of parliament has officially called for acts of terror . . . . But let them say it . . . . Aren't they saying it now?"[104] In the same speech, Rafsanjani called for the killing of Americans and other Westerners saying: "It is not hard to kill Americans or Frenchmen. It is a bit difficult to [kill] Israelis. But there are so many [Americans and Frenchmen] everywhere in the world."[105]

5.53 Consistent with these statements, on October 23, 1990, a U.S. citizen, Cyrus Elahi, a former university professor and dissident of the Iranian regime, was assassinated in Paris.[106] A number of those involved in the assassination were arrested, interrogated, tried, and convicted in a criminal proceeding in France. In the course of the French criminal proceeding, "[i]ndividuals implicated in the killing of Cyrus Elahi confirmed, under oath, to French authorities that [Iranian Minister of Intelligence and head of MOIS Ayatollah] Fallahian was involved in ordering the killings of Iranian dissidents in Paris."[107] The criminal process in France also established that Elahi's assassination was "organized and executed by Iranian government officials."[108] Witnesses included co-conspirators and a high-ranking Iranian

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[102] *Id.* **(U.S. Annex 45)**.

[103] *See* U.S. DEP'T OF DEFENSE, TERRORIST GROUP PROFILES 17 (1988) (U.S. P.O. Annex 19); Frontline, "Target America," program #2001 transcript, Oct. 4, 2001, at 10-12 (U.S. P.O. Annex 57).

[104] "Majlis Speaker Urges Attacks on U.S. Citizens," Tehran IRNA, *in* Foreign Broadcast Information Service Daily Rep., FBIS-NES-89-086, at 45-46 (May 5, 1989) (U.S. P.O. Annex 77).

[105] *Id.* (U.S. P.O. Annex 77).

[106] *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99 (D.D.C. 2000) **(U.S. Annex 46)**.

[107] *Id.* at 101 **(U.S. Annex 46)**.

[108] *Id.* at 105 **(U.S. Annex 46)**; Court of Cassation, Criminal Div. [Cour de Cassation], Judgment of July 9, 1998. No. 9783.612 (denying appeal) **(U.S. Annex 47)**.

defector who had been detained by German authorities.[109] Two Iranian nationals ultimately were tried before the Cour d'assises de Paris (Paris Court of Assize) and, in September 1996, convicted of conspiracy to commit terrorist acts, including Elahi's assassination.[110] French appellate courts subsequently upheld their convictions, confirming evidentiary findings that defendants met with "members of Iranian intelligence agencies."[111] Drawing on this and other evidence, the U.S. court, consistent with the French court judgment, concluded that "the murder of Cyrus Elahi was perpetrated by agents of MOIS acting at the direction of, and in furtherance of the policies of, the Islamic Republic of Iran."[112]

(b) Thwarted Attacks

5.54 Beyond the attacks that Iran and its proxies have successfully carried out, Iran has also supported a number of attacks targeting U.S. personnel and institutions that were disrupted by U.S. and foreign authorities before they could be carried out. While these thwarted attacks did not cause the suffering and death that resulted from the attacks described in the preceding section, they are equally compelling as evidence of Iran's continued commitment to terrorism as an element of its foreign policy.

5.55 For example, in 1997, the Supreme Court of Azerbaijan found a group of Azerbaijan citizens guilty, *inter alia*, of having cooperated with Iranian officials in "prepar[ing] programs to sabotage American and Israeli institutions operating in Azerbaijan" and overthrowing the Government of Azerbaijan.[113] The court recounted a detailed scheme between approximately 1994 and 1996, by which the defendants, pursuant to agreements with high-ranking Iranian officials, gathered information to pass to Iran, including of strategically important places such as sketches and maps of airports and the number of prisoners in detention centers.[114]

> After reviewing all the evidence on this case the collegium of the court has concluded that [the defendants], being citizens of Azerbaijan Republic had made agreements in advance with

[109] *Elahi*, 124 F. Supp. 2d at 105 **(U.S. Annex 46)**.

[110] *Id.* **(U.S. Annex 46)**.

[111] Court of Cassation, Criminal Div. [Cour de Cassation], Judgment of July 9, 1998. No. 9783.612 (denying appeal) **(U.S. Annex 47)**; *see also Elahi*, 124 F. Supp. 2d at 105 **(U.S. Annex 46)**.

[112] *Elahi*, 124 F. Supp. 2d at 107-08 **(U.S. Annex 46)**.

[113] Supreme Court of Azerbaijan Judgment, Case No. 63, at 2 (Apr. 14, 1997) (U.S. P.O. Annex 69).

[114] *Id.* at 7 (U.S. P.O. Annex 69).

> members of the special services organizations of the Islamic Republic of Iran, doing criminal activities with them.[115]

5.56 In 2012, Kenyan authorities arrested and convicted two Iranian nationals identified as members of the IRGC-Qods Force (the "IRGC-QF") in connection with explosives stockpiled for a suspected terrorist attack against U.S., Saudi, and British targets in Kenya, as well as Israel's ambassador to Kenya.[116] Iran recently recalled its ambassador in March 2019 after the Kenyan Supreme Court overturned a court of appeal decision and confirmed the convictions of the two Iranians.[117] Iran has also been in the process of setting up a network of terror cells in Africa to attack U.S. and other Western targets. The new terror network is reportedly being established on the orders of Qassem Suleimani, head of the IRGC-QF.[118]

5.57 Also thwarted were Iran's supported planned acts of terrorism on U.S. soil. For example, in 2011 and 2012, the United States convicted four individuals on terrorism charges for their involvement in a 2007 plot tied to Iran to commit a terrorist attack at the John F. Kennedy International Airport in New York City by exploding fuel tanks and a fuel pipeline under the airport.[119] The conspirators were arrested on their way to Iran to meet with contacts there, including Mohsen Rabbani, a former Iranian government official who was also indicted for his role in 1994 AMIA bombing discussed in Section A above.[120]

5.58 Also in 2011, officials in the Iranian military, including the IRGC-QF, were implicated in a conspiracy to assassinate the ambassador of Saudi Arabia to the United States.

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[115] *Id.* at 18 (U.S. P.O. Annex 69). Iran again attempted to target U.S. facilities in Azerbaijan in 2012. At that time, the Azerbaijani national security ministry announced the arrest of 22 individuals on suspicion of plotting attacks on the U.S. embassy in Baku on behalf of Iran. "Azerbaijan arrests 22 alleged Iran backed attack plotters," Al Arabiya News, Mar. 14, 2012 (U.S. P.O. Annex 72).

[116] "In Kenya, two Iranians get life in prison for plotting attacks," L.A. Times, May 6, 2013 (U.S. P.O. Annex 43); Cyrus Ombati, "Iranians' 30-bomb plot in Kenya," The Standard, July 4, 2012 (U.S. P.O. Annex 44); "Iranians planned to assassinate Israeli ambassador," YNet, Aug. 17, 2012 **(U.S. Annex 48)**.

[117] "Supreme Court overturns decision to free two Iranian terror suspects," Capital News, Mar. 15, 2019 **(U.S. Annex 49)**; "Iran recalls ambassador to Kenya over court case involving two Iranians," Reuters, Mar. 17, 2019 **(U.S. Annex 50)**.

[118] "Tehran sets up terror cells in Africa as Western sanctions bite," The Telegraph, June 24, 2019 **(U.S. Annex 51)**.

[119] Federal Bureau of Investigation Press Release, "Russell Defreitas Sentenced to Life in Prison for Conspiring to Commit Terrorist Attack at JFK Airport" (Feb. 17, 2011) (U.S. P.O. Annex 45); See Federal Bureau of Investigation Press Release, "Kareem Ibrahim Sentenced to Life in Prison for Conspiring to Commit Terrorist Attack at JFK Airport" (Jan. 13, 2012) (U.S. P.O. Annex 46).

[120] Press Release, Federal Bureau of Investigation, Kareem Ibrahim Sentenced to Life in Prison for Conspiring to Commit Terrorist Attack at JFK Airport (Jan. 13, 2012) (U.S. P.O. Annex 46).

In 2012, an Iranian-U.S. dual national, Manssor Arbabsiar, pleaded guilty to participating in the plot. In the plea agreement signed by the defendant, he admitted that:

> From the spring of 2011 to the fall of 2011, Manssor Arbabsiar and his co-conspirators, officials in the Iranian military who were based in Iran (the "co-conspirators"), agreed to cause the assassination of the Ambassador of Saudi Arabia to the United States (the "Ambassador"), while the Ambassador was in the United States.
>
> Acting at the direction of his co-conspirators and in furtherance of this agreement, Arbabsiar traveled internationally to Mexico on several occasions, including from Iran, in order to· arrange the assassination of the Ambassador. These trips occurred in May, June, July and September of 2011. In Mexico, Arbabsiar met with a person ("the Individual") who claimed to be a representative of a sophisticated and violent Latin American drug cartel that had access to military-grade weaponry. With the approval of Arbabsiar's co-conspirators, Arbabsiar arranged to hire the Individual and his criminal associates to murder the Ambassador, while the Ambassador was in the United States. Arbabsiar agreed to pay $1.5 million to the Individual.[121]

5.59 Arbabsiar further admitted that he:

> [D]iscussed with the Individual a plan for the Individual and his criminal associates to travel to Washington, D.C. to murder the Ambassador at a restaurant there. The plan was subsequently approved by Arbabsiar' s co-conspirators.[122]

5.60 Arbabsiar then:

> [A]rranged for a $100,000 payment, in two installments, to be wired to the Individual at a U.S. bank account, as a down-payment for the anticipated murder of the Ambassador. Arbabsiar's co-conspirators approved this payment, which was made via wire transfers to a U.S. bank account that passed through Manhattan, New York.[123]

5.61 Additionally, Arbabsiar "met several times in Iran with Gholam Shakuri . . . a co-conspirator and Iran-based member of the Qods Force, and another senior Qods Force official."

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[121] Letter from Preet Bharara, U.S. Attorney for the Southern District of New York, to Sabrina Shroff re: United States v. Manssor Arbabsiar, S1 11 Cr 897 (JFK), Plea Agreement of Manssor Arbabsiar, at 7 (Oct. 17, 2012) (U.S. P.O. Annex 62).

[122] *Id.* (U.S. P.O. Annex 62).

[123] *Id.* (U.S. P.O. Annex 62); *see also* Press Release, U.S. Dep't of Justice, Man Pleads Guilty in New York to Conspiring with Iranian Military Officials to Assassinate Saudi Arabian Ambassador to the United States (Oct. 17, 2012) (U.S. P.O. Annex 61).

According to Arbabsiar, "the plan was to blow up a restaurant in the United States frequented by the Ambassador and that numerous bystanders would be killed. The plan was approved by these Iranian officials.[124]

5.62 Following his arrest, Arbabsiar made monitored phone calls at the direction of law enforcement to IRGC-QF member Gholam Shakuri in Iran.

> During these calls, Shakuri confirmed that Arbabsiar should move forward with the plot to murder the Ambassador and that he should accomplish the task as quickly as possible, stating on Oct. 5, 2011, "[j]ust do it quickly, it's late . . ." Shakuri also told Arbabsiar that he would consult with his superiors about whether they would be willing to pay CS-1 additional money. Shakuri, who was also charged in the plot, remains at large.[125]

5.63 In the aftermath, the Council of the League of Arab States "express[ed] its condemnation and rejection of the criminal Iranian attempt,"[126] and the United Kingdom's Foreign Secretary observed that "[t]he assassination plot appears to constitute a[n] escalation in Iran's sponsorship of terrorism outside its borders."[127] The EU imposed sanctions on five individuals, including the head of the IRGC-QF.[128] In addition, the UN General Assembly adopted a resolution calling upon Iran "to comply with all of its obligations under international law, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents."[129]

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5.64 As the incidents detailed above make clear, Iran has for decades targeted the United States and its nationals. Iran has targeted U.S. military forces in Lebanon, Saudi Arabia, and

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[124] Press Release, U.S. Dep't of Justice, Manssor Arbabsiar Sentenced in New York City Federal Court to 25 Years in Prison for Conspiring with Iranian Military Officials to Assassinate the Saudi Arabian Ambassador to the United States (May 30, 2013) **(U.S. Annex 222)**.

[125] *Id.* **(U.S. Annex 222)**.

[126] Letter addressed to the Secretary-General and the President of the Security Council, Statement issued by the Council of the League of Arab States, U.N. Doc. S/2011/640 (Oct. 17, 2011) (U.S. P.O. Annex 63).

[127] U.K. Foreign & Commonwealth Office Announcement, "Foreign Secretary welcomes EU sanctions following assassination plot in the US" (Oct. 21, 2011) (U.S. P.O. Annex 64); *see also* Letter from the Permanent Representative of Saudi Arabia to United Nations addressed to the Secretary-General, U.N. Doc. A/66/553 (Nov. 14, 2011) (U.S. P.O. Annex 65); Letter from the Secretary General addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/66/517, S/2011/649 (Oct. 19, 2011) (U.S. P.O. Annex 66).

[128] EU-U.S. Summit joint statement, Memo/11/842 (Nov. 28, 2011) (U.S. P.O. Annex 67).

[129] G.A. Res. 66/12, ¶ 5, U.N. Doc. A/RES/66/12 (Nov. 18, 2011) (U.S. P.O. Annex 68).

elsewhere. It has conspired to facilitate attacks on U.S. institutions around the world. Iran's sponsorship of terrorist attacks targeting the United States continues to the present day.

5.65 As is addressed in Chapter 6 below, in response to Iran's conduct, the United States adopted a series of measures allowing those claiming to be victims of this conduct to bring proceedings, *inter alia*, against Iran to enable those claims to be tested and, if upheld, to allow compensation to be awarded. As is addressed in Chapters 8 and 18 below, the direct link between Iran's conduct targeting the United States and its nationals underpins the U.S. contention that Iran comes to the Court with unclean hands or, in the alternative, Iran's claims constitute an abuse of right that precludes Iran from pursuing the remedy that it seeks.

CHAPTER 6: U.S. MEASURES WERE TAKEN AS A RESULT OF IRAN'S SPONSORSHIP OF TERRORISM AND OTHER ACTIONS THREATENING U.S. NATIONAL SECURITY

6.1 The United States has taken a range of measured actions over the years in an effort to counteract and deter Iran's sponsorship of terrorism and other conduct that threatens U.S. national security described above (e.g., with respect to nuclear non-proliferation, ballistic missiles, and arms trafficking). The United States has taken these actions in a careful and peaceful way, utilizing tools that the United States deploys to counteract and deter similar conduct by other State actors.

6.2 Many of the U.S. measures at issue in this case have aimed to ensure that U.S. victims of Iranian-sponsored terrorism are able to pursue litigation, and enforce judgments, against Iran and Iranian owned entities in pursuit of compensation for their injuries. The United Nations has recognized the importance of providing victims of terrorism with access to justice and redress mechanisms, as provided under applicable domestic law.[130] Consistent with the United States' legal framework, which regularly affords injured parties the opportunity to bring civil suits to hold liable those responsible for their injuries and obtain compensation, the United States has put in place measures to allow victims of terrorism to bring civil litigation against

[130] G.A. Res. 73/305, PP 9, ¶ 13, U.N. Doc. A/RES/73/305 (July 2, 2019) **(U.S. Annex 56)** (calling upon Member States to respect the dignity and legal rights of victims of terrorism, as provided for in domestic law, in gaining access to justice); *see also* "Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts," Sections VII and VIII (May 19, 2017) **(U.S. Annex 57)** ("VII. Effective access to the law and to justice. States must provide effective access to the law and to justice for victims by providing the right of access to competent courts in order to bring a civil action in support of their rights, including legal assistance and interpretation as required to this end. VIII. Compensation. 1. Victims should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened should contribute to the compensation of victims for direct physical or psychological harm, irrespective of nationality.").

those who have perpetrated and sponsored the terrorist acts. As described below, the U.S. measures at issue in this case reflect reasonable efforts by the U.S. Government to ensure that victims of terrorism are not unduly burdened in their efforts to seek justice and compensation against terrorist actors and their state sponsors.

Section A: Iran's Designation as a State Sponsor of Terrorism and Designation of Iranian Financial Institutions under Executive Order 13599

6.3 Since 1979, provisions of U.S. law have authorized the Secretary of State to determine that "the government of [a] country has repeatedly provided support for acts of international terrorism."[131] Such determinations result in a foreign state being designated as a "state sponsor of terrorism." In determining whether a foreign government has repeatedly provided support for acts of international terrorism, the U.S. Government is guided by a number of sources, including other provisions of U.S. law. For example, for purposes of certain annual terrorism reporting by the Department of State, "international terrorism" is defined to mean "terrorism involving the citizens or the territory of more than 1 country."[132] The term "terrorism" is in turn defined to mean "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[133] In accordance with applicable law, multiple states have been designated as state sponsors of terrorism. Currently, in addition to Iran, other states also designated as state sponsors of terrorism are Syria, Sudan, and the Democratic People's Republic of Korea.[134]

6.4 Designating a foreign state as a state sponsor of terrorism in accordance with provisions of U.S. law only occurs after careful deliberation within the U.S. Government. These determinations must be made public in the Federal Register.[135] Updated information on the activities of state sponsors of terrorism is included in the "Country Reports on Terrorism," an annual statutorily-mandated report produced by the U.S. Department of State.[136] U.S. law

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[131] Section 620A(a) of the Foreign Assistance Act of 1961, as amended (P.L. 87-195, 22 U.S.C. § 2371(a)) **(U.S. Annex 58)**; Section 40(d) of the Arms Export Control Act, as amended (P.L. 90-629; 22 U.S.C. 2780(d)) **(U.S. Annex 59)**; Section 1754(c)(1) of the Export Controls Act of 2018 (title XVII of the John S. McCain National Defense Authorization Act for Fiscal Year 2019; P.L. 115-232; 50 U.S.C. 4813(c)(1)) **(U.S. Annex 60)**.

[132] 22 U.S.C. § 2656f(d)(1) **(U.S. Annex 61)**.

[133] 22 U.S.C. § 2656f(d)(2) **(U.S. Annex 61)**.

[134] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017 at 217-220 **(U.S. Annex 62)**.

[135] 22 U.S.C. § 2371(b) **(U.S. Annex 58)**; 22 U.S.C. § 2780(e) **(U.S. Annex 59)**; 50 U.S.C. 4813(c)(3) **(U.S. Annex 60)**.

[136] 22 U.S.C. § 2656f **(U.S. Annex 61)**.

imposes a range of sanctions and restrictions on designated state sponsors of terrorism, including restrictions on U.S. foreign assistance; a ban on defense exports and sales; and certain controls over exports of dual use items.[137] Of particular relevance to these proceedings, under the Foreign Sovereign Immunities Act ("FSIA") specified parties may bring civil claims in U.S. courts against state sponsors of terrorism 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."[138]

6.5 While the consequences of a state sponsor of terrorism designation are appropriately significant, the United States is able to take account of a foreign state's cessation of support for international terrorism. U.S. law provides two possible paths for rescinding the designation of a foreign state as a state sponsor of terrorism. The first possible option is that the President of the United States submits a report to Congress before the proposed rescission would take effect certifying that (1) there has been a fundamental change in the leadership and policies of the government of the country concerned; (2) that government is not supporting acts of international terrorism; and (3) that government has provided assurances that it will not support acts of international terrorism in the future.[139] The second possible option requires the President to submit a report to Congress at least 45 days before the proposed rescission would take effect justifying the rescission and certifying that (1) the government concerned has not provided any support for acts of international terrorism during the preceding 6-month period; and (2) the government concerned has provided assurances that it will not support acts of international terrorism in the future.[140] The United States has utilized these mechanisms to rescind the designations of other state sponsors of terrorism upon determining that the statutory requirements for rescission, including a cessation of support for acts of international terrorism, were satisfied.[141] In addition, where foreign states cease support for acts of international

[137] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017 at 217 **(U.S. Annex 62)**.

[138] 22 U.S.C. § 1605A(a)(1) (IM Annex 15). Courts may hear claims under this section if the foreign state was designated as a state sponsor of terrorism at the time of the relevant act or was designated as a state sponsor of terrorism as a result of such act, and if the foreign state either remains so designated when the claim is filed or was so designated within the 6-month period before the claim is filed. *Id.* § 1605A(a)(2).

[139] 50 U.S.C. § 4813(c)(4)(A) **(U.S. Annex 60)**.

[140] 50 U.S.C. § 4813(c)(4)(B) **(U.S. Annex 60)**.

[141] For example, Cuba's designation was rescinded in 2015 (Rescission of Determination Regarding Cuba, 80 Fed. Reg. 31945 (June 4, 2015)) **(U.S. Annex 63)**; Libya's designation was rescinded in 2006 (Rescission of Determination Regarding Libya, 71 Fed. Reg. 39696 (July 13, 2006)) **(U.S. Annex 64)**; and Iraq's designation

terrorism, the United States has utilized various mechanisms to address outstanding claims against the foreign state.[142]

6.6 In January 1984, following the Beirut Marine barracks bombing, Secretary of State George Schultz determined that "Iran is a country which has repeatedly provided support for acts of international terrorism."[143] Iran has remained designated as a state sponsor of terrorism since that time for its continued terrorist-related activity as detailed above. Each year, the Country Reports on Terrorism detail Iran's ongoing support for international terrorism. For example, the 2017 Country Reports on Terrorism notes that Iran:

> continued its terrorist-related activity in 2017, including support for Lebanese Hizballah (LH), Palestinian terrorist groups in Gaza, and various groups in Syria, Iraq, and throughout the Middle East. Iran used the Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) to provide support to terrorist organizations, provide cover for associated covert operations, and create instability in the Middle East. Iran has acknowledged the involvement of the IRGC-QF in both of the conflicts in Iraq and Syria, and the IRGC-QF is Iran's primary mechanism for cultivating and supporting terrorists abroad.[144]

As a result, Iran remains designated as a state sponsor of terrorism.

6.7 The United States has taken steps to combat the financing of terrorist acts, including specific measures to counter the financing of terrorism by Iran and other state sponsors of terrorism. In 1977, Congress enacted the International Emergency Economic Powers Act ("IEEPA") which authorizes the President to take broad-ranging action against the financial assets and transactions of designated individuals and entities determined to pose an "unusual and extraordinary threat" to the national security of the United States.[145] The United States has

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was rescinded in 2004 (Rescission of Determination Regarding Iraq, 69 Fed. Reg. 61702 (Oct. 20, 2004)) **(U.S. Annex 65)**.

[142] *See* Libyan Claims Resolution Act (P.L. 110-301) **(U.S. Annex 66)** and Executive Order No. 13477, 73 Fed. Reg. 65965 (Oct. 31 2008) **(U.S. Annex 67)** (noting that a comprehensive settlement of terrorism-related claims by U.S. nationals against Libya was part of the process of restoring normal relations between Libya and the United States); Determination of the President of the United States, No. 2008-09 (Jan. 28, 2008) **(U.S. Annex 68)** (determining that Iraq was a partner in combating acts of international terrorism).

[143] Determination Pursuant to Section 6(i) of the Export Administration Act of 1979 – Iran, 49 Fed. Reg. 2836 (Jan. 23, 1984) (IM Annex 21) (U.S. PO Annex 127). The Export Administration Act of 1979 was repealed by the Export Controls Act of 2018. Section 1768 of the Export Controls Act of 2018 continues any state sponsor of terrorism determination made under the Export Administration Act of 1979, which includes the designation of Iran.

[144] U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017 at 218 **(U.S. Annex 62)**.

[145] 50 U.S.C. §§ 1701, 1702 **(U.S. Annex 70)**.

relied on this provision of law to impose financial sanctions on foreign persons that support or otherwise associate with these foreign terrorists.[146]

6.8 With respect to Iran, the U.S. Department of the Treasury found in 2011 that Iran was a jurisdiction of primary money laundering concern based on "a growing body of public information about [Iranian banks'] illicit and deceptive conduct designed to facilitate the Iranian government's support for terrorism and its pursuit of nuclear and ballistic missile capabilities."[147] In the wake of these concerns and "particularly in light of the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties," in 2012 President Obama issued Executive Order 13599 blocking all property and interests in property of the Government of Iran, including the Central Bank of Iran, and of Iranian financial institutions, where such assets are subject to U.S. jurisdiction."[148] Thus, in light of the concerns that Iranian financial institutions, including Bank Markazi, were engaged in deceptive conduct to facilitate Iran's support of terrorism and other conduct threatening U.S. national security, the United States blocked assets of those financial institutions subject to U.S. jurisdiction.

Section B: Efforts to Provide Redress for Victims of Terrorism

6.9 Because victims of terrorism have faced particular challenges in obtaining compensation from states that have sponsored acts of terrorism that brought death or injury to the victims, the United States has enacted laws designed to facilitate the ability of these victims to sue state sponsors of terrorism and enforce any resulting civil judgments.[149] These measures, while generally not unique to Iran, are particularly appropriate in light of Iran's support for acts of terrorism targeting U.S. nationals and interests, its unwillingness to provide redress for terrorism victims, and its efforts to avoid enforcement of valid judgments holding Iran liable for its support of acts of terrorism.

6.10 Congress enacted a series of laws that sought to ensure that victims of terrorism were not unduly prejudiced in their efforts to obtain and enforce valid court judgments against

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[146] Executive Order 13224, 66 Fed. Reg. 49077 (Sept, 23, 2001) (U.S. P.O. Annex 134).

[147] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757 (Nov. 18, 2011) (U.S. P.O. Annex 152). *See* U.S. Preliminary Objections ¶ 4.11.

[148] Exec. Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (IM Annex 22). For further discussion of Executive Order 13599, *see* Chapter 11.

[149] *See In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009) **(U.S. Annex 73)** (noting that victims efforts to enforce judgments against state sponsors of terrorism were "a long, bitter, and often futile quest for justice").

terrorist actors, including state sponsors of terrorism. A number of the measures detailed in Iran's Memorial pertain to the grant of jurisdiction to U.S. courts over civil suits brought against state sponsors of terrorism and liability of those states for their conduct. These measures include adding to the FSIA a terrorism-related exception to sovereign immunity for state sponsors of terrorism, an express cause of action for personal injury or death caused by terrorist acts for which the state lacks immunity, and allowing for money damages (including punitive damages) against states liable for personal injury or death.[150] Iran's claims with respect to those provisions were predicated on Iran's arguments concerning sovereign immunity and are therefore no longer before the Court. Iran's remaining claims before the Court principally concern the following measures taken by Congress to facilitate the enforcement of terrorism-related judgments.

6.11 **Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA).** Following earlier attempts to facilitate enforcement of judgments against state sponsors of terrorism, in 2002 Congress enacted TRIA. Section 201(a) of TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under [FSIA exceptions for state sponsors of terrorism], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in the aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.[151]

6.12 This provision of TRIA specifically permits the attachment and execution of terrorism judgments for compensatory damages against the assets of a state sponsor of terrorism, including those of its agencies and instrumentalities, which have been blocked pursuant to a sanctions regime.

6.13 **Section 1610(g) of the FSIA (2008).** Congress also sought to address the barriers that victims faced in holding government instrumentalities liable for the debts of their foreign

[150] Iran Memorial, ¶¶ 2.4-2.8, 2.20-2.26.

[151] U.S. Terrorism Risk Insurance Act of 2002, § 201(a), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (IM Annex 13). "Blocked assets" under TRIA as originally enacted included "any asset seized or frozen by the United States" under the authority of relevant sections of the Trading With the Enemy Act or International Emergency Economic Powers Act. *Id.* § 201(d)(2).

sovereign owners.[152] As originally enacted in 1976, the FSIA did not address attachment of state agency and instrumentality property to satisfy judgments against the foreign state. In the absence of a statutory provision, but "guided by the policies articulated by Congress in enacting the FSIA," the Supreme Court concluded that, in litigation permitted by the FSIA, "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status."[153] That rule, referred to as the "*Bancec* presumption," recognized that under certain situations the presumption could be overcome, with the Supreme Court explicitly declaring that "[w]e decline to adhere blindly to the corporate form where doing so would cause such an injustice."[154] U.S. jurisprudence developed five "*Bancec* factors" to be considered in determining whether the presumption has been overcome in any given case. Yet, in the absence of further statutory direction from Congress, lower courts were reluctant to enforce terrorism judgments against the property of instrumentalities of state sponsors of terrorism, even where it was acknowledged that it might be unjust that the corporate form prevented victims of a terrorist attack from collecting on such judgments.[155] With state sponsors of terrorism able to protect their assets by placing them within agencies or instrumentalities (even though State-owned), members of the U.S. Congress expressed concern that in the context of terrorism cases "the misapplication of the 'Bancec doctrine,' . . . has in the past erroneously protected the assets of terrorist states from attachment or collection."[156]

6.14 Addressing these concerns about the enforcement of terrorism-related judgments, Congress amended the FSIA in the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"). Section 1610(g) of the FSIA, as added by the 2008 NDAA, provides:

> [T]he property of a foreign state against which a judgment is entered under [FSIA exceptions for state sponsors of terrorism], 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

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[152] *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) **(U.S. Annex 141)** ("*Bancec*").

[153] *Bancec*, 462 U.S. at 627 **(U.S. Annex 141)**. Notably, the Supreme Court's reliance on the FSIA's legislative history in *Bancec* in reaching the conclusion signaled the Court's view that Congress may identify circumstances in which the separate corporate form of a foreign state's agency or instrumentality will not be recognized.

[154] *Id.* at 633 **(U.S. Annex 141)**.

[155] *See Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.,* 183 F.3d 1277, 1282 (11th Cir. 1999) **(U.S. Annex 71)** (overturning a district court decision, which had allowed for garnishment against a state instrumentality's assets in aid of execution of a judgment against the Cuban government to avoid "unjustly prevent[ing] the plaintiffs from collecting their judgment").

[156] 154 Cong. Rec. S55 (Jan. 22, 2008) (Statement of Sen. Lautenberg) **(U.S. Annex 72)**.

> subject to attachment in aid of 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 that 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.[157]

6.15 In this provision, the Congress determined that the *Bancec* factors will not apply in enforcing a terrorism-related judgment against assets of a foreign state's agencies and instrumentalities and thereby intended to "subject any property interest in which the foreign state enjoys a beneficial ownership" to attachment and execution.[158] As such, section 1610(g) of the FSIA is best understood as a rule concerning when the assets of a terrorist state's wholly owned agency or instrumentality are subject to execution to pay terrorism-related judgments against that state. However, it does not displace the role of the judiciary in determining who has a beneficial ownership interest in the assets in question and accounting for equitable considerations."[159]

6.16 **Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012.** Finally, Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 reflects another effort by Congress to facilitate justice for a certain group of terrorism victims.[160] That provision, codified at 22 U.S.C. § 8772, identifies certain "financial assets" in which the Central Bank of Iran has a security entitlement and which were the subject of post-judgment enforcement proceedings in the United States District Court for the Southern District of New

[157] U.S. National Defense Authorization Act for Fiscal Year 2008, § 1083(b)(3)(D), Pub. L. No. 110-181, 122 Stat. 206 (2008) (IM Annex 15).

[158] H.R. Rep. No. 110-477, at 1001 (2007) **(U.S. Annex 74)**.

[159] The U.S. Supreme Court has also held that 28 U.S.C. 1610(g) does not provide a freestanding basis for parties holding a judgment under Section 1605A to attach and execute against the property of a foreign state. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) **(U.S. Annex 75)**.

[160] U.S. Iran Threat Reduction and Syria Human Rights Act of 2012, § 502, Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified at 22 U.S.C. § 8772 (2012)) (IM Annex 16).

York in *Peterson v. Islamic Republic of Iran* at the time the provision was enacted. The law makes those assets "subject to execution or attachment in aid of execution in order to satisfy" certain terrorism-related judgments against Iran, provided that the assets are (1) "held in the United States for a foreign securities intermediary doing business in the United States," (2) blocked assets, and (3) "equal in value to a financial asset" held abroad by the financial securities intermediary on behalf of the Central Bank of Iran.[161] In this regard, this provision, much like the provisions discussed above, codifies a rule that permits terrorism victims who hold judgments against Iran to execute those judgments against assets owned by an Iranian agency. As the U.S. District Court for the Southern District of New York noted in subsequent litigation, this provision of law did not require turnover of the assets identified, but instead left the determination to the courts as to whether to turn over the assets.[162] Specifically, under this provision, U.S. courts were required to "make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and (2) whether constitutionally-protected interest holders *other than* Iran are present."[163] The Court further explained that "[t]hese determinations are not mere fig leaves; it is quite possible that the Court could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that [other parties] have some form of beneficial or equitable interest."[164]

Section C: Judicial Decisions Related to the Execution of Terrorism-Related Judgments

6.17 U.S. courts have carefully considered the above provisions of U.S. law designed to facilitate execution of terrorism-related judgments by victims of Iranian-sponsored terrorism. Although Iran has refused to appear in U.S. courts to contest the claims made against it, under U.S. law a default judgment may not be entered by a U.S. court against a foreign state unless the claimant establishes his claim by evidence satisfactory to the court.[165] In a number of cases, victims of terrorism have been able to establish their claims with satisfactory evidence, thus resulting in adverse judgments against Iran.

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[161] *Id.* § 502(a)(1) (IM Annex 16).

[162] *Peterson v. Islamic Republic of Iran*, 2013 WL 1155576, at *31 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**.

[163] *Id.* **(U.S. Annex 108)**.

[164] *Id.* **(U.S. Annex 108)**.

[165] 28 U.S.C. § 1608(e) (IM Annex 6) ("No judgment by default shall be entered by a court of the United States . . . against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.").

6.18 This case does not concern the validity of the terrorism-related judgments against Iran, since the Court dismissed on jurisdictional grounds Iran's claims based on its inability to invoke sovereign immunity in those cases. Iran's remaining claims before the Court instead concern efforts to enforce those judgments, and specifically efforts to enforce those judgments against Iranian state-owned entities. Iran and Iranian state entities have, through deceptive practices designed to conceal the nature of financial transactions occurring in the United States, complicated legitimate enforcement efforts to enforce terrorism judgments. As a result, terrorist victims holding judgments, utilizing the provisions of U.S. law described above, have sought to enforce those judgments not only against Iran, but also against entities owned or controlled by Iran. Even still, given the difficulties in executing these judgments, the vast majority of compensatory damages awarded to victims of Iranian-sponsored terrorism remain unpaid.

6.19 Judicial proceedings related to the enforcement of terrorism-related judgments against Iran have been vigorously litigated and carefully considered by United States District Courts, Courts of Appeal, and the Supreme Court. In determining whether assets are subject to execution under section 201 of TRIA and section 1610 of the FSIA, U.S. courts examine whether Iran, or its agencies and instrumentalities, have an ownership interest in the assets in question. The proceedings to enforce the judgment in *Peterson* illustrate the deliberate approach, based in fact and law, applied by U.S. courts over the course of many years when considering attachment of assets in satisfaction of these terrorism judgments.

6.20 The *Peterson* case pertains to the 1983 U.S. Marine barracks bombing which killed 241 U.S. service members and gravely wounded many others. The U.S. District Court's findings on liability in this case are addressed in detail in Chapter 5.B. After examining the extensive evidence and determining the appropriate amount of damages available under local law, the court in 2007 awarded $2.6 billion in compensatory damages to more than eight hundred plaintiffs in *Peterson*.[166]

6.21 Among efforts by the *Peterson* plaintiffs to enforce this judgment, plaintiffs commenced judicial proceedings in 2008 to restrain 22 debt securities and related cash held by Citibank in an omnibus account for its customer Clearstream Banking, S.A. in which Iran was

[166] Judgment, *Peterson v. Islamic Republic of Iran*, Nos. 01-2094, 01-2684 (D.D.C. Sep. 7, 2007), ECF No. 228 **(U.S. Annex 76)**; Memorandum Opinion, *Peterson v. Islamic Republic of Iran*, Nos. 01-2094, 01-2684 (D.D.C. Sep. 7, 2007), ECF No. 229 **(U.S. Annex 77)**.

alleged to have an interest.[167] In 2010, plaintiffs initiated proceedings to obtain turnover of these restrained assets, totaling approximately $1.75 billion, in which Bank Markazi held a beneficial interest. Other victims of terrorism holding judgments against Iran similarly asserted claims on these assets. As a result, the *Peterson* judicial proceedings concerning the turnover of $1.75 billion in Bank Markazi assets involved not just victims of the Beirut Marine barracks attack, but sixteen groups of judgment creditors totaling more than 1,300 American victims of Iranian-sponsored terrorist attacks, who collectively held billions of dollars in unpaid compensatory damages judgments against Iran.[168]

6.22 Over the course of the next three years, Bank Markazi and other litigants "vigorously litigated" the turnover of these assets, raising issues of state, federal and international law to oppose the turnover of the assets at issue.[169] While these judicial proceedings were ongoing, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, which included 22 U.S.C. § 8772 as discussed above. In 2013, the U.S. District Court for the Southern District of New York ordered turnover of the assets based on both section 201(a) of TRIA as well as 22 U.S.C. § 8772.[170] The U.S. Court of Appeals for the Second Circuit affirmed based on 22 U.S.C. § 8772.[171] On April 20, 2016, the U.S. Supreme Court affirmed the Second Circuit's decision.[172] Acknowledging that 22 U.S.C. § 8772 was an "unusual statute," the Supreme Court noted that "[t]he statute, we point out, is not fairly portrayed as a 'one-case-only regime.' Rather, it covers a category of postjudgment execution claims filed by numerous plaintiffs who, in multiple civil actions, obtained evidence-based judgments against Iran together amounting to billions of dollars. Section 8772 subjects the designated assets to execution 'to satisfy any judgment' against Iran for damages caused by specified acts of terrorism."[173]

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[167] Order Entering Partial Final Judgment Pursuant to Fed. R. Civ. P. 54(b), Directing Turnover of the Blocked Assets, Dismissal of Citibank with Prejudice and Discharging Citibank from Liability, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. July 9, 2013), ECF No. 462 **(U.S. Annex 78)**. After an initial hearing on June 27, 2008, the district court issued an order vacating the restraint on two of the securities.

[168] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, slip op. at 6 (Apr. 20, 2016) (IM Annex 66).

[169] *Peterson v. Islamic Republic of Iran*, No. 10-4518, 2013 WL 1155576, at *3 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**. Notably, as discussed further in Chapter 9, the arguments advanced by Iran in this proceeding, particularly with respect to the nature of the transactions at issue and the status of Bank Markazi, are directly contrary to those advanced by Bank Markazi in the *Peterson* litigation.

[170] *Id.* **(U.S. Annex 108)**.

[171] *Peterson v. Islamic Republic of Iran*, 758 F.3d 185 (2d Cir. 2014) **(U.S. Annex 233)**.

[172] *Bank Markazi v. Peterson,* 136 S. Ct. 1310, slip op. at 1-2 (Apr. 20, 2016) (IM Annex 66).

[173] *Id.* (citations omitted) (IM Annex 66).

6.23 Subsequent to the Supreme Court's decision, on June 6, 2016 the U.S. District Court for the Southern District of New York authorized the distribution of the assets to the multiple plaintiffs who were party to this turnover action.[174] Because over 16 groups of judgment creditors were party to the proceedings, the *Peterson* judgment holders still have outstanding judgments against Iran for hundreds of millions of dollars in compensatory damages. Although the U.S. measures at issue in this case have sought to facilitate the efforts of victims of terrorism to obtain compensation from Iran, these victims have only been able to recover from Iran a fraction of what U.S. courts have lawfully awarded in compensatory damages.

* * * *

6.24 The measures that Iran has challenged are a reasonable response to Iran's sponsorship of terrorist attacks and its unwillingness to compensate the victims of those attacks. These measures have been carefully interpreted and applied by U.S. courts, in an impartial judicial forum in which the terrorism victims and their families, on the one hand, and the subjects of the enforcement action, on the other, have been afforded a full opportunity to present their arguments and evidence.

PART III: THE COURT SHOULD REJECT IRAN'S CLAIMS

CHAPTER 7: INTRODUCTION

7.1 Against the backdrop addressed in the preceding chapters, Part III of the Counter-Memorial sets out four defenses that each require the dismissal of some or all of Iran's claims as a threshold matter, i.e., before turning to the detail of Iran's article-by-article claims under the Treaty. Three of these defenses are carried over from the preliminary objections phase of the case, one which the Court joined to the proceedings on the merits (the "company" issue in respect of Bank Markazi), and the other two (unclean hands and Article XX) which the Court concluded were available to the United States as defenses on the merits, rather than at the preliminary stage. The fourth ground advanced in this Part is an objection to admissibility, namely, the failure to exhaust local remedies.

7.2 Building on the immediate factual context of this case addressed in Chapter 5 above, Chapter 8 establishes that, as a result of the numerous acts of terrorism it has sponsored during the past four decades, Iran has come to the Court with unclean hands. Even if Iran's claims

[174] Order Authorizing Distribution of Funds, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. June 6, 2016), ECF No. 651 **(U.S. Annex 79)**.

have merit – which they do not, as is addressed in Part IV of this Counter-Memorial – Iran's unclean hands preclude it from obtaining any of the relief it has requested.

7.3 Chapter 9 picks up the issue left over from the preliminary objections phase that Bank Markazi is not a "company" within the meaning of the Treaty and, accordingly, that it is not entitled to protection under any of the Treaty articles on which Iran relies. Accordingly, the entirety of Iran's claims with respect to the alleged mistreatment of Bank Markazi as a company under Articles III, IV, and V of the Treaty should be dismissed.

7.4 Chapter 10 sets forth an objection to admissibility with respect to claims that Iran is pursuing on behalf of entities that it has not shown have exhausted local remedies.

7.5 Finally, Chapter 11 demonstrates that one of the measures Iran has challenged, Executive Order 13599, both regulates the "traffic in arms" and is "necessary to protect [the United States'] essential security interests." Executive Order 13599 is therefore excluded from the scope of the Treaty's substantive articles by Article XX(1), and Iran's claims with respect to this measure must accordingly be rejected.

CHAPTER 8: IRAN COMES TO THE COURT WITH UNCLEAN HANDS

Section A: Introduction and Overview

8.1 Since the 1979 Islamic Revolution, Iran has engaged in a concerted and consistent campaign to advance its own political interests through destabilizing acts, contrary to international law. As discussed in Chapter 5, terrorism has been – and continues to be – a core component of that campaign, operating as an "adjunct" of Iranian foreign policy.[175] U.S. nationals have been among its principal targets and casualties. This is most starkly illustrated by the deaths of 241 U.S. servicemen in the 1983 Beirut Marine barracks bombings, for which Iran both contemporaneously claimed responsibility and was found, on the evidence, to be liable in the *Peterson* and other proceedings before U.S. courts.[176]

8.2 The U.S. measures that Iran seeks to challenge under the narrow auspices of the Treaty of Amity arose directly out of the Iranian-sponsored terrorist attacks perpetrated against U.S. nationals. Through considered, measured and incremental legislative and executive acts,[177] the United States provided a forum for the victims of those attacks to seek the redress

[175] Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* 5 (1996) **(U.S. Annex 4)**.

[176] *See* Chapter 5.B.

[177] *See* Chapter 6.

to which they were entitled. That forum was impartial and fair, requiring plaintiffs to prove their claims and protecting Iran's fair trial rights where it elected not to appear itself. Iran now seeks to avoid the payment of the consequent reparation owing to its many victims by invoking the Treaty of Amity.

8.3 The Court should reject Iran's invocation of the Treaty pursuant to the doctrine of unclean hands, which is ripe for recognition and application by the Court in this case and at this time, given the exceptional facts before it. While Iran's global terrorist campaign provides the background against which the Court should view Iran's conduct, it is the elements of that campaign that have a direct connection to the United States and its nationals that are the foundation of the United States' defense of unclean hands. Put simply, Iran cannot be permitted to cloak itself in the Treaty of Amity in the hope of shielding itself from the consequences of its support for terrorism.

8.4 Following the Court's Preliminary Objections Judgment, and in light of that judgment, the United States now advances Iran's unclean hands as a defense on the merits, rather than as an objection to admissibility. The United States asks that the Court reject Iran's claims on the basis that the U.S. measures that Iran challenges are a response to Iranian-supported terrorist acts directed at the United States and its nationals.

Section B: The Scope and Application of the Doctrine of Unclean Hands

8.5 The United States acknowledges that the Court has not previously applied the doctrine of unclean hands. It also acknowledges that some doubt has been expressed about the doctrine's scope and status.[178] The doctrine of unclean hands is, however, extensively applied by international and domestic tribunals and its application is warranted by the Court in the particular circumstances of this case.

8.6 The starting point for the analysis is that the principle of good faith, which is widely accepted and applied by the Court,[179] is a cornerstone of international law and treaty

[178] Occasioned, in part, by a misinterpretation of this Court's jurisprudence. *See Guyana v. Suriname*, 30 R.I.A.A. 1, ¶ 418 (Perm. Ct. Arb. 2007) **(U.S. Annex 80)**; *Hulley Enterprises (Cyprus) Limited v. Russia*, UNCITRAL, PCA Case No. AA 226, Final Award ¶¶ 1358-1359 (Jul. 18, 2014) **(U.S. Annex 81)**.

[179] *See, e.g., Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria),* 1998 I.C.J. 275, 296, ¶ 38 (June 11) ("the principle of good faith is a well-established principle of international law"); *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253, ¶ 49 (Dec. 20) and *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. 457, ¶ 46 (Dec. 20) ("one of the basic principles governing the creation and performance of legal obligations"). *See also Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 212 (Aug. 27) (rights "must be exercised reasonably and in good faith").

interpretation. The Court has also confirmed that "the legal concept of equity is a general principle directly applicable as law."[180]

8.7 The equitable doctrine of unclean hands flows from the twin principles of good faith and equity. The doctrine has its origins in Roman law[181] and in aspects of Chinese customary law.[182] It has found more recent expression in common law systems, in particular in the equitable maxim that "he who comes to equity must come with clean hands."[183] Civil law systems today apply it as part of the principle of *abus de droit* and related principles.[184] It is closely related to the maxim *ex turpi causa non oritur actio* ("an unlawful act cannot form the basis of an action in law") and *nullus commodum capere potest de sua injuria propria* ("a party cannot benefit from its own wrong"), the former of which has been recognized by Members of the Court,[185] and the latter of which has been applied by the Court.[186]

8.8 In essence, the doctrine of unclean hands affords the Court discretion, exercisable on the basis of considerations of equity and good faith, to deny a party's request for relief where that party has engaged in serious misconduct or wrongdoing that has a sufficiently close connection to the relief sought.

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[180] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 60, ¶ 71 (Feb. 24).

[181] STEPHEN M. SCHWEBEL, *Clean Hands, Principle*, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 232 (Rüdiger Wolfrum ed., 2012) **(U.S. Annex 82)**; *see also Diversion of Water from the Meuse*, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (Individual Opinion of Judge Hudson) (Jun. 28).

[182] *See* R. A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 250 n.19 (1961) **(U.S. Annex 83)**.

[183] *See, e.g.,* SNELL'S EQUITY ¶ 5-010 (33rd ed. 2018) **(U.S. Annex 84)**.

[184] *See* Chapter 18 for discussion of the codification of the prohibition of abuse of rights in civil law systems. The concept of unclean hands is also reflected in several civil law systems insofar as a right to restitution is barred on the basis of claimant misconduct: *see, e.g.*, Swiss Civil Code of Obligations of Mar. 30, 1911 (as at Apr. 1, 1907), Article 66 **(U.S. Annex 85)**; Bürgerliches Gesetzbuch (BGB) (German Civil Code) § 817 **(U.S. Annex 86)**. *See also* R. A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 250 n.19 (1961) **(U.S. Annex 83)**.

[185] *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 95, ¶ 308 (Dissenting Opinion of Judge Anzilotti) (Apr. 5) ("This claim should, in my view, be rejected, for an unlawful act cannot serve as the basis of an action in law"). *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 149 (1953) ("A State may not invoke its own illegal act to diminish its own liability") **(U.S. Annex 87)**.

[186] *Factory at Chorzów (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26). *See also Jurisdiction of the Courts of Danzig* 1928 P.C.I.J (ser. B) No. 15, at 26-27 (Mar. 3); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 221, 244 (Dissenting Opinion of Judge Read) (Jul. 18); *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, 1956 I.C.J. 23, 46 (Separate Opinion of Sir Hersch Lauterpacht) (June 1); *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 40 (Separate Opinion of Vice-President Alfaro) (Jun. 15); *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),* 1997 I.C.J. 7, ¶¶ 110, 133 (Sep. 25). *See also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 162, ¶ 9 (2002) (where the rule that "a State may not benefit from its own wrongful act" is described as a "general principle") **(U.S. Annex 88)**.

8.9 The acceptance of the doctrine by States appearing before the Court is clear from the regular and repeated assertion of the defense. At least 13 different States have sought to rely on it before the Court in a range of different contexts.[187] While the Court has not previously upheld a defense on this basis, it also has never rejected the doctrine as a matter of principle. This is despite the Court having been invited to do so, including in the preliminary objections phase of the present case. Rather, the Court has in previous cases concluded that it was unnecessary to address the issue and rejected its application on the facts. That said, at least four Members of the Court have accepted and applied the doctrine of unclean hands, albeit in dissenting opinions.[188] Both Judge Ajibola and Judge Hudson have also referred to the

[187] An unclean hands-based objection or defense has been raised by Australia (*see Certain Phosphate Lands in Nauru (Nauru v. Australia)* 1992 I.C.J. 240, ¶¶ 37-38 (June 26); *Certain Phosphate Lands in Nauru*, Preliminary Objections of the Government of Australia 162-164 (Dec. 1990)); the United States (*see LaGrand (Germany v. United States of America),* 2001 I.C.J. 466, ¶¶ 61-63 (June 27); *Avena and Other Mexican Nationals (Mexico v. United States of America),* 2004 I.C.J. 12, ¶¶ 45-47 (Mar. 31); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Memorial and Counter-claim ¶¶ 5.01-5.07 (June 23, 1997); *Oil Platforms (Islamic Republic of Iran v. United States),* 2003 I.C.J. 161, ¶¶ 27–30); Israel (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, ¶¶ 63–64 (July 24); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement of the Government of Israel on Jurisdiction and Propriety, ¶ 0.7 (Jan. 30, 2004)); Kenya (*Maritime Delimitation in the Indian Ocean (Somalia v. Kenya),* 2017 I.C.J. 3, ¶ 135-144 (Feb. 2)); and Pakistan (*Jadhav Case (India v. Pakistan)*, 2019 I.C.J., ¶¶ 59-61; *Jadhav Case (India v. Pakistan)*, Counter-Memorial of the Islamic Republic of Pakistan ¶ 188ff (Apr. 17, 2018)). The doctrine has also been raised by States in the following additional cases (where the doctrine was not directly addressed by the Full Court): Belgium, the United States, the United Kingdom, Portugal, the Netherlands, Germany and Canada in the *Legality of Use of Force* cases (see *Legality of Use of Force (Yugoslavia v. Belgium)*, Preliminary Objections of the Kingdom of Belgium ¶ 479ff (Jul. 5, 2000); Verbatim Record of the Public Sitting of the I.C.J. Held on May 11, 1999, at 23, ¶ 3.17, *Legality of Use of Force (Yugoslavia v. United States)* (United States argued that provisional measures would be inappropriate because Yugoslavia "does not come to the Court with clean hands"); Verbatim Record of the Public Sitting of the I.C.J. Held on May 11, 1999, at 15-16, ¶ 24, *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* (in which the United Kingdom argued that the clean hands doctrine is "deeply rooted in the essential nature of the judicial function" and "should be regarded as a 'general principle of law' within the meaning of Article 38 of the Statute"); Verbatim Record of the Public Sitting of the I.C.J. Held on May 11, 1999, at 11, ¶ 3.1.4, *Legality of Use of Force (Serbia and Montenegro v. Portugal)* (in which Portugal argued that "[b]earing in mind the 'clean hands' criterion, the request of the Federal Republic of Yugoslavia is not legitimate" since the facts at the origin of Yugoslavia's request were caused by Yugoslavia's "illicit conduct"); Verbatim Record of the Public Sitting of the I.C.J. Held on May 11, 1999, at 15-16, ¶¶ 44, 48(d), *Legality of Use of Force (Serbia and Montenegro v. Netherlands)* (The Netherlands asserted the Court should deny Yugoslavia's request because of Yugoslavia's "extremely dirty hands"); Verbatim Record of the Public Sitting of the I.C.J. Held on May 11, 1999, at 10, ¶ 1.6, *Legality of Use of Force (Serbia and Montenegro v. Germany)* (Germany argued that Yugoslavia "does not come to the Court with 'clean hands'"); Verbatim Record of the Public Sitting of the I.C.J. Held on May 10, 1999, at 7, ¶ 5, *Legality of Use of Force (Serbia and Montenegro v. Canada)* (same for Canada); Greece (*Application of Article 11(1) of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Counter-Memorial of Greece, ¶ 8.30 (Jan. 19, 2010)); and Nicaragua (*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Reply of the Republic of Nicaragua ¶¶ 6.85 and 6.92 (Aug. 4, 2014)).

[188] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran),* 1980 I.C.J. 3, 52 (Dissenting Opinion of Judge Morozov) (May 24); *Military and Paramilitary Activities in Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, ¶¶ 268-272 (Dissenting Opinion of Judge Schwebel) (June 27); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 35 (Dissenting opinion of Judge ad hoc Van den Wyngaert) (Feb. 14); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 46 and 61 (Dissenting Opinion of Judge ad hoc Kateka) (Dec. 19).

principle as it prevails in common law jurisdictions in separate opinions.[189] Further, Judge Iwasawa, in his recent consideration of the doctrine in the *Jadhav* case, did not reject the doctrine, but instead identified limitations on its application.[190]

8.10 States' practice of relying on the doctrine of unclean hands is also reflected in international disputes addressed by other international fora. For example, States (including Iran) have advanced this argument before international tribunals, in particular, the Iran-US Claims Tribunal,[191] Annex VII arbitration tribunals,[192] inter-State claims commissions and investor-State arbitration tribunals.[193] As one illustration, in the *Good Return and the Medea* case before the Ecuadorian-United States Claims Commission, Commissioner Hassaurek declined to allow the claim on the basis of the rule that "[a] party who asks for redress must

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[189] *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (Individual Opinion of Judge Hudson) (Jun. 28) ("a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper") (citing 13 HALSBURY'S LAWS OF ENGLAND 87 (2nd ed. 1934)); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 1993 I.C.J. 325, 395 (Separate Opinion of Judge Ajibola) (Sep. 13) (referring to the principle in common law jurisdictions that "an applicant who 'wants equity must do equity' implying that the applicant 'must come with clean hands.'").

[190] *See Jadhav Case (India v. Pakistan)*, 2019 I.C.J., Declaration of Judge Iwasawa ¶ 3.

[191] Iran itself asserted that the doctrine was "supported by a vast and diverse body of international legal literature, State practice and international case-law." *Aryeh v. Iran*, Case Nos. 842, 843 & 844, Respondent's Hearing Memorial and Written Evidence, Vol. III, Exhibit C, at 44 (Mar. 23, 1993) (Doc. 80), (IRAN-U.S. CL. TRIB.) (U.S. P.O. Annex 187). *See also Mohtadi v. Iran*, Case No. 271, Award No. 573-271-3 (Dec. 2, 1996), 32 IRAN-U.S. CL. TRIB. REP. 124, 134 (U.S. P.O. Annex 188) (noting that Iran had raised clean hands as a reason to dismiss a claim); *Karubian v. Iran*, Case No. 419, Award No. 569-419-2 (Mar. 6, 1996), 32 IRAN-U.S. CL. TRIB. REP. 3, 36 (U.S. P.O. Annex 189) (asserting that claims were barred by clean hands doctrine, among other things).

[192] This was argued by Suriname in *Guyana v. Suriname*, 30 R.I.A.A. 1, ¶¶ 182-84 (Perm. Ct. Arb. 2007) **(U.S. Annex 80)**. Although the Tribunal declined to apply the doctrine, it did so on the basis of Judge Hudson's limiting factors, discussed further below. It did not decide whether the doctrine exists in international law. *Id.* ¶ 421.

[193] The doctrine has been expressly invoked by at least eight States: Bangladesh in *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh*, ICSID Case No. ARB/10/11 and 10/18, Decision on Jurisdiction ¶ 476 (Aug. 19, 2013) **(U.S. Annex 89)**; Russia in *Hulley Enterprises (Cyprus) Limited v. Russia*, UNCITRAL, PCA Case No. AA 226, Final Award ¶¶ 1273 *et seq.* (July 18, 2014) **(U.S. Annex 81)**; The Philippines in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award ¶ 210 (Dec. 10, 2014) (where the Tribunal cited the doctrine with apparent approval at ¶ 328) **(U.S. Annex 90)**; Indonesia in *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award ¶¶ 161-164 (Dec. 15, 2014), with the Tribunal's reliance on the doctrine recorded at ¶¶ 646-648 **(U.S. Annex 91)**; Ecuador in *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award ¶ 5.36 (Mar. 15, 2016) **(U.S. Annex 92)**; Venezuela in *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award ¶¶ 491 *et seq.* (Aug. 22, 2016) (where it was "undisputed that claimants with 'dirty hands' have no standing in investment arbitration") **(U.S. Annex 93)**; Italy in *Blusun S.A v. Italian Republic*, ICSID Case No. ARB/14/3, Award ¶ 272 (Dec. 27, 2016) **(U.S. Annex 94)**; and Bolivia in *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), ¶ 45 (Jan. 31, 2018) **(U.S. Annex 95)**. *See also Plama Consortium Ltd. v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award ¶¶ 130-146 (Aug. 27, 2008) **(U.S. Annex 96)** (indirectly applying the doctrine when addressing the issue of legality) and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award ¶ 317 (June 18, 2010) **(U.S. Annex 97)** (where an investor's "clean hands" are cited by the Tribunal as a relevant consideration).

present himself with clean hands."[194] Equally, in the *Frierdich* case before the French-Venezuelan Mixed Claims Commission, the Umpire dismissed the claim on the basis that the company itself "was the primary and potent cause of its own misfortunes in connection with [the] incident." This led the Umpire to apply "one of the most important maxims of equity, viz, 'He who comes into equity must come with clean hands'."[195]

8.11 Beyond international courts and tribunals, the doctrine of unclean hands is extensively recognized and applied in domestic jurisdictions as an equitable maxim. It operates to bar relief where a claimant's misconduct in regards to the subject matter of the litigation is improper. For example, in the United States, the doctrine of unclean hands is "designed to prevent the court from assisting in fraud or other inequitable conduct" and operates to "protect the integrity of the court and the judicial process by denying relief to those persons whose very presence before a court is the result of some fraud or iniquity." [196] The application of this equitable maxim has also been recognized in States such as the United Kingdom (the courts of England & Wales),[197] Australia,[198] Canada,[199] Pakistan[200] and South Africa.[201]

8.12 The Court, like the domestic and international tribunals surveyed above, plainly has the discretion to apply the doctrine of unclean hands in order to deny an applicant the ability to employ the Court's judicial process to vindicate a wrong of that party's own making. The United States accepts that the exercise of that discretion must encompass considerations of justice and fairness, given that it is founded on an equitable maxim. The United States further accepts that the Court's discretion should not be exercised lightly. However, in exceptional

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[194] *Good Return and the Medea*, Opinion of the Commissioner Hassaurek, 29 R.I.A.A. 99, 107 (Aug. 8, 1865) **(U.S. Annex 98)**.

[195] *Frierdich & Co*, Opinion of the Umpire, 10 R.I.A.A. 50, 54 (July 31, 1905) **(U.S. Annex 99)**.

[196] *See, e.g.*, *Gilead Sciences Inc. v. Merck & Co., Inc.*, 888 F.3d 1231, 1239-40 (Fed. Cir. 2018) **(U.S. Annex 100)**.

[197] *See, e.g.*, *Royal Bank of Scotland plc v. Highland Financial Partners LP* [2013] EWCA Civ 328, ¶¶ 158-172 (Court of Appeal of England and Wales) **(U.S. Annex 101)**. *See also* SNELL'S EQUITY ¶ 5-010 (33rd ed. 2018) **(U.S. Annex 84)**.

[198] *See, e.g.*, *Official Trustee in Bankruptcy v. Tooheys Ltd* (1993) 29 NSWLR 641 (Mar. 18, 1993) (New South Wales Court of Appeal) **(U.S. Annex 102)**.

[199] *See, e.g.*, *Volkswagen Canada Inc. v. Access International Automotive Ltd* [2001] 3 FC 311, ¶ 19 *et seq.* (Mar. 21, 2001) (Federal Court of Appeal) **(U.S. Annex 103)**.

[200] *See, e.g.*, *Société Générale de Surveillance SA v. Pakistan (Minister of Finance, Revenue Division and Islamabad)*, Civil Appeal No 459/2002, ¶ 61 (Jul. 3, 2002) (Supreme Court of Pakistan) **(U.S. Annex 104)**.

[201] *See, e.g.*, *South Africa v. Mahala and Mahala,* Determination of Jurisdiction, 1992 (2) SACR 305 (E), ¶ 32 (May 21, 1992) (High Court, Eastern Cape) **(U.S. Annex 105)**.

cases, such as the present, where the applicant seeks to use the Court to shield its own wrongdoing, it is appropriate that the Court deny the applicant's request for relief.

Section C: The Circumstances in which the Doctrine May Be Applied and Its Consequences

8.13 There are certain factors that the Court may use to guide its discretionary assessment in identifying cases of an exceptional character that warrant application of the doctrine. These factors include: *first*, whether there is a qualifying wrong or misconduct; *second*, whether the wrong or misconduct was undertaken by or on behalf of the applicant State;[202] *third*, whether there is a nexus between the wrong or misconduct and the claims being made by the applicant State;[203] *fourth*, whether the wrong or misconduct is of sufficient gravity to render the Court's grant of the requested relief inequitable or improper; and *fifth*, whether there exists any countervailing misconduct or wrong on the part of the respondent State that may cause the Court to decline to exercise its discretion in favor of applying the doctrine.

8.14 At the preliminary objections phase of the case, there was some debate as to whether the criteria set down in Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* case[204] are engaged by the doctrine of unclean hands. For the avoidance of any doubt, they have no relevance to the doctrine of unclean hands, contrary to Iran's (revised) position.[205]

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[202] *See, e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, ¶¶ 63–64 (Jul. 24).

[203] The level of connection between the misconduct or wrong and the applicant's claim will depend on the circumstances of the case (including the relief sought by the respondent in relying on the doctrine). For example, in cases where a declaration of inadmissibility is sought, it is necessary to establish a relationship between the treaty on which the application is based and the misconduct or wrong in question. *See Jadhav Case (India v. Pakistan)*, 2019 I.C.J., Declaration of Judge Iwasawa, ¶ 3. See, more broadly, the nexus expressed in *Frierdich & Co*, Opinion of the Umpire, 10 R.I.A.A. 50, 54 (July 31, 1905) **(U.S. Annex 99)** (where the company was the "primary and potent cause of its own misfortunes" and was denied its requested relief on that basis); *see also* Gerald G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 119 (1957) **(U.S. Annex 106)**.

[204] *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (Individual Opinion of Judge Hudson) (Jun. 28) ("It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."); *see also id.* at 78 ("[T]he Netherlands itself is now engaged in taking similar action, similar in fact and similar in law. This seems to call for an application of the principle of equity stated above.")

[205] Preliminary Objections Judgment, ¶ 121, recording Iran's argument that "it only applies when the claimant is engaged in 'precisely similar action, similar in fact and similar in law' as that of which it complains" (mirroring page 78 of Judge Hudson's opinion). As Judge ad hoc Brower observed, Iran's original position was that Judge Hudson's opinion did not address the doctrine of clean hands: *see* Preliminary Objections Judgment, Separate Opinion of Judge ad hoc Brower, ¶ 4; *Certain Iranian Assets*, Iran's Observations and Submissions on the U.S. Preliminary Objections ¶ 8.8 (Sep. 1, 2017).

Instead, they relate to another maxim entirely, *exceptio non adimpleti contractus*,[206] which is not (and has never been) relied upon by the United States in this case. For this reason, the decisions of those tribunals that have declined to apply the doctrine on the basis that the conditions laid down in Judge Hudson's Opinion have not been satisfied should be disregarded by the Court, if and to the extent that Iran should seek to rely on them.[207]

8.15 As to the legal consequences of the successful application of the doctrine of unclean hands, they are not circumscribed. Given its foundation in good faith and equity, the doctrine should be applied in a manner that best meets the ends of justice, having regard to the particular circumstances of the case and the factors set out above.

Section D: Iran's Sponsorship of Terrorism against the United States Engages the Doctrine of Unclean Hands

8.16 The crux of the United States' defense of unclean hands is that Iran seeks to deploy the Treaty of Amity to avoid the consequences of its own conduct, through the guise of allegations of treaty breaches against the United States. Critically, those allegations concern the steps that the United States has taken to mitigate the consequences of Iran's wrongful acts.

8.17 As described in Chapter 5 above, Iran has, since 1979, engaged in conduct that includes sponsorship of terrorist acts which were carried out against U.S. nationals and U.S. interests and which led to the U.S. measures of which Iran now complains. Iran's wider support for and direction of terrorist acts, as well as assassinations, killings and airline hijackings, and

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[206] The principle that Judge Hudson was seeking to invoke in that case, and to which the conditions at the end of page 77 of his judgment refer, is the *exceptio non adimpleti contractus* (i.e., the exception of non-performance of a contract, which entitles a state to suspend performance and is codified in Article 60 of the Vienna Convention). That the application of this principle is the proper characterization of his decision has been recognized by several Members of the Court: *see Military and Paramilitary Activities in Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, ¶ 269 (Dissenting Opinion of Judge Schwebel) (June 27); *Oil Platforms (Islamic Republic of Iran v. United States),* 1998 I.C.J. 190, 228 (Dissenting Opinion of Judge ad hoc Rigaux) (Mar. 10); *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, 2011 I.C.J. 644, ¶ 16 (Separate Opinion of Judge Simma) (Dec. 5). *See also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 162, ¶ 9 & n.337 (2002) **(U.S. Annex 88)**. This is also how Judge Anzilotti characterized the relevant principle to which Belgium's submissions had given rise: *see Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 50 (Dissenting Opinion of Judge Anzilotti) (Jun. 28) ("I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies . . . ."). Judge ad hoc Brower also recognized in the present case that Judge Hudson "did not write specifically about the clean hands doctrine." *See* Preliminary Objections Judgment (Separate Opinion of Judge ad hoc Brower), ¶ 5.

[207] *See, e.g.*, *Guyana v. Suriname*, 30 R.I.A.A. 1, ¶¶ 420-421 (Perm. Ct. Arb. 2007) **(U.S. Annex 80)**; *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh*, ICSID Case No. ARB/10/11 and 10/18, Decision on Jurisdiction ¶¶ 476, 480-485 (Aug. 19, 2013) **(U.S. Annex 89)**.

Iran's violations of its ballistic missile and arms trafficking obligations provides background and context to the Court's assessment of Iran's conduct.

8.18 There can be no doubt that Iran has sponsored a comprehensive program of terrorist acts against the United States and its nationals, which has endured from 1983 until the present day. As addressed above,[208] Iran's terrorist campaign has specifically targeted U.S. nationals and U.S. facilities. This campaign is exemplified by the attack on the U.S. Marine barracks in Beirut, causing the deaths of 241 U.S. servicemen, and the attack on Khobar Towers (the residence on the U.S. military base in Dharan, Saudi Arabia), resulting in the deaths of 17 U.S. servicemen.[209] Both attacks were egregious in character and gave rise to the principal cases that Iran invokes before the Court, namely the *Peterson*[210] and *Heiser* cases.[211] In both cases, U.S. courts concluded, in reliance on extensive fact and expert testimony at trial[212] and with regard to the applicable U.S. legal principles, that Iran had knowingly sponsored and supported the wrongful terrorist acts perpetrated against U.S. servicemen, which were deliberately and callously targeted. Beyond these acts, the United States also relies on and invokes the broader series of terrorist acts perpetrated against U.S. nationals to which it responded through U.S.

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[208] *See* Chapter 5.B.

[209] *See* Chapter 5.B.

[210] Iran relies on the *Peterson* case in its Memorial at ¶¶ 1.13, 1.27, 1.29, 2.39-2.43, 2.46, 2.58, 4.22, 4.35, 5.12, 5.14, 5.16, 5.45, 5.60 and 7.2 and at Attachment 2, lines 21, 23, 29, 30, 38 and 79. See also the *Bland* (Attachment 2, lines 38, 67 and 79), *Brown* (Attachment 2, lines 38, 71 and 79), *Davis* (Attachment 2, lines 9 and 70), *Holland* (Attachment 2, line 69), *Murphy* (Attachment 2, line 17), *Relvas* (Attachment 2, line 83) and *Valore* (Attachment 2, lines 38, 47 and 79) cases, which also arise out of the attack on the U.S. military barracks in Beirut.

[211] Iran relies on the *Heiser* case in its Memorial at ¶¶ 2.26, 2.51, 2.59, 2.60, 4.32, 4.33, 5.14, 5.59 and 5.69 and at Attachment 2, lines 2, 25, 26, 27, 28, 33, 34, 35, 36, 38, 39, 40, 41, 44, 45, 46, 48, 49, 53, 54, 57, 63, 65, 66 and 79. See also the *Blais* (Attachment 2, line 74), *Rimkus* (Attachment 2, lines 51 and 52) and *Valencia* (Attachment 2, line 75) cases, which also arise out of the attack on Khobar Towers.

[212] In *Peterson v. Islamic Republic of Iran,* 264 F. Supp. 2d 46 (D.D.C. 2003) **(U.S. Annex 36)**, the court held that "the complicity of Iran in the 1983 attack was established conclusively" (*id.* at 54) and that "it was beyond question that Hezbollah and its agents received massive material and technical support from the Iranian government" (*id.* at 58). The court reached those conclusions after hearing extensive evidence from fact and expert witnesses, including the evidence of Dr. Patrick Clawson, Dr. Reuven Paz, Dr. Michael Ledeen, Admiral James Lyons, Col. Timothy Geraghty, Mr. Robert Baer and Mr. Warren Parker. In *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006) **(U.S. Annex 41)**, the court concluded that "the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the government of the Islamic Republic of Iran." *Id.* at 265. The court reached those conclusions after hearing evidence from FBI Director Louis Freeh, Mr. Dale Watson, Dr. Patrick Clawson and Dr. Bruce Tefft and taking judicial notice of the facts that he had established in *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40 (D.D.C. 2006) **(U.S. Annex 40)**, which arose out of the same attack. *See also* Transcript of Deposition of Dr. Patrick Clawson, *Heiser v. Islamic Republic of Iran*, No. 00-2329 (D.D.C. Nov. 25, 2003) **(U.S. Annex 110)**; Transcript of Trial (Testimony of Dr. Patrick Clawson), *Heiser v. Islamic Republic of Iran*, No. 00-2329 (D.D.C. Dec. 12, 2003) **(U.S. Annex 111)**; Transcript of Trial (Testimony of Director Louis Freeh), *Heiser v. Islamic Republic of Iran*, No. 00-2329 (D.D.C. Dec. 18, 2003) **(U.S. Annex 42)**; Transcript of Trial (Testimony of Dr. Patrick Clawson), *Heiser v. Islamic Republic of Iran*, No. 00-2329 (D.D.C. Feb. 9, 2004) **(U.S. Annex 113)**; Transcript of Trial (Testimony of Dr. Bruce Tefft), *Blais v. Islamic Republic of Iran*, No. 2003-285 (D.D.C. May 26, 2006) **(U.S. Annex 114)**.

judicial processes. These include the hijackings, kidnappings and assassinations of U.S. government officials and citizens carried out by Iran's proxies, as set out in detail above.[213]

8.19 Iran has sought to suppress these inconvenient facts by arguing that the United States' allegations of terrorism are irrelevant to the present proceedings.[214] This position is untenable. In reality, the terrorist acts invoked by the United States for the purposes of this defense on the merits are inherently connected to Iran's claims under the Treaty of Amity.

8.20 As a starting point, the U.S. legislative and executive measures at issue in this case were originally conceived in part in response to the Beirut attacks, the Khobar Towers bombings, and other state-sponsored terrorism, as well as the efforts by victims of these attacks to obtain redress.[215] Through those measures, the United States established a legislative and judicial framework for U.S. victims of terrorism to hold Iran and other state sponsors of terrorism to account and to seek compensation for the suffering that they and their families endured. Had Iran not sponsored the relevant terrorist acts, or had it acted consistently with its obligation to make reparation to its victims,[216] the U.S. measures and legal proceedings now at issue would not have been necessary. In those circumstances, Iran cannot now claim that the question of its unclean hands has no bearing on the Court's determination of the legality of the impugned U.S. measures. To quote the Umpire in *Frierdich*, Iran is undeniably the "author of its own misfortune."[217]

8.21 This notwithstanding, Iran seeks to invoke the Treaty of Amity – a treaty premised on the existence of "peace and friendship"[218] and mutually beneficial economic relations[219] – as a defensive tool. It seeks the Court's assistance to allow it to evade the consequences of

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[213] *See* Chapter 5.B.

[214] Preliminary Objections Judgment, ¶ 118, recording Iran's argument that the United States' allegations of terrorism were "irrelevant."

[215] The Beirut attack was a precursor to the United States' designation of Iran as a state sponsor of terrorism in January 1984. *See* Chapter 6.A.

[216] It is notable that Iran describes the obligation to make reparation as "axiomatic" and disingenuously invokes it in these proceedings itself. Iran's Memorial, ¶ 7.18.

[217] *Frierdich & Co*, Opinion of the Umpire, 10 R.I.A.A. 50, 54 (July 31, 1905) **(U.S. Annex 99)**.

[218] *See* Treaty of Amity, Article 1. *See* also, *Oil Platforms (Islamic Republic of Islamic Republic of Iran v. United States of America),* 1996 I.C.J. 803, ¶ 28. *See also id.* ¶ 52 ("The spirit and intent set out in this Article animate and give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty.").

[219] *See* Treaty of Amity, Preamble.

conduct for which it has been found, on the evidence, to be liable. If the Court were to accede to Iran's request for relief, the result would be a denial, rather than an exercise, of equity.

8.22 Against this background, the Court should exercise its discretion, on the basis of considerations of good faith and equity, to deny the claims that Iran brings under the Treaty of Amity in their entirety. Iran's misconduct to which the United States points is directly engaged by the case that Iran brings to the Court, encompassing acts targeting U.S. nationals and U.S. facilities, and causing the death or injury of a significant number of U.S. nationals.

8.23 For all of these reasons, the Court should view the entirety of Iran's claims through the prism of its unclean hands and, accordingly, should dismiss Iran's claims on the basis that the impugned U.S. measures are in response to Iran's conduct. In the United States' respectful submission, Iran cannot be shielded from the consequences of its own misdeeds.

CHAPTER 9: APPLICATION OF THE COURT'S PRELIMINARY OBJECTIONS JUDGMENT TO THE FACTS REQUIRES DISMISSAL OF IRAN'S CLAIMS CHALLENGING THE TREATMENT OF BANK MARKAZI BECAUSE BANK MARKAZI IS NOT A "COMPANY" ENTITLED TO RIGHTS UNDER ARTICLES III, IV, AND V OF THE TREATY

9.1 This chapter demonstrates that, under the framework established by the Court in its Preliminary Objections Judgment, Bank Markazi is not a "company" within the meaning of the Treaty. The Preliminary Objections Judgment concluded that an entity may only be characterized as a "company" under the Treaty to the extent that the activities in which it engaged were of a commercial nature.[220] The Court took the view that, for purposes of the Preliminary Objections Judgment, it did not have before it all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of a commercial nature that would permit Bank Markazi to be characterized as a "company."[221]

9.2 As will be shown below, Bank Markazi's conduct at issue in these proceedings is manifestly to be regarded as sovereign conduct, rather than commercial conduct, by reference to Bank Markazi's own express characterization of its conduct in the *Peterson* litigation – the very proceedings underlying Iran's claims with respect to Bank Markazi in this case. Iran cannot be permitted to "blow hot and cold" on the same issue in different fora. Based on its own description of its relevant activities, Bank Markazi cannot be considered a "company" under the Treaty. Further, Iran's pleadings in this case make no serious effort to establish that

[220] Preliminary Objections Judgment, ¶ 92.

[221] *Id.*, ¶ 97.

Bank Markazi was engaged in the type of commercial activity that the Court found to be necessary for Bank Markazi to qualify as a "company." On the contrary, like Bank Markazi in the *Peterson* litigation, Iran has up until this point emphasized the sovereign nature of Bank Markazi's activity. If Iran is held, as it should be, to its own descriptions of Bank Markazi's activities in this case, then Bank Markazi does not meet the standard set out by the Court to be considered a "company" under the Treaty. Iran's claims concerning Bank Markazi as a company must be dismissed.

Section A: If Bank Markazi Is Not a "Company" Entitled to Rights under the Treaty, then Iran's Claims Related to Bank Markazi Must Fail

9.3 Iran alleges numerous breaches of U.S. obligations under the Treaty which are specific to Bank Markazi and arise out of Bank Markazi's alleged treatment in the *Peterson* judicial proceedings before U.S. courts, including breaches of Articles III(1), III(2), IV(1), IV(2), and V(1).[222] As noted in the Preliminary Objections Judgment, these Treaty articles apply solely to "nationals" and "companies" of a Contracting Party.[223] Because "national" applies to natural persons, in order for Bank Markazi to be entitled to the treatment required under these Treaty provisions, it would need to be considered a "company" for purposes of the Treaty.[224] Iran's claims related to the alleged treatment of Bank Markazi are therefore predicated on Iran's view that Bank Markazi is entitled to the treatment required to be afforded to "companies" under these Treaty provisions.[225] If Bank Markazi is not a "company" for

[222] Iran's Memorial, ¶ 4.35 (alleging violation of Iran's entitlement to freedom of access to U.S. courts for Iranian nationals and companies under Article III(1)); *id.* ¶¶ 5.14(b), 5.16 (alleging violation of Iran's entitlement to freedom of access to U.S. courts for Iranian nationals and companies under Article III(2)); *id.* ¶ 5.45 (alleging violation of the obligation to accord fair and equitable treatment to Iranian nationals and companies under Article IV(1)); *id.* ¶ 5.48 (alleging violation of the protection against unreasonable or discriminatory measures that would impair legally required rights and interests of Iranian nationals and companies under Article IV(1)); *id.* ¶ 5.60 (alleging violation of Iran's entitlement to the most constant protection and security of the property and interests in property of Iranian nationals and companies under Article IV(2)); *id.* ¶ 5.69 (alleging violation of Iran's entitlement to freedom from expropriation of the property and interest in property of Iran's nationals and companies, except for a public purposes and the payment of just compensation, under Article IV(2)); *id.* ¶ 5.75 (alleging violation of Iran's entitlement for Iran's nationals and companies to be permitted to lease, acquire and dispose of property under Article V(1)).

[223] Preliminary Objections Judgment, ¶ 86.

[224] The term "companies" is defined in Article III(1) of the Treaty to mean "corporations, partnerships, companies, and other associations, whether or not with limited liability and whether or not for pecuniary profit."

[225] Notably, Iran's Memorial at one point specifically asserts that Bank Markazi is being unfavorably treated, not compared to other "companies," but compared to the central banks of other States, implicitly acknowledging the unique status occupied by central banks. Iran's Memorial, ¶ 5.17.

purposes of the Treaty, then Iran's claims concerning Bank Markazi's alleged treatment have no basis in these Treaty provisions.

9.4 In the Preliminary Objections Judgment, the Court established the framework for considering whether Bank Markazi is a "company" under the Treaty. The Court made clear that a legal person should only be "regarded as a 'company' within the meaning of the Treaty to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities."[226] In doing so, the Court has already rejected Iran's central argument for why Bank Markazi should be considered a "company" under the Treaty, namely that any entity with a separate juridical status from the State would be a "company" under the Treaty, irrespective of the activities undertaken by that entity.[227] The Court concluded that it "cannot accept the interpretation put forward by Iran in its main argument, whereby the nature of the activities carried out by a particular entity is immaterial for the purpose of characterizing that entity as a 'company'."[228] As the Court noted, Iran's interpretation was inconsistent with the clear aim of the Treaty to guarantee rights and afford protections to entities engaged in activities of a commercial nature. And Iran, as described below, has failed in its Memorial to meet its burden to demonstrate Bank Markazi's commercial activities in the United States.

Section B: Iran's 1972 Monetary and Banking Act Illustrates the Sovereign Functions Assigned to Bank Markazi

9.5 The Court in the Preliminary Objections Judgment specifically observed that the Parties did not discuss in detail the scope of activities in which Bank Markazi is entitled to engage under Iran's Monetary and Banking Act.[229] Given Iran and Bank Markazi's clear statements with respect to Bank Markazi's specific activities that relate to this case, the Court need not engage in a detailed analysis of Iran's banking law or identify the outer parameters of activity authorized under that law. However, a review of that Act confirms the sovereign functions assigned to Bank Markazi.

9.6 Article 10 of the Monetary and Banking Act provides that Bank Markazi "shall have the task of formulating and implementing monetary and credit policies on the basis of the general economic policy of the State," and that the "objectives of the Central Bank of the

[226] Preliminary Objections Judgment, ¶ 92.

[227] Observations and Submissions of Iran on the Preliminary Objections of the United States, ¶¶ 4.4-4.30

[228] Preliminary Objections Judgment, ¶ 90.

[229] Preliminary Objections Judgment, ¶ 95.

Islamic Republic of Iran are to maintain the value of the currency and the equilibrium in the balance of payments, to facilitate trade transactions, and to assist the economic growth of the country."[230]

9.7 Article 11 establishes the central bank "as the regulatory authority of the monetary and credit system of the country," and provides that the central bank shall fulfill functions including: issuance of currency; supervision of banks; adoption of regulations pertaining to foreign exchange transactions and control over foreign exchange transactions; control over gold transactions; and control over the export and import of foreign exchange and Iranian currency.[231]

9.8 Article 13 vests the central bank with specific powers, including granting loans and credits to governmental entities, government companies and municipalities; guaranteeing commitments made by the Government; rediscounting drafts and short-term commercial instruments presented by other banks; purchase and sale of Treasury Bills and Government Bonds, as well as bonds issued by foreign governments or international financial institutions; purchase and sale of gold and silver; and opening and holding current accounts with foreign banks and carrying out all other authorized banking operations.[232] Even to the extent that some of the specific powers in Article 13 are not unique to central banks, those powers must be considered in the context of the sovereign tasks and objectives described above which are assigned to the central bank.

9.9 The sovereign functions assigned to Bank Markazi under the Monetary and Banking Act illuminate the general principle that traditional central banks are *fundamentally unlike* the ordinary "companies" (whether publicly or privately owned) covered by Articles III, IV, and V of the Treaty. Central Banks like Bank Markazi are entrusted with sovereign functions, and are presumed to be acting on behalf of the State when acting in these governmental capacities.[233] This government role of Central Banks would have been understood at the time of the negotiation of the Treaty, during the post-World War II period when Central Banks were important tools for rebuilding and restructuring national economies, often under the

[230] Monetary and Banking Act, art. 10 (IM Annex 73).

[231] *Id*., art. 11 (IM Annex 73).

[232] *Id.,* art. 12 (IM Annex 73).

[233] *See* James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820, 864 (1981) ("The ordinary functions of a central bank or monetary authority are quite clearly governmental for the purposes of any distinction between 'governmental' and other transactions of a state.") **(U.S. Annex 115)**.

government's close direction.[234] In light of these sovereign functions carried out by Central Banks, they occupied a different, more quintessentially governmental status from other state-owned enterprises at the time of the negotiation of the Treaty. Indeed, this understanding was confirmed by U.S. negotiators concerning the scope of an FCN treaty with the Netherlands:

> There can be said to be a presumption . . . that a State's "central bank" which acts as an arm of the Government in executing the Government's monetary control and fiscal policy represents the Government in its sovereign capacity, and is not a commercial (or business) enterprise within the purview of the [immunity waiver] provision. This presumption is, of course, rebuttable if the evidence in the instance of a given central bank does not bear it out.[235]

Section C: By Iran's Own Characterization, the Claims in This Case Pertain to Bank Markazi's Sovereign Governmental Activity

9.10 While there is a strong presumption that Central Banks are carrying out sovereign functions, the Preliminary Objections Judgment sets out a specific inquiry to determine whether Bank Markazi may be characterized as a company under the Treaty. Acknowledging that an entity may engage both in activities of a commercial, or business, nature and in sovereign activities, the Court stated in the Preliminary Objections Judgment that it is the "nature of the activity actually carried out which determines the characterization of the entity engaged in it."[236] The Court therefore concluded that it is "necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization as a 'company' within the meaning of the Treaty of Amity, and which would have been capable of being affected by the measures complained of by Iran by reference to Articles III, IV and V of the Treaty."[237]

9.11 As such, the Court's inquiry is now focused on whether Iran can establish that (a) Bank Markazi carried out activities of a commercial nature and (b) that those activities are related to the U.S. measures at issue in this case, namely those measures that affect the assets at issue in the *Peterson* enforcement proceedings. It is insufficient for Iran to show only that

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[234] Lilia Costabile & Gerald Epstein, *An Activist Revival in Central Banking? Lessons from the History of Economic Thought and Central Bank Practice*, 24 EURO. J. HISTORY OF ECONOMIC THOUGHT 1416, 1429 (2017) **(U.S. Annex 116)**.

[235] *See* U.S. Preliminary Objections, ¶ 9.16 (citing Department of State Instruction A-52 to Embassy The Hague, Aug. 4, 1953, at 2 (U.S. P.O. Annex 231)).

[236] Preliminary Objections Judgment, ¶ 92.

[237] *Id.,* ¶ 97.

Bank Markazi may have at some point in time, in some location, engaged in commercial activities beyond its sovereign functions.

9.12 Iran and Bank Markazi have repeatedly characterized Bank Markazi's activities, both generally and specifically related to this proceeding, as sovereign in nature. Iran places particular emphasis throughout its Memorial on the sovereign functions Bank Markazi performs as Iran's Central Bank.[238] While Iran specifically invokes Articles 11 and 13 of its 1972 Monetary and Banking Act in support of its position that "Bank Markazi is plainly engaged in acts pertaining to or integrally related to 'commerce'," [239] Bank Markazi cited to these very Articles in U.S. court proceedings in order to establish that it was engaged in *sovereign conduct*.[240]

9.13 With specific regard to Bank Markazi's activities at issue in the *Peterson* enforcement proceedings, Bank Markazi explicitly stated that it acted in a sovereign – not commercial – capacity in all relevant aspects. Bank Markazi argued that the assets at issue were being "used for the classic central banking purpose of investing Bank Markazi's currency reserves"[241] and that this investment served "an important governmental purpose."[242] In Bank Markazi's petition for certiorari to the U.S. Supreme Court in the *Peterson* case, it described its activities as follows:

> Petitioner Bank Markazi is the Central Bank of Iran. Like other central banks, it holds foreign currency reserves to carry out monetary policies such as maintaining price stability. Like other central banks, it often maintains the reserves in bonds issued by foreign sovereigns or "supranationals" like the European Investment Bank.

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[238] *See* Preliminary Objections of the United States, ¶ 9.4 (citing Iran's Memorial, ¶¶ 1.25, 2.34, 3.23-3.25, 3.40); Affidavit of Gholamhossein Arabeieh ¶¶ 27-37, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Oct. 17, 2010) (U.S. P.O. Annex A03) (describing Bank Markazi's various functions under its governing statute, all of a sovereign rather than commercial nature, as well as the Bank's role as Iran's representative before international organizations such as the IMF).

[239] Observations and Submissions of Iran on the Preliminary Objections of the United States, ¶ 4.24.

[240] Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction 29, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. May 11, 2011) (U.S. P.O. Annex A01); Affidavit of Gholamhossein Arabeieh ¶¶ 27-37, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (D.D.C. Dec. 20, 2010) (U.S. P.O. Annex A03).

[241] Brief for Defendant-Appellant Bank Markazi 35-36, *Peterson v. Islamic Republic of Iran*, No. 13-2952 (2d Cir. Nov. 19, 2013) (U.S. P.O. Annex 233).

[242] Defendant Bank Markazi's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 3, 29, *Peterson v. Islamic Republic of Iran,* No. 10-4518 (S.D.N.Y. June 22 2012) (U.S. P.O. Annex A15).

> As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. UBAE, in turn, held corresponding security entitlements in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. Clearstream then held corresponding security entitlements in an omnibus account at Citibank, N.A., in New York.[243]

9.14 Notably, Bank Markazi used very similar language in describing additional Bank Markazi assets that the *Peterson* plaintiffs are now seeking to attach in proceedings outside of the United States.[244] These additional assets, which are related to the assets previously subject to litigation before U.S. courts, consist of proceeds attributable to bonds in which Bank Markazi is the beneficial owner.[245] In Luxembourg enforcement proceedings brought by U.S. terrorism victims different from the *Peterson* plaintiffs, Bank Markazi has offered the following description via an expert declaration:

> The assets seized in this specific case are part of the reserves of Markazi Bank in its capacity as the central bank of the Islamic Republic of Iran.
>
> Like all central bank reserves, these assets are used to instill confidence in the financial markets and promote price stability. These objectives are among the key and priority objectives of Markazi Bank as a central bank. The purposes of any central bank include the conduct of a monetary policy with a view to promoting the national economic objectives of the State concerned (see supra, § 28).
>
> It can therefore safely be argued in this particular case that the assets in question are indeed and exclusively used, or at least intended for use, for the purposes of the central bank, and are therefore covered by the immunity from execution.
>
> Indeed, within the context at issue here, the assets seized even appear to actually be earmarked for monetary or other sovereign purposes . . . .

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[243] Petition for a Writ of Certiorari 7-8, *Bank Markazi v. Peterson*, No. 14-770 (Dec. 29, 2014) **(U.S. Annex 117)** (citations omitted).

[244] *See* Petition for a Writ of Certiorari 7, *Bank Markazi v. Peterson ("Peterson II")*, No. 14-770 (May 18, 2018) **(U.S. Annex 118)**.

[245] *See Peterson v. Bank Markazi ("Peterson II")*, 2015 U.S. Dist. LEXIS 20640, at **5-7 (S.D.N.Y. 2015) **(U.S. Annex 119)**.

> They are certainly not earmarked in any case for economic or commercial purposes under private Law.[246]

9.15 On the basis of these representations, which Iran has not disputed, two conclusions may be reached. *First*, Bank Markazi has consistently claimed that its activities at issue in this case consist of the management of its foreign currency reserves. Neither Iran nor Bank Markazi has asserted any other activity of Bank Markazi related to the challenged U.S. measures. *Second*, Bank Markazi's purported management of its foreign currency reserves is understood by Iran to be a sovereign activity.[247] Thus, the actions by Bank Markazi at issue in this case are, as Iran and Bank Markazi have both confirmed, sovereign. Therefore, under the standard set out by the Court in the Preliminary Objections Judgment, Bank Markazi cannot be characterized as a "company" within the meaning of the Treaty and, consequently, Iran may not claim the benefit of the protections provided for in Articles III, IV, and V for Bank Markazi.

Section D: Iran's Arguments that Bank Markazi Engages in Commercial, or Professional, Activities Are Irrelevant to the Case at Hand and Also Incorrect

9.16 Recognizing the difficulty of divorcing itself from its longstanding position that Bank Markazi is carrying out sovereign functions, Iran argues that an entity carrying out sovereign functions may at the same time, in certain respects, act exactly in the same manner as a private company.[248] While Iran asserts that this is contrary to the U.S. position, the United States agrees with the proposition that a Central Bank may be authorized to undertake activities beyond its sovereign remit, such as assisting private companies in their businesses, and that those activities may be of a commercial nature. Accepting that proposition has no impact on the outcome of this case, because Iran has not asserted, much less demonstrated, that Bank Markazi engaged in any such activity in the United States related to the U.S. measures at issue in this case.

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[246] Frédéric Dopagne, Legal Opinion on Immunity from Execution of the Central Bank of the Islamic Republic of Iran (Markazi Bank) Under International Law as Part of the Procedure for Garnishment Validation Pending Before the District Court of Luxembourg in Docket No 177.393, ¶¶ 60-64 (March 16 2018) (courtesy translation) **(U.S. Annex 120)**.

[247] *See* Declaration of Prof. Andreas F. Lowenfeld ¶ 16, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. May 6, 2011) (U.S. P.O. Annex A4) ("Whether the funds consist of cash, bonds, or other instruments of value, so long as they are used to manage the country's reserves or the exchange rate of its currency – traditional central bank functions – the assertion by the central bank that the funds are held 'for the bank's own account' should be accepted.").

[248] Observations and Submissions of Iran on the Preliminary Objections of the United States, ¶ 4.21.

9.17 Iran also advances an argument that its specific activities, including concluding contracts, owning property, and buying and selling of securities, are economic in nature and pertain to commerce, even if they advance sovereign purposes.[249] As an initial matter, the United States again notes that Iran has not alleged, much less demonstrated, that the U.S. measures at issue in this case pertain to any of these specific activities identified by Iran. Further, many of the "professional" activities which, according to Iran, imbue Bank Markazi with the qualities of a "company", such as owning property, concluding contracts, and appearing in court, are activities that sovereign states ordinarily undertake and are not determinative of whether the state is performing a sovereign function. The fact that private entities also engage in this activity does not alter the generally recognized sovereign nature of a Central Bank's activities, such as management of foreign currency reserves. And the sovereign function is key: when a Central Bank engages in the purchase of securities as part of its management of foreign currency reserves, it is acting on behalf of the State, not as a "company" with private comparators. In arguing that Central Banks are making investments like commercial actors, and ignoring the sovereign function behind foreign currency reserves, Iran is simply asserting a variation of its more general argument that the sovereign nature of the activity is irrelevant to determining whether Bank Markazi is a "company" under the Treaty. However, the Court has already considered, and rejected, Iran's argument, instead holding that the sovereign functions of an entity are essential to assessing whether that entity is a "company" under the Treaty.

9.18 Even apart from the foregoing analysis, Iran's argument is also directly contradicted by the positions taken by Bank Markazi in the *Peterson* litigation. There, Bank Markazi argued that "a central bank's investment of foreign currency reserves plainly serves an 'important governmental purpose' and thus does not constitute 'commercial' activity under the Treaty."[250] Bank Markazi not only described its activities as sovereign and governmental, but it took the position that its investment of foreign currency reserves was *not* commercial activity under the Treaty.[251] Thus, under Bank Markazi's own view of the case, the distinction between the

[249] *Id.,* ¶¶ 4.24, 4.34. *See also* Preliminary Objections Judgment, Declaration of Judge Gaja, ¶ 2.

[250] Defendant Bank Markazi's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 29, *Peterson v. Islamic Republic of Iran,* No. 10-4518 (S.D.N.Y. June 22 2012) (U.S. P.O. Annex A15). Bank Markazi went on to argue that it conducts no "business activities" within the United States, which would also seem to be fatal to Iran's attempt to bring a treaty claim with respect to the Bank's treatment. *Id.* at 29-30.

[251] Bank Markazi advanced this position in U.S. litigation in arguing that it was not subject to the Treaty's immunity waiver provision in Article XI(4), further highlighting the incongruity of Iran's position that Bank

commercial nature and sovereign purpose of an act should not control the Court's analysis as to whether Bank Markazi is properly considered a company under the Treaty.

* * * *

9.19 For all of the foregoing reasons, and in light of the standard set forth in the Court's Preliminary Objections Judgment, Bank Markazi is not a "company" under the Treaty for purposes of this case. Iran and Bank Markazi have made repeated admissions before U.S. and other domestic courts, including in the *Peterson* case that is the subject of Iran's claims, that Bank Markazi was carrying out sovereign functions. These admissions expose the fallacy of Iran's assertions before this Court. Iran relies merely on the general notion that a Central Bank could carry out commercial functions, but this has no bearing on the case given that the functions carried out by Bank Markazi of relevance to this dispute were, by Iran's own admission, sovereign in nature. Iran's claims under the Treaty involving Bank Markazi therefore should be dismissed.

CHAPTER 10: CLAIMS FOR WHICH IRAN CANNOT SHOW THAT LOCAL REMEDIES WERE EXHAUSTED ARE INADMISSIBLE

10.1 In the opening sentence of its Memorial, Iran declares that this case arises from a U.S. policy that "strips Iranian companies of respect for their rights including respect for their separate corporate personality . . . ." In order for Iran to bring any claims on behalf of these companies, international law requires that Iran first demonstrate that the companies have exhausted their remedies in the United States. Iran cannot rely on sweeping assertions of harm or potential harm, but must show that each company has exhausted its local remedies in each case in order for Iran's claims on the companies' behalf to be admissible before the Court. With very few exceptions, the Iranian companies have not exhausted their local remedies. The Court should therefore find inadmissible any claim for which Iran has not demonstrated that the relevant company exhausted its remedies in the United States. These issues are developed further in the present chapter.

Markazi's activities should not be considered "commercial" with respect to certain provisions of the Treaty, but should be considered "commercial in deciding whether Bank Markazi is a "company" under the Treaty.

Section A: Exhaustion of Local Remedies Is Required Before a State May Institute International Proceedings on Behalf of Its Nationals

10.2 Before a State may institute international proceedings against another State on behalf of its national (either a natural or legal person), the national must have exhausted local remedies in the respondent State. The requirement to exhaust local remedies is a long-standing, non-controversial rule of customary international law. This Court and scholars have stated, for example, that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law,"[252] and "[t]he rule. . . is accepted as one of the best established and, in principle, least questioned rules of international law."[253] Article 14 of the International Law Commission's Draft Articles on Diplomatic Protection provides that a State "may not present an international claim in respect of an injury to a national or other person . . . before the injured person has . . . exhausted all local remedies."[254] Among other things, the rule acts as a measure of international judicial economy, reserving the limited resources of international fora, such as the Court, for controversies that conclusively have not been resolved through municipal proceedings, and permitting facts and legal theories to be developed and clarified at the local level first.[255]

10.3 As stated by the Court, the national is required to use all "procedural facilities which municipal law makes available to litigants" so as to utilize "the whole system of legal protection."[256] Exhaustion of local remedies is excused only in relatively rare circumstances

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[252] *Interhandel Case (Switzerland v. United States)*, 1959 I.C.J. 6, 27 (Mar. 21). *See also Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 118 (1956) **(U.S. Annex 121)**; *Elettronica Sicula S.p.A. (ELSI) (United. States v. Italy)*, 1989 I.C.J. 15, ¶¶ 49-63; *Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)*, 2007 I.C.J. 582, ¶¶ 34-48.

[253] 2 GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 686 (1986) **(U.S. Annex 122)**. *See also* C.F. AMERASINGHE, DIPLOMATIC PROTECTION 142 (2008) **(U.S. Annex 162)**; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 102 (2010) **(U.S. Annex 123)**; ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 522-23 (1992) **(U.S. Annex 124)**.

[254] *Report of the Commission to the General Assembly on the Work of Its 58th Session,* "Draft Articles on Diplomatic Protection" [2006] 2 Y.B. INT'L L. COMM'N 2, art. 14.1, U.N. Doc. A/CN.4/SER.A/2006 **(U.S. Annex 125)**; *see also Report of the Commission to the General Assembly on the Work of Its 53rd Session,* [2001] 2 Y.B. INT'L L. COMM'N 2, art. 44(b), U.N. Doc. A/CN.4/SER.A/2001 **(U.S. Annex 126)**.

[255] *See, e.g.,* PAULSSON, DENIAL OF JUSTICE at 101-02 **(U.S. Annex 123)**; JENNINGS & WATTS, OPPENHEIM'S INTERNATIONAL LAW at 524 **(U.S. Annex 124)**; ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 416-17 (1970) **(U.S. Annex 127)**.

[256] *Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 119-20 (1956) **(U.S. Annex 121)**; *see also* AMERASINGHE, DIPLOMATIC PROTECTION at 143-149 **(U.S. Annex 162)**; *Report of the Commission to the General Assembly on the Work of Its 58th Session,* "Draft Articles on Diplomatic Protection" [2006] 2 Y.B. INT'L L. COMM'N 2, art. 14.1, U.N. Doc. A/CN.4/SER.A/2006 **(U.S. Annex 125)** ("If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision

where remedies are "obviously ineffective" or "obviously futile."[257] Commentators have noted that this standard may be met, for example, when courts lack jurisdiction to adjudicate the dispute, or the judicial system is pervasively corrupt or dependent on the executive.[258]

10.4 An applicant State is required to show that its national has, in fact, exhausted local remedies in the respondent State. As the Court stated in the *Diallo* case, "it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieve the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies."[259]

Section B: A Significant Number of Iran's Claims Do Not Satisfy the Exhaustion of Local Remedies Rule

10.5 As set forth in Chapter 2, following the Court's Preliminary Objections Judgment, the case before the Court concerns U.S. measures that allow for attachment of assets of Iranian state-owned companies to satisfy judgments against Iran. Thus, the claims before the Court are advanced by Iran on behalf of Iranian companies. In addition to Iran's case in respect of Bank Markazi, which Iran has advanced on the ground that it is a "company," other entities on behalf of whom Iran has raised claims include Bank Melli, the Export Development Bank of Iran, the Iranian Telecommunication Infrastructure Company, the National Iranian Oil Company, Iran Air, Iranohind Shipping Company, Bank Saderat, Iran Marine Industrial Company, Behran Oil Company, and Sediran.[260]

10.6 As addressed above, if these entities are indeed to be regarded as "companies" for purposes of the Treaty, international law requires them to have exhausted local remedies before Iran is entitled to bring claims in respect of any loss allegedly suffered by them. While the

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in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.").

[257] *See, e.g., Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 83, 119 (1956) **(U.S. Annex 121)**; AMERASINGHE, DIPLOMATIC PROTECTION at 152 **(U.S. Annex 162)**.

[258] *See, e.g.*, AMERASINGHE, DIPLOMATIC PROTECTION at 153 **(U.S. Annex 162)** (courts lacking jurisdiction); FITZMAURICE, LAW AND PROCEDURE at 692 **(U.S. Annex 122)** (judiciary notoriously under the influence of the executive); EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 332 (1919) **(U.S. Annex 128)**.

[259] *Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)*, 2007 I.C.J. 582, ¶ 44 (citing *Elettronica Sicula S.p.A. (ELSI) (United. States v. Italy)*, 1989 I.C.J. 15, ¶ 53).

[260] *See* Iran's Memorial, ¶¶ 4.7-4.15. It is important to note that not all of these entities have, in fact, had their assets attached. Iran has included a number of attachment proceedings in U.S. courts in Attachment 2 to its Memorial regardless of the status of those proceedings; in many cases the U.S. court has not ordered attachment of any assets.

United States acknowledges that Iranian entities have exhausted local remedies in several cases brought against them, in other cases, the Iranian entities at issue have not done so.

10.7 The critical consideration is that Iran must establish, as a threshold matter, that a given entity has exhausted local remedies as a condition precedent to bringing a claim in respect of any alleged injury suffered by that entity. Iran has not done so, however. On the contrary, Iran has simply appended to its Application and Memorial summary charts in the form of Attachments 1 to 4 without providing any context or explanation for the information apparently contained therein. Attachment 2, which lists enforcement actions and is the only one of the four Attachments that is still relevant to this proceeding,[261] provides only basic, and in most cases incomplete, information about the parties to and the procedural status of the 90 cases listed therein.

10.8 It is not enough for Iran merely to provide a list of cases, leaving it to the Court and the United States to work out whether in each case the Iranian entities have exhausted local remedies. For Iran's claims to be admissible before the Court, Iran must affirmatively demonstrate for each case on which it bases its claims, that local remedies have been exhausted

10.9 Moreover, Iran cannot claim that there has been exhaustion in a case where the relevant entity did not pursue available opportunities for legal recourse. In fact, in many cases the entity simply did not appear to oppose attachment. A notable example is *Heiser v. Iran*, where the plaintiffs were attempting to satisfy the judgment in their favor by garnishing assets of Bank Melli, Bank Saderat, and the Iran Marine Industrial Company that were held by Bank of America and Wells Fargo Bank. The two U.S. banks filed a third-party petition to bring the Iranian entities into the case so that they could register objections to the garnishment of the funds. Even so, the Iranian entities "failed to answer, plead, or otherwise defend against" the third-party petition.[262]

10.10 As will be discussed later in this Counter-Memorial in Chapter 13.B, the U.S. judicial system has always been available to Iran and its nationals to pursue their legal interests. Indeed, many of the entities listed above have availed themselves of U.S. courts and have defended

[261] *See* Chapter 2.

[262] Clerk's Certificate of Default, *Heiser v. Islamic Republic of Iran*, 00-2329, 01-2104, (D.D.C. Aug. 20, 2015), ECF No. 272 **(U.S. Annex 129)**; Order Granting Unopposed Motion for Judgment against Garnishees Bank of America, N.A. and Wells Fargo Bank, N.A. for Turnover of Funds, and for Interpleader Relief for Such Garnishees, *Heiser v. Islamic Republic of Iran*, 00-2329, 01-2104 (D.D.C. June 9, 2016) **(U.S. Annex 130)**, ECF No. 275.

against attachment in these proceedings, as discussed in further detail below.[263] In spite of this reality, these entities have not in all cases exhausted their remedies under U.S. law. As noted above, it is only certain of the cases listed in Attachment 2 that remain relevant to Iran's case following the Court's Preliminary Objections Judgment. The Court should hold inadmissible any claims advanced by Iran that arise out of those cases, such as *Heiser*, for which Iran cannot show that the entities have exhausted local remedies.

CHAPTER 11: ARTICLE XX(1) CATEGORICALLY BARS IRAN'S CLAIMS REGARDING EXECUTIVE ORDER 13599

11.1 At the Preliminary Objections stage, the United States submitted that the Court should dismiss for lack of jurisdiction any of Iran's claims that were premised on Executive Order 13599, which, as part of the U.S. sanctions program, blocks assets of the Iranian government and Iranian financial institutions, on the ground that the Executive Order fell within the scope of Article XX(1) of the Treaty and thus fell outside the scope of the Treaty, *ratione materiae*. In its Preliminary Objections Judgment, the Court concluded that Article XX(1) did not restrict its jurisdiction but rather provided a defense on the merits, and accordingly deferred the question of Article XX(1)'s impact on the claims at issue to the merits phase of the proceedings. The U.S. defense on the merits based on Article XX(1) of the Treaty is accordingly developed in the present chapter. As is addressed further below, Article XX(1) memorializes exceptions to the Treaty of Amity's substantive obligations and explicitly reserves to both States their sovereign right to take measures in highly sensitive areas of national security.

11.2 It is the U.S. case that Executive Order 13599 falls within two of Article XX(1)'s exceptions, and that Article XX(1) accordingly bars any claim by Iran premised on that Executive Order. There can be no question that Executive Order 13599 was promulgated to address Iran's illicit and destabilizing activities of grave national security concern to the United States, including arms trafficking, support for terrorism, and the pursuit of ballistic missile capabilities. Consequently, Executive Order 13599 is both a measure regulating arms trafficking under Article XX(1)(c) and a measure necessary to protect U.S. essential security interests under Article XX(1)(d). Article XX(1) expressly states that nothing in the Treaty

[263] *See, e.g.*, Chapter 13.B. *See Rubin v. Iran*, 637 F.3d 783 (7th Cir. 2011) **(U.S. Annex 131)**; *Rubin v. Iran*, 133 S. Ct 23 (2012) **(U.S. Annex 132)**; *Bank Markazi v. Peterson et al.*, 578 U.S. 1 (2016) (IM Annex 66).

precludes the Parties from taking such measures, and Iran's attempt to bring claims based on Executive Order 13599 must therefore be rejected.

11.3 Iran's Memorial fails to mention Article XX(1) and likewise fails to acknowledge that Executive Order 13599 engages national security. Instead, Iran asserts that Executive Order 13599 violates various substantive provisions of the Treaty of Amity. As set forth in this chapter, however, Iran's approach collapses once Article XX(1)'s impact is appropriately examined. Article XX(1) clearly bars any claim to the extent it is based on Executive Order 13599. Consequently, the Court need not, and should not, get to the issue of whether such a claim impacts one of the Treaty's substantive provisions. Article XX(1)'s exceptions provide a straightforward path to the dismissal of any claim to the extent it pertains to Executive Order 13599. It is a matter of systemic importance going to the interpretation and application of treaties that fundamental, national security exceptions included in a treaty should be honored.

11.4 Article XX(1) provides as follows (with the provisions relevant for purposes of this chapter in italics):

> *The present Treaty shall not preclude the application of*
>
> *measures*:
>
> (a) regulating the importation or exportation of gold or silver;
>
> (b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;
>
> (c) *regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment*; and
>
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or *necessary to protect its essential security interests*.

11.5 The language of Article XX(1) is broad in scope – the *chapeau* establishes that substantive obligations under the Treaty simply do not apply to, and cannot prohibit or limit, measures falling within this exception. Thus, in accordance with the provision's plain language,

and as the Court has consistently recognized, if one of Article XX(1)'s exceptions applies to a given measure, that measure is excluded from the Treaty's application.[264]

11.6 Section A of this chapter shows that Executive Order 13599 was promulgated to address Iran's destabilizing and illicit activities, including arms production and trafficking, support for terrorism and terrorist financing, and the pursuit of ballistic missile capabilities. Section B of this chapter demonstrates that Executive Order 13599 comes within Article XX(1)'s exception under subparagraph (c), as a measure regulating arms trafficking and production, and as a result, any claim based on Executive Order 13599 must be dismissed. Section C of this chapter establishes that Executive Order 13599 also comes within Article XX(1)'s exception under subparagraph (d), as a measure necessary to protect U.S. essential security interests, which provides a second, independent basis for dismissing Iran's claims to the extent they are based on Executive Order 13599.

Section A: Executive Order 13599 was Promulgated to Address Iran's Illicit Activities, Including Arms Production and Trafficking, Support for Terrorism and Terrorist Financing, and the Pursuit of Ballistic Missile Capabilities

11.7 As set forth in Chapter 5, terrorist attacks sponsored and directed by Iran have killed and severely injured many hundreds of U.S. nationals worldwide. In addition, Iran has violated ballistic missile and arms trafficking obligations, further putting U.S. nationals and others at risk.[265] In response to Iran's violent and destabilizing activities, the United States has implemented sanctions and adopted other legal measures to protect its people and to deter Iran's sponsorship of terrorism and pursuit of increased ballistic missile capability. In so doing, the United States has acted consistently with applicable UN Security Council resolutions and often in alignment with the actions of other States and multilateral organizations.

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[264] *See Military and Paramilitary Activities in Nicaragua (Nicaragua v United States of America),* 1986 I.C.J. 14, ¶¶ 222, 271 (June 27); *Oil Platforms (Iran v. United State)*, 1996 I.C.J. 803, 811, ¶ 20 (Dec. 12); *Oil Platforms (Iran v United States)*, 2003 I.C.J. 161, 179, ¶¶ 33-34 (Nov. 6). At the preliminary objections phase of this case, the Court concluded that Article XX(1) affords the parties a defense on the merits. Preliminary Objections Judgment, ¶ 47. The United States still respectfully maintains, however, that measures covered by any of the exceptions in Article XX(1) are excluded from the Court's jurisdiction. At the very least, measures covered by Article XX(1) can still be addressed at a preliminary phase under Article 79(1) of the Court's Rules, as set forth in the United States' Preliminary Objections in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Relations*.

[265] *See* Chapter 5.A.

11.8 This measured response by the United States includes adoption of Executive Order 13599.[266] Executive Order 13599 implemented the sanctions required by Section 1245(c) of the 2012 National Defense Authorization Act by blocking the property and interests of Iran and Iranian financial institutions when such assets are subject to U.S. jurisdiction.[267] The Act and the Executive Order were rooted in Iran's increased efforts to mask illicit activities, using complex financial transactions and front companies, as documented by the U.S. Treasury,[268] by FATF,[269] and by a series of UN Security Council findings,[270] and as set forth in the U.S. Preliminary Objections.

11.9 Of particular note, and in chronological order:

- On November 21, 2011, the U.S. Treasury issued a finding concluding that Iran was a "jurisdiction of primary money laundering concern" on the basis of Iran's support for terrorism, its pursuit of nuclear and ballistic missile capability, use of deceptive financial practices to evade sanctions, serious deficiencies in its controls to combat money laundering and terrorist finance, and its lack of cooperation with U.S. law enforcement and regulatory officials. The justification for this designation explained:

> In recent years, many international financial institutions have severed ties with Iranian banks and entities because of a growing body of public information about their *illicit and deceptive conduct designed to facilitate the Iranian government's support for terrorism and its pursuit of nuclear and ballistic missile capabilities*. This illicit conduct by Iranian banks and companies

[266] Exec. Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (IM Annex 22).

[267] *See* National Defense Authorization Act for Fiscal Year 2012, § 1245(c), Pub. L. No. 112-239, 126 Stat. 2006 (IM Annex 17).

[268] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756 (Nov. 18, 2011) (U.S. P.O. Annex 152).

[269] *See* Chapter 5.A.

[270] The UN Security Council recognized that Iranian banks were being used to pursue illicit activity, calling on all States to exercise vigilance with respect to Iranian banks. S.C. Res. 1929, prmbl., U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110) ("recalling in particular the need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran, so as to prevent such transactions contributing to proliferation-sensitive activities, or to the development of nuclear weapon delivery systems"); S.C. Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102) ("*Calls upon* all States to exercise vigilance over the activities of financial institutions in their territories with *all banks domiciled in Iran*, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems" (emphasis added)). The UN Security Council also identified certain banks that were involved in Iran's nuclear and ballistic missile programs. *See, e.g.*, S.C. Res. 1929, Annex I, at 11, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110) ("Over the last seven years, Bank Mellat has facilitated hundreds of millions of dollars in transactions for Iranian nuclear, missile, and defense entities."); S.C. Res. 1747, Annex I, at 5, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (U.S. P.O. Annex 101) (finding that Bank Sepah was a key provider of financial services to two Iranian firms listed by the UN Security Council for their role in Iran's ballistic missile programs).

> has been highlighted in a series of United Nations Security Council ("UN Security Council") resolutions related to Iranian proliferation sensitive activities. The Financial Action Task Force ("FATF") has also warned publicly of the risks that *Iran's deficiencies in countering money laundering and, particularly terrorism finance*, pose to the international financial system, and has called on FATF members and all jurisdictions to implement counter measures to protect against these risks . . . .
>
> [The United States] has reason to believe that Iran directly supports terrorism and is pursuing nuclear/ballistic missile capabilities, relies on state agencies or state-owned or controlled financial institutions to facilitate WMD proliferation and financial *and uses deceptive financial practices to facilitate illicit conduct and evade sanctions*.
>
> Iran also continues to defy the international community by pursuing nuclear capabilities and developing ballistic missiles in violation of seven UNSCRs . . . . To date Iran has not complied with the UN Security Council resolutions regarding its nuclear and missile activities[.][271]

- Relying in part on these Treasury Department findings, Congress passed Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 ("2012 NDAA"), stating:

> (a) FINDINGS.—Congress makes the following findings:
>
> (1) *On November 21, 2011 the Secretary of the Treasury issued a finding* under section 5318A of title 31, United States Code, that identified Iran as a jurisdiction of primary money laundering concern.
>
> (2) In that finding, the Financial Crimes Enforcement Network of the Department of the Treasury wrote, "The Central Bank of Iran, which regulates Iranian banks, has assisted designated Iranian banks by transferring billions of dollars to these banks in 2011. In mid-2011, the CBI transferred several billion dollars to designated banks, including Saderat, Mellat, EDBI and Melli, through a variety of payment schemes. *In making these transfers, the CBI attempted to evade sanctions* by minimizing the direct involvement of large international banks with both CBI and designated Iranian banks."
>
> (3) On November 22, 2011, the Under Secretary of the Treasury for Terrorism and Financial Intelligence, David

[271] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756 (Nov. 18, 2011) (U.S. P.O. Annex 152) (emphasis added) (internal reference to U.N. Security Council Resolutions 1696, 1737, 1747, 1803, 1835, 1887, and 1929.)

> Cohen, wrote, "Treasury is calling out the entire Iranian banking sector, including the Central Bank of Iran, *as posing terrorist financing, proliferation financing, and money laundering risks* for the global financial system."[272]

Section 1245 of the 2012 NDAA therefore directed the President, pursuant to applicable law, to block all assets of Iranian financial institutions within the United States or in the possession or control of U.S. persons. The Act explicitly recognized the connection between the deceptive financial practices used by Iranian institutions and the underlying illicit activities of the Iranian government, stating:

> The financial sector of Iran, including the Central Bank of Iran, is designated as a primary money laundering concern . . . because of the threat to government and financial institutions resulting from the illicit activities of the Government of Iran, including its pursuit of nuclear weapons, support for international terrorism, and *efforts to deceive responsible financial institutions and evade sanctions*.[273]

- Consequently, on February 5, 2012 and explicitly pursuant to the 2012 NDAA, President Barack Obama issued Executive Order 13599, which provides in part:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including . . . section 1245 of the National Defense Authorization Act . . . [p]articularly in light of *the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transaction of sanctioned parties*, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation . . .[274]

11.10 The logic of the necessary and measured approach taken by the United States is apparent. Iran supported terrorism and violated ballistic missile and arms trafficking obligations. Iran, with the help of Iranian financial institutions, has evaded prior U.S. and international attempts to restrict this illicit activity by engaging in deceptive banking practices. By late 2011, it was clear that in order to protect its essential security interests and in furtherance of efforts to deter Iranian pursuit of ballistic military capability and arms, the United States needed to take measures to further address avenues that enabled Iran's

[272] National Defense Authorization Act for Fiscal Year 2012, § 1245(a)-(b), Pub. L. No. 112-239, 126 Stat. 2006 (IM Annex 17) (emphasis added).

[273] *Id.*, § 1245(b) (IM Annex 17).

[274] Exec. Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (IM Annex 22).

development of ballistic missiles and provision of arms and support for terrorism, which included principally Iran's deceptive banking practices. That is precisely why the President issued Executive Order 13599.

Section B: Executive Order 13599 and Its Implementing Provisions Come Within the Exception Created by Article XX(1)(c) as a Measure Regulating Arms Production, Arms Trafficking, and Military Supplies

11.11 Subparagraph (c) of Article XX(1) excludes from the Treaty's scope any measures "regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment." Executive Order 13599 is a measure that the United States imposed to address Iran's evasion of U.S. and international sanctions relating to its development of ballistic missiles and its provision of arms and other support to militant and terrorist groups. As such, it is a measure within the terms of the exception in Article XX(1)(c) and therefore outside the scope of the Treaty and this case.

11.12 Iran's pursuit of ballistic missile capabilities is well-documented. At the time of Executive Order 13599, it was widely known that Iran was developing ballistic missiles in violation of multiple resolutions of the UN Security Council.[275] For example, at a meeting of the UN Security Council, the representative from France stated, "[t]he facts are overwhelming; there is no room for doubt . . . Iran has developed a programme for missiles capable of carrying nuclear warheads."[276] Nevertheless, Iran today persists in developing and testing ballistic missiles.[277]

11.13 Iran also has a longstanding history of supplying arms and other support to militant and terrorist groups abroad.[278] As noted in Chapter 5, Iran has routinely provided arms and ammunition, as well as funding and training, to a number of terrorist or militant organizations,

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[275] *See* Chapter 5.A. *See also, e.g.*, S.C. Res. 1929, ¶¶ 1, 9, S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110); Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72758 (Nov. 18, 2011) (U.S. P.O. Annex 152) ("Iran also continues to defy the international community by pursuing nuclear capabilities *and developing ballistic missiles* in violation of seven UNSCRs." (emphasis added)).

[276] U.N.S.C., 65th year, 6335th Mtg., at 7, U.N. Doc. S/PV.6335 (June 9, 2010) (statement of France) (U.S. P.O. Annex 196) (also noting that "Iran has worked on advanced military studies that are the missing link between enrichment and the ballistic missile programme, in particular on building a delivery vehicle in which a nuclear warhead can be placed . . . .").

[277] *See* Chapter 5.A.

[278] *See* Chapter 5.

including the Taliban, Hezbollah, Hamas, Palestinian Islamic Jihad, and, more recently, the Houthis in Yemen.[279] Iran's arms trafficking activities are undertaken in violation of binding resolutions of the UN Security Council, which since 2007 has sharply restricted all sales or transfers of conventional arms by the Iranian government and Iranian nationals.[280]

11.14 In particular, Iran relies on the IRGC-QF – a branch of the Iranian Revolutionary Guards Corps and an element of the Iranian military establishment – to cultivate and support terrorist and militant groups abroad.[281] The United States blocked the assets of the IRGC-QF pursuant to Executive Order 13224, one of its terrorism-related sanctions authorities, since 2007, in response to the unit's provision of support, including frequent arms shipments, to the Taliban, Hezbollah, and other terrorist or militant organizations.[282] Just before the adoption of Executive Order 13599, the U.S. Treasury Department noted that the IRGC and the IRGC-QF nonetheless continued to use deceptive financial practices to evade sanctions, engaging "in seemingly legitimate activities that provide cover for intelligence operations and support terrorist groups such as [Hezbollah], Hamas, and the Taliban."[283]

11.15 Executive Order 13599 builds on and complements earlier international and U.S. sanctions addressing these illicit activities.[284] Prior to Executive Order 13599, these measures

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[279] *See, e.g.*, Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 18, 2011) (U.S. P.O. Annex 152) ("Iran remains the most active of the listed state sponsors of terrorism, routinely providing substantial resources and guidance to multiple terrorist organizations. Iran has provided *extensive funding, training, and weaponry to Palestinian terrorist groups*, including Hamas and the Palestinian Islamic Jihad ('PIJ'). . . . The Qods Force [of the Islamic Revolutionary Guards Corps] reportedly has been active in the Levant, where it has a long history of supporting [Hezbollah's] military, paramilitary, and terrorist activities, and provides [Hezbollah] with as much as $200 million in funding per year. Additionally, the Qods Force provides the Taliban with *weapons, funding, logistics, and training* in support of anti-U.S. and anti-coalition activity. Information dating from at least 2006 indicates that Iran has arranged *frequent shipments to the Taliban of small arms and associated ammunition, rocket propelled grenades, mortar rounds, 107 mm rockets, and plastic explosives.*" (emphasis added)).

[280] *See, e.g.*, S.C. Res. 2231, ¶ 7, Annex B ¶ 6(b), U.N. Doc. S/RES/2231 (July 20, 2015) (U.S. P.O. Annex 122) (providing that all States are to "[t]ake the necessary measures to prevent, except as decided otherwise by the UN Security Council in advance on a case-by- case basis, the supply, sale, or transfer of arms or related materiel from Iran by their nationals or using their flag vessels or aircraft, and whether or not originating in the territory of Iran," for a specified period) (Annex 122); S.C. Res. 1747, ¶ 5, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (U.S. P.O. Annex 101) (deciding "that Iran shall not supply, sell or transfer directly or indirectly . . . any arms or related material, and that all States shall prohibit the procurement of such items from Iran ").

[281] *See, e.g.*, Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 18, 2011) (U.S. P.O. Annex 152).

[282] U.S. Dep't of the Treasury, "Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism" (Oct. 25, 2007) (U.S. P.O. Annex 147); *see also* S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (U.S. P.O. Annex 101) (imposing sanctions on the commander of the IRGC-QF).

[283] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72762 (Nov. 18, 2011) (U.S. P.O. Annex 152).

[284] *See* Chapter 6. In particular, Executive Order 13599 refers to the earlier Executive Order 12957, declaring a national emergency with respect to Iran. That Order was issued "in response to actions and policies of the

included requirements to block the assets of specific Iranian agencies, institutions, and individuals that engaged in or supported terrorism or Iran's ballistic missile program.[285] The United States has long used asset blocking measures as a means to deter conduct that threatens U.S. national security, including to prevent the use of the U.S. financial system to further, or provide resources for, such conduct. The UN Security Council has both required States to apply asset freezing measures in a number of circumstances and recognized in various contexts that asset freezes are a "significant tool" for combatting activity that it has determined constitutes a threat to international peace and security.[286]

11.16 In the period leading up to Executive Order 13599, the international community's sanctions on Iran became increasingly strict in response to Iran's continued activities of proliferation concern, and Iran increased its efforts to evade detection using complex financial transactions and front companies to mask its unlawful activities. The U.S. Department of Treasury, in the above-quoted November 2011 finding that underpinned Executive Order 13599, specified that Iran was relying on an array of agencies, instrumentalities, and financial

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Government of Iran, including support for international terrorism, efforts to undermine the Middle East peace process, and the acquisition of weapons of mass destruction and the means to deliver them." President William J. Clinton, *Message to the Congress on Iran*, 34 WEEKLY COMP. PRES. DOCS. 446 (Mar. 16, 1998) (U.S. P.O. Annex 193).

[285] *See, e.g.*, Exec. Order 13224, 66 Fed. Reg. 186 (Sept. 25, 2001) (U.S. P.O. Annex 134) (blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism); Exec. Order 13382, 70 Fed. Reg. 38567 (June 28, 2005) (U.S. P.O. Annex 197) (blocking property of those who engage in or support proliferation of "weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons)"). The UN Security Council also imposed asset freezes relating to these activities. *See, e.g.*, S.C. Res. 1737, ¶ 12, U.N. Doc. S/RES/1737 (Dec. 27, 2006) (U.S. P.O. Annex 100) (deciding that "all States shall freeze the funds, other financial assets and economic resources . . . that are owned or controlled" by designated persons and entities involved in the nuclear and ballistic missile program); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (U.S. P.O. Annex 101) (adding additional entities and persons, including IRGC affiliates, to the list of sanctioned persons); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102) (further intensifying sanctions); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110) (similar).

[286] *See e.g.*, S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sep. 28, 2001) (U.S. P.O. Annex 81) (requiring States to "freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities"); S.C. Res. 1989, prmbl. & ¶ 1, U.N. Doc. S/RES/1989 (June 17, 2011) (U.S. P.O. Annex 199) ("Emphasizing that sanctions are an important tool under the Charter . . . and stressing in this regard the need for robust implementation of the [asset freeze] measures in paragraph 1 of this resolution as a significant tool in combating terrorist activity"); S.C. Res. 1807, prmbl. & ¶ 11, U.N. Doc. S/RES/1807 (Mar. 31, 2008) (U.S. P.O. Annex 200) (determining that the situation in the DRC continues to constitute a threat to international peace and security in the region, deciding that all States shall freeze the funds, other financial assets and economic resources on their territories of persons and entities designated by the sanctions committee); S.C. Res. 2293, ¶ 5, U.N. Doc. S/RES/2293 (June 23, 2016) (U.S. P.O. Annex 201) (renewing resolution 1807); S.C. Res. 2140, prmbl. & ¶ 11, U.N. Doc. S/RES/2140 (Feb. 26, 2014) (US PO Annex 202) (determining that the situation in Yemen constitutes a threat to international peace and security in the region, and deciding that all Member States shall freeze without delay all funds, financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities designated by the sanctions committee); S.C. Res. 2342, ¶ 2, U.N. Doc. S/RES/2342 (Feb. 23, 2017) (U.S. P.O. Annex 203) (renewing resolution 2140).

institutions to evade sanctions and to further its support for terrorism abroad and its pursuit of ballistic missiles domestically.[287] These entities included a number of well-known Iranian financial institutions, such as Bank Sepah,[288] Bank Melli,[289] Bank Mellat,[290] Bank Saderat,[291] and the Central Bank of Iran (Bank Markazi),[292] among others.[293]

11.17 This and other evidence cited in its November 2011 finding formed the basis for the U.S. Treasury Department conclusion that Iran and Iranian financial institutions were engaged in a concerted effort to evade U.S. and multilateral sanctions targeting, *inter alia*, weapons proliferation and the provision of support to terrorist groups. The Treasury Department stated:

> As a result of the strengthened U.S. sanctions and similar measures taken by the United Nations and other members of the global community, Iran now faces significant barriers to conducting international transactions. *In response, Iran has used deceptive financial practices to disguise both the nature of transactions and its involvement in them in an effort to circumvent sanctions.* This conduct puts any financial institution involved with Iranian entities at risk of unwittingly *facilitating transactions related to terrorism, proliferation, or the evasion of U.S. and multilateral sanctions.* Iranian financial institutions, including the Central Bank of Iran ("CBI"), and other state-controlled entities, willingly engage in deceptive practices to disguise illicit conduct, evade international sanctions, and

[287] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756 (Nov. 18, 2011) (U.S. P.O. Annex 152) (designating Iran as a "jurisdiction of primary money laundering concern" on the basis of its support for terrorism, pursuit of nuclear and ballistic missile capability, use of deceptive financial practices to evade sanctions, serious deficiencies in its controls to combat money laundering and terrorist finance, and lack of cooperation with U.S. law enforcement and regulatory officials).

[288] *Id.* at 72759 (U.S. P.O. Annex 152) (noting that Bank Sepah provided "direct and extensive financial services to Iranian entities responsible for developing ballistic missiles," including the Aerospace Industries Organization and the Shahid Hemat Industrial Group).

[289] *Id.* (U.S. P.O. Annex 152) (noting that Bank Melli "facilitated numerous purchases of sensitive materials for Iran's nuclear and missile programs on behalf of UN-designated entities").

[290] *Id.* (U.S. P.O. Annex 152) (noting public findings by the United States, the United Kingdom, and the UN Security Council that Bank Mellat had been extensively involved in financing Iran's ballistic missile program).

[291] *Id.* at 72758 (U.S. P.O. Annex 152) (noting that Bank Saderat had been used to support terrorist organizations, and that from 2001 to 2006 it "transferred $50 million from the Central Bank of Iran through its subsidiary in London to its branch in Beirut for the benefit of [Hezbollah] fronts in Lebanon that support acts of violence").

[292] *Id.* at 72760 (U.S. P.O. Annex 152) (finding that the Central Bank of Iran had used a variety of payment schemes to evade terrorism and proliferation-related sanctions and had deliberately attempted to conceal the involvement of sanctioned Iranian banks in international transactions).

[293] *Id.* (U.S. P.O. Annex 152) (referring to Post Bank, which operated on behalf of Bank Sepah; the Iranian-owned German bank EIH which served Bank Mellat, Post Bank, and others; Bank Refah, which provided services to the sanctioned Iranian Ministry of Defense and Armed Forces Logistics; the Bank of Industry and Mines, which provided services to Bank Mellat and EIH; and Ansar Bank and Mehr Bank, which served the IRGC).

> undermine the efforts of responsible regulatory agencies around the world.[294]

11.18 In light of the foregoing, the blocking requirements imposed in Executive Order 13599 constitute measures "regulating the production of or traffic in arms, ammunition or implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment," within the meaning of Article XX(1)(c). These blocking measures form part of a regulatory scheme – encompassing U.S. sanctions with respect to Iran– designed to address Iranian arms trafficking, its ballistic missile program, and its financial support for terrorism. That regulatory regime included, for example, asset freezes imposed by the United States on Iranian entities engaging in prohibited activities. Executive Order 13599 was designed to further disrupt these activities by cutting off hidden or masked sources of funding arranged under the guise of seemingly legitimate transactions. Executive Order 13599 thus works in conjunction with other proliferation- and terrorism-related measures to deter – and thus to "regulate" within the meaning of the Treaty – Iranian pursuit of ballistic missiles, its traffic in such missiles or their component parts, its traffic in arms and supplies to terrorist and militant organizations abroad, and traffic in arms and other military supplies to sanctioned entities within the Iranian military establishment, such as the IRGC-QF. For these reasons, the blocking measures imposed by Executive Order 13599 and challenged by Iran fall within the exclusion in Article XX(1)(c) of the Treaty, and Iran's claims must be dismissed to the extent they are based on Executive Order 13599.

Section C: Executive Order 13599 Comes Within the Exception Created by Article XX(1)(d) as a Measure Necessary to Protect the United States' Essential Security Interests

11.19 Subparagraph (d) of Article XX(1) excludes from the Treaty's scope any measures "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Executive Order 13599 is a measure necessary to protect the United States' essential security interests and is therefore not subject to the Treaty's substantive provisions for the independent reason that it falls within the exception under Article XX(1)(d).

11.20 The Article XX(1)(d) exception is broad and a high degree of deference is due to the State invoking it. As the text of the provision makes clear, Article XX(1)(d) does not authorize

[294] *Id.* (U.S. P.O. Annex 152) (emphasis added).

or disallow any particular measure that is necessary to protect a Party's essential security interests. It simply removes such measures from the scope and application of the Treaty.

11.21 The negotiating history confirms that Article XX(1)(d) excludes from the Treaty's application and scope a wide range of measures to protect a Party's essential security interests. In the treaty negotiations between Iran and the United States, Article XX(1)(d) was cited when the Iranian negotiators proposed subjecting Article II's right to entry to "internal safety regulations." The U.S. State Department instructed U.S. Embassy Tehran to explain that such language was unnecessary because the right to enforce internal safety regulations was amply covered by Article XX(1)(d). Further, the U.S. State Department authorized Embassy Tehran to provide a written statement recording that the Treaty recognized the "paramount right" of a State to "take measures to protect itself and public safety."[295] As the Court explained in the *Military and Paramilitary Activities* case, "[t]he concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past."[296]

11.22 The negotiating history's reference to a State's "paramount right" and the United States' willingness to enter into a written statement to this effect confirm the wide discretion afforded by Article XX(1)(d). The Court acknowledged the deference due to a Party invoking Article XX(1)(d) in its 2008 Judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. There, it cited the Treaty of Amity's essential security interests clause as an example of a provision that affords the invoking State "wide discretion":

> [W]hile it is correct, as France claims, that the terms of Article 2 [of the treaty at issue in the case] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties [citations omitted]; *for the competence of the Court in the face of provisions giving wide discretion*, see [citations to *Military and Paramilitary Activities in Nicaragua* Merits Judgment ¶ 222, *Oil Platforms* Merits Judgment ¶ 43].[297]

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[295] Telegram from U.S. Dep't of State to U.S. Embassy Tehran (Feb. 15, 1955) **(U.S. Annex 133)**.

[296] *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States of America),* 1986 I.C.J. 14, ¶ 224 (June 27).

[297] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 229, ¶ 145 (emphasis added); *see also* Rejoinder Submitted by the United States of America (Mar. 23, 2001), ¶¶ 4.24-4.35, *Oil Platforms (Iran v. United States)* (arguing that the Court "should allow the Party invoking Article XX(1)(d) a measure of discretion in its application").

11.23 Historical sources further confirm the wide latitude that Parties invoking Article XX(1)(d) have been understood to have to determine their essential security interests and the matters necessary to protect them. In 1981, Charles Sullivan issued an internal, unclassified study of the standard draft FCN treaty for the U.S. Department of State (the "Sullivan Study") which provides insight into the intent of FCN treaty provisions. For many years, Mr. Sullivan headed the U.S. State Department office that negotiated FCN treaties. The Sullivan Study analyzed the standard draft treaty as well as all of the FCN treaties of the United States from 1946 until 1962, article by article and paragraph by paragraph.[298] The Sullivan Study confirms that the essential security clause of FCN treaties was meant to afford invoking Parties wide latitude and explicitly notes the "broad freedom of action extended to each treaty partner by the essential security reservation."[299]

11.24 As demonstrated below, Iran's illicit activities and Iran's attempts to develop deceptive and evasive ways to fund them present a serious and demonstrable security risk to the United States and its nationals. The United States has unquestionable essential security interests in preventing terrorist attacks and the financing of terrorist activities that threaten its nationals and halting the advancement of Iran's ballistic missile program. Executive Order 13599 was a measure necessary to protect these interests. The United States' determination to this effect warrants substantial deference and compels the dismissal of Iran's claims to the extent they are based on the Executive Order, as outside the scope of the Treaty.

i. The United States Has Essential Security Interests in Preventing Terrorism and Terrorist Financing, and in Halting the Advancement of Iran's Ballistic Missile Program

11.25 The United States unquestionably has an essential security interest in preventing terrorist attacks that target the United States, its nationals, and its interests abroad, including by preventing the provision of arms, materiel, training, and funds to terrorist groups and suppressing the use of money laundering and other deceptive financial practices to finance terrorism. It has a similarly clear essential security interest in halting Iran from advancing its ballistic missile program.

[298] CHARLES H. SULLIVAN, U.S. DEP'T OF STATE, STANDARD DRAFT TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION: ANALYSIS AND BACKGROUND (1981) (hereinafter "SULLIVAN STUDY") (excerpts at U.S. P.O. Annex 214 and IM Annex 20).

[299] SULLIVAN STUDY at 308 (U.S. P.O. Annex 214).

11.26 Over the past decades, many U.S. nationals have been killed or wounded in terrorist attacks carried out by groups and individuals sponsored and directed by Iran, as described in Chapter 5. The international community has long condemned such acts of terrorism, and State involvement in terrorism in the strongest possible terms. For example, in 1994 the UN General Assembly adopted a resolution urging States "to take all appropriate measures at the national and international levels to eliminate terrorism," stating that the General Assembly was

> Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States, . . . [and]
>
> Convinced . . . that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security.[300]

11.27 The UN Security Council reaffirmed its determination that acts of international terrorism constitute a threat to international peace and security in 2001, and declared that the "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."[301] It accordingly mandated that States "[p]revent and suppress the financing of terrorist acts" and that they freeze "funds and other financial assets or economic resources" of those who commit or support terrorism.[302] The Council also recognized the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.[303] The UN Security Council has since repeatedly recognized that terrorism poses a threat to international peace and security,[304] and

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[300] G.A. Res. 49/60, at 1-3, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) (U.S. P.O. Annex 179); *see also* S.C. Res. 1373, ¶ 3, U.N. Doc. S/RES/1373 (Sep. 28, 2001) (U.S. P.O. Annex 81) ("reaffirming" that acts of international terrorism "constitute a threat to international peace and security").

[301] S.C. Res. 1373, prmbl & ¶ 5, U.N. Doc. S/RES/1373 (Sep. 28, 2001) (U.S. P.O. Annex 81).

[302] *Id*. at ¶ 1 (U.S. P.O. Annex 81).

[303] *Id*. prmbl. (U.S. P.O. Annex 81).

[304] S.C. Res. 1455, prmbl., U.N. Doc. S/RES/1455 (Jan. 17, 2003) (U.S. P.O. Annex 207); S.C. Res. 1963, prmbl., U.N. Doc. S/RES/1963 (Dec. 20, 2010) (U.S. P.O. Annex 208); S.C. Res. 2129, prmbl., U.N. Doc. S/RES/2129 (Dec. 17, 2013) (U.S. P.O. Annex 209); S.C. Res. 2178, prmbl., U.N. Doc. S/RES/2178 (Sept. 24, 2014) (U.S. P.O. Annex 210); S.C. Res. 2253, prmbl., U.N. Doc. S/RES/2253 (Dec. 17, 2015) (U.S. P.O. Annex 182); S.C. Res. 2341, prmbl., U.N. Doc. S/RES/2341 (Feb. 13, 2017) (U.S. P.O. Annex 211).

that "countering this threat requires collective efforts on national, regional, and international levels."[305]

11.28 The international community also recognizes the danger of Iran's pursuit of ballistic missile capabilities. As discussed above, in adopting UN Security Council resolution 1929 (2010), the UN Security Council "decide[d] that Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology."[306] Later, in the wake of Iran's March 2016 ballistic missile launches, the UN Secretary General called on Iran "to refrain from conducting such launches."[307] For its part, the United States has been clear in voicing its conviction that Iran's ballistic missile program poses a "fundamental threat[] to the region and beyond."[308]

11.29 As the Court held in *Military and Paramilitary Activities in Nicaragua*, the concept of essential security interests "certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past."[309] Moreover, the phrase "its essential security interests" makes clear that it is the assessment of the Party invoking the defense that is most relevant. Whether a situation implicates "*its* security interests" and whether the interests at stake are "essential" to that Party are not questions in the abstract but instead must be viewed from the perspective of the Party invoking the defense – based on its specific circumstances, and its own perception of those circumstances. The interests identified here – the prevention of terrorism and terrorist financing and the prevention of ballistic missile proliferation – must on any view qualify under the provision. And while the critical point in this case is that these are essential security interests of the United States, it is notable that the

[305] S.C. Res. 2253, prmbl., U.N. Doc. S/RES/2253 (Dec. 17, 2015) (U.S. P.O. Annex 182); S.C. Res. 2341, prmbl., U.N. Doc. S/RES/2341 (Feb. 13, 2017) (U.S. P.O. Annex 211).

[306] S.C. Res. 1929, ¶ 9, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110). *See* Chapter 5.A.

[307] UN Secretary General, *First Implementation Report*, at 3, U.N. Doc. S/2016/589 (July 12, 2016) (U.S. P.O. Annex 123).

[308] Statement of Thomas A. Shannon, Jr., Under Secretary for Political Affairs, U.S. Dep't of State, Before the Senate Foreign Relations Comm., *Iran's Recent Actions and Implementation of the JCPOA*, at 1 (Apr. 5, 2016), (U.S. P.O. Annex 212) ("While we are encouraged by Iran's adherence to its nuclear commitments thus far, I assure you that the Administration shares your concerns about the government of Iran's actions beyond the nuclear issue, including its destabilizing activities in the Middle East and its human rights abuses at home. Iran's support for terrorist groups like [Hezbollah], its assistance to the Assad regime in Syria and the Houthi rebels in Yemen, and its ballistic missile program are at odds with U.S. interests, and pose fundamental threats to the region and beyond.").

[309] *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States of America),* 1986 I.C.J. 14, 117, ¶ 224 (June 27).

same concerns have been recognized as essential not only by the United States, but by the UN Security Council and the broader international community.

ii. Executive Order 13599 is Necessary to Protect the Essential Security Interests of the United States, Particularly in Preventing and Deterring Terrorist Attacks and the Advancement of Iran's Ballistic Missile Program

11.30 Executive Order 13599 is a measure necessary to protect the essential security interests identified in the preceding section, and as discussed above, the Court should accord substantial deference to a State's determination to that effect.

11.31 The essential security rationale for the United States issuing Executive Order 13599 is evident. As indicated above in Section A, Executive Order 13599 implements the requirements of Section 1245(c) of the 2012 NDAA.[310] Among the Congressional findings included in Section 1245 is a reference to the U.S. Treasury Department's November 2011 finding identifying Iran as a jurisdiction of "primary money laundering concern," and the statement of the Under Secretary of the Treasury for Terrorism and Financial Intelligence that the "entire Iranian banking sector, including the Central Bank of Iran" posed "terrorist financing, proliferation financing, and money laundering risks for the global financial system."[311]

11.32 The U.S. Treasury Department's conclusions accorded with FATF's findings to the effect that Iran's financial sector posed serious risks with regard to terrorism finance.[312] Just prior to the adoption of Executive Order 13599, on October 28, 2011, the FATF indicated "with a renewed urgency" that it was "particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system[.]"[313] Iran is on FATF's list of "high-risk and non-cooperative

[310] Notably, Iran cites this authority but not the Congressional findings that underpin it. Iran's Memorial, ¶ 2.35 n.81.

[311] National Defense Authorization Act for Fiscal Year 2012, § 1245(a), Pub. L. No. 112-239, 126 Stat. 2006 (IM Annex 17).

[312] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 18, 2011) (U.S. P.O. Annex 152) ("Iran remains the most active of the listed state sponsors of terrorism, routinely providing substantial resources and guidance to multiple terrorist organizations. . . . Iran is known to have used state-owned banks to facilitate terrorist financing."); Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Imposition of Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72878, 72879-80 (Nov. 28, 2011) (U.S. P.O. Annex 153) (discussing findings concerning Iran's role in terrorist financing, as well as multilateral findings or actions by the UN Security Council and the FATF).

[313] Financial Action Task Force (FATF), Public Statement – 28 October 2011 (U.S. P.O. Annex 222); *see* Chapter 5.A (discussing the FATF's findings and recommendations concerning Iran).

jurisdictions"; in fact, it is one of only two jurisdictions (together with the Democratic People's Republic of Korea) on FATF's "call to action" list of countries against which States are advised to take measures.[314]

11.33 As this history makes clear, Executive Order 13599 was adopted to protect the United States' interest in combatting Iranian support for terrorism and terrorist financing, and thereby preventing future acts of terrorism. It is a measure necessary to the achievement of that purpose. As the UN Security Council has recognized, asset freezes are an important method of "prevent[ing] and suppress[ing] the financing of terrorist acts" – which States are obliged to do under UN Security Council Resolution 1373[315] – "even in the absence of a link to a specific terrorist act[.]"[316]

11.34 In addition to its purpose of combatting terrorism financing, Section 1245 of the 2012 NDAA makes plain that Executive Order 13599 was also adopted as a measure necessary to protect against the "proliferation financing" risks posed by Iran and the Iranian financial sector.[317] The United States is not alone in its concern regarding Iran's ballistic missile program and the involvement of Iran's financial sector in contributing to Iranian proliferation efforts. Just prior to the adoption of Executive Order 13599, the UN Security Council called upon States to "exercise vigilance" over transactions involving Iranian banks, including Bank Markazi and Bank Melli, "so as to prevent such transactions contributing to Iran's proliferation-sensitive nuclear activities or to the development of nuclear weapon delivery systems."[318]

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[314] *See* Financial Action Task Force, High-risk and monitored jurisdictions **(U.S. Annex 134)**.

[315] *See* S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sep. 28, 2001) (U.S. P.O. Annex 81) (deciding that States shall "[f]reeze without delay funds or other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts[.]").

[316] S.C. Res. 2253, prmbl., U.N. Doc. S/RES/2253 (Dec. 17, 2015) (U.S. P.O. Annex 182).

[317] National Defense Authorization Act for Fiscal Year 2012, § 1245(a)-(b), Pub. L. No. 112-239, 126 Stat. 2006 (IM Annex 17); *see also* Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72762 (Nov. 18, 2011) (U.S. P.O. Annex 152) (discussing evidence "that organized criminal groups, international terrorists, or entities *involved in the proliferation of weapons of mass destruction or missiles*, have transacted business in that jurisdiction" (emphasis added)).

[318] S.C. Res. 1929, prmbl. & ¶ 23, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110) ("recalling in particular the need to exercise vigilance over transactions involving Iranian banks, *including the Central Bank of Iran*" and calling upon States to take "appropriate measures" that prohibit financial institutions within their territories providing certain financial services if they have reasonable grounds to believe that such services "could contribute to Iran's proliferation-sensitive nuclear activities *or the development of nuclear weapon delivery systems*" (emphasis added)); S.C. Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102) ("[c]all[ing] upon all States to exercise vigilance *over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat* . . . in order to avoid such activities

11.35 Furthermore, the United States adopted Executive Order 13599 only after Iran persisted in violating, through the use of deceptive practices, an array of more targeted sanctions relating to its support for terrorism and its pursuit of vehicles for delivering weapons of mass destruction. Iran had also ignored repeated calls to address the serious terrorist financing risks posed by its financial sector.[319] The Executive Order thus became necessary, and was adopted, due to Iran's own concerted efforts to frustrate these earlier measures targeting Iran's illicit conduct.

11.36 In light of the above, claims challenging Executive Order 13599 are precluded under the Treaty because the Executive Order is a measure necessary to protect the United States' essential security interests under Article XX(1)(d), compelling the dismissal of Iran's claims to the extent they are based on the Executive Order.

* * * *

11.37 For all of the above reasons, Executive Order 13599 is excluded from the Treaty's scope and application. Article XX(1)'s applicability to the Executive Order should be a simple inquiry, especially given the substantial evidence that demonstrates the purpose of Executive Order 13599. Iran, however, has ignored Executive Order 13599's national security function and instead attempted to invoke it as a violation of the Treaty's substantive articles. Although Iran's allegations can be vague, the Memorial explicitly invokes Executive Order 13599 as a violation of three of the Treaty's substantive articles: Article III, Article V, and Article VII. Whether these articles could apply to Executive Order 13599 is irrelevant and the Court should not consider such assertions because Article XX(1)'s exceptions make clear that Executive Order 13599 falls outside the scope of the Treaty and thus cannot be found to have violated any of the Treaty's substantive provisions. The Court should therefore dismiss Iran's claims to the extent they are premised on Executive Order 13599.

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contributing to the proliferation sensitive nuclear activities*, or to the development of nuclear weapon delivery systems* . . . ." (emphasis added)).

[319] *See, e.g.*, Financial Action Task Force (FATF), *Public Statement –28 October 2011* (U.S. P.O. Annex 222).

PART IV: THE U.S. MEASURES DO NOT VIOLATE THE TREATY OF AMITY

CHAPTER 12: IRAN'S FLAWED APPROACH TO PLEADING ITS CLAIMS AND INTERPRETING THE TREATY OF AMITY

12.1 Should any of Iran's claims remain after the Court rules on the U.S. defenses presented in Part III, Chapters 13 through 17 in this Part IV of the Counter-Memorial demonstrate that Iran's claims under Articles III, IV, V, VII and X fail in any event. They fail because Iran has either misinterpreted the relevant Treaty provision or misapplied the relevant provision to the facts. In many instances it has done both.

12.2 In the alternative, in the event that the Court were to conclude that Iran, *quod non*, did indeed have any actionable rights under the Treaty, the United States contends that Iran, as a matter of admissibility, should not be permitted to invoke those rights as to do so would constitute an abuse of right, deploying the claimed rights in an effort to frustrate efforts by terrorism victims to obtain compensation for the harm caused by Iran-sponsored attacks is an abuse. This issue is addressed in Chapter 18.

12.3 Finally, in Chapter 19, the United States notes the unavailability of certain forms of relief as a result of the termination of the Treaty of Amity and also the vague and incomplete nature of Iran's request for relief more generally.

12.4 Before responding to Iran's article-by-article claims, it is important to bear in mind two cross-cutting issues presented by the way in which Iran has pled its claims. *First*, as noted in Chapter 2, Iran relies heavily on conclusory assertions and imprecise factual statements to make its case. As a result, Iran's submissions fall short of what is required to establish its claims. The United States responds below to the case Iran has presented, but that effort has been hampered by the vague and ill-defined nature of Iran's pleading.

12.5 *Second*, Iran has not followed the proper approach to interpreting the Treaty provisions at issue, as outlined in the Court's prior decisions, including in the context of the Treaty of Amity at issue here. As a result, Iran's arguments are divorced from the Treaty's text and cannot be sustained.

12.6 As the Court observed in the *Oil Platforms* case, in interpreting a treaty, it must look to the rules of customary international law reflected in Articles 31 and 32 of the 1969 Vienna

Convention on the Law of Treaties (the "Vienna Convention" or the "VCLT").[320] Under those rules, the Treaty of Amity

> must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Under Article 32, recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded.[321]

12.7 The Court has recognized that the object and purpose of the Treaty of Amity is not to "regulate peaceful and friendly relations between the two States in a general sense."[322] Rather, the object and purpose of the Treaty, as stated in the preamble, is "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and regulating consular relations."[323] In addition to the Treaty's object and purpose, the Court has also taken into account its context and history, including in connection with similar FCN treaties concluded by the United States during the same time period.[324]

12.8 Iran's interpretation of the Treaty's articles strays far from the guidance provided by the Court in past cases. For example, Iran has attempted to read words into the Treaty provisions that simply are not there, as in the case of Article III(1). It has also, in the case of Article IV(1), rested its interpretation primarily on a single arbitral award rendered more than fifty years after the Parties signed the Treaty of Amity that did not engage and has no direct bearing on the Treaty. And, in the case of Article VII, Iran has ignored negotiating history that clearly demonstrates the intent to restrict paragraph 1 to exchange restrictions. On the basis of these and other interpretive failings by Iran, as detailed in the chapters that follow, the Court should reject Iran's reading of the Treaty provisions at issue.

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[320] *Oil Platforms*, Preliminary Objections Judgment, 1996 I.C.J. at 812, ¶ 23. The International Court of Justice concluded that Article 31 of the Vienna Convention reflects customary international law. *See, e.g., Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Dec. 13). Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice.

[321] *Id*. *See also Certain Iranian Assets*, Preliminary Objections Judgment, 2019 I.C.J. ¶ 70; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections Judgment, 2018 I.C.J. ¶ 91; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections Judgment, 2004 I.C.J. 279, 318, ¶ 100.

[322] *Oil Platforms,* Preliminary Objection Judgment*,* 1996 I.C.J. at 814, ¶ 28.

[323] Treaty of Amity, Preamble; Preliminary Objections Judgment, ¶ 57.

[324] *See, e.g.*, *Oil Platforms*, 1996 I.C.J. at 814, ¶ 29 (referring to clauses in FCN treaties concluded between the United States and China, Ethiopia and Oman).

CHAPTER 13: IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE III

13.1 Iran's Article III claims are representative of the flaws in its overall case. Iran's interpretation of Article III(1) and III(2) cannot be squared with the text or negotiating history of these provisions. As detailed below, Article III(1) simply identifies the types of entities that qualify for protection under the Treaty as "companies" and provides that each Party must recognize the "juridical status" of such companies. From this provision, however, Iran attempts to derive a guarantee that a company and its property will be treated separately from its owners. Article III(1) does not provide any such guarantee, either explicitly or implicitly. Indeed, it has nothing whatsoever to say about the relationship between a company and its owners.

13.2 Iran's approach to Article III(2) is similarly flawed, as the Court has already confirmed. Article III(2), like Article III(1), has a simple aim: it provides that each Party's companies and nationals will have the "freedom of access to the courts" of the other Party. As with Article III(1), Iran seeks to stretch Article III(2) far beyond any interpretation that its text or history can accommodate. Specifically, Iran attempts to transform Article III(2) from a provision protecting "*access* to the courts" into a provision guaranteeing litigants a variety of rights once they are in court. The Preliminary Objections Judgment, however, rejected Iran's interpretation and thus left no basis for its Article III(2) claims because Iranian companies not only enjoyed free access to, but also appeared in, U.S. courts.

Section A: Iran Has Failed to Establish a Violation of Article III(1) of the Treaty

13.3 Iran is asking the Court to find – without textual or other support – that Article III(1) requires the United States to treat Iranian state-owned companies separately from Iran itself, such that the assets of such companies are insulated from enforcement of terrorism-related judgments obtained against Iran. Iran's argument is premised on inserting the term "separate" before the phrase "juridical status," although that term is not found in Article III(1). Iran then asserts, based on this premise, that allowing the assets of Iran's state-owned companies to be attached to satisfy terrorism-related judgments against Iran constitutes a breach of Article III(1) because the attachments fail to recognize the "separate juridical status" of such companies. As discussed in this section, Iran's argument rests on a fundamentally flawed interpretive premise and must fail. Article III(1) simply ensures that companies have status as legal persons (i.e., juridical status); it nowhere insulates companies from judgment enforcement rules under domestic law.

i. Iran's Interpretation of Article III(1) is Fundamentally Flawed.

(a) Article III(1) Does Nothing More Than Require Recognition of the Legal Status of "Companies"

13.4 Article III(1) is a simple and straightforward provision that was intended to set forth a definition of the term "companies" in order to establish the types of entities that qualify for the protections afforded to "companies" under the Treaty, and to require that the status of such entities as legal persons be recognized.

13.5 Article III(1) provides as follows:

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

13.6 Thus, Article III(1) contains three elements: (1) it defines the term "companies"; (2) it sets out what is required for a "company" to establish that it has the nationality of one of the High Contracting Parties; and (3) it requires both Parties to "recognize" the "juridical status" of such companies, taking into account that the concept of "recognition" is subject to the explicit limitation that it does not confer further rights.

13.7 A straightforward reading of the text makes clear that the Parties intended Article III(1) to identify the scope of legal persons (as opposed to natural persons) that would qualify for the protections afforded to "companies" under the other substantive provisions of the Treaty and to require that their status as legal persons would be recognized. This interpretation of the scope of Article III(1) is further bolstered by the provision's explicit limitation that "recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized."

13.8 A review of the Treaty's *travaux préparatoires* confirms the narrow purpose of Article III(1). During the negotiations, Iran expressed concern about the scope of entities covered by the term "companies," and the implications of that definition for Iran's obligations toward such entities. A U.S. State Department cable to Embassy Tehran provided some clarification in order to assist the negotiators in explaining to Iran the intended scope of this provision. The cable stated:

> Iranian comment appears [to] reflect misunderstanding. Paragraph confers no rights [on] corporations [to] engage in business. It merely provides their recognition as corporate entities principally in order they may prosecute or defend their rights in court as corporate entities. In this sense paragraph one [is] related to paragraph two [on access to courts]. Under [the] treaty, no U.S. corporation may engage in business in Iran except as permitted by Iran. Corporate status should be recognized [to] assure [the] right [of] foreign corporate entities – those that sell goods or furnish other services to Iran as well as those permitted [to] operate in Iran – free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc. . . . .[325]

13.9 This cable makes clear that the United States understood Article III(1) to be limited to recognizing the legal personality of the companies of the other Party, and nothing more, and that it communicated this view to Iran. The negotiating history contains no indication that Iran took a different view on the interpretation of this provision.

13.10 The negotiating history of other FCNs that were concluded by the United States around the same time as the Treaty of Amity also confirms this understanding of the meaning of Article III(1). In reference to the corresponding provision of the U.S.-Netherlands FCN, the State Department noted that "[o]f itself, the definition only requires each Party to concede and acknowledge that a corporation is actually existent and endowed with legal being when the law of the other Party has created it and given it existence. The operative rights of a corporation must be sought in the operative provisions of the body of the treaty."[326] Similarly, during negotiations with Belgium, the Department noted that "this provision does nothing more than require each country to acknowledge that a corporation is actually existent and endowed with legal being when the law of the other country has created it and given it existence."

13.11 The language of Article III(1) also appears in Article XXII(3) of the U.S. standard draft treaty. The Sullivan Study explains that the language in the first sentence on recognition of juridical status "establishes a definite legal rule, although essentially for definitional

[325] Telegram from U.S. Dep't of State, No. 936, to U.S. Embassy in Tehran (Nov. 9, 1954) **(U.S. Annex 135)**.

[326] Instruction from the U.S. Dep't of State to U.S. Embassy in The Hague (Dec. 21, 1953) **(U.S. Annex 136)**. *See also* Instruction from the U.S. Dep't of State to U.S. Embassy in Brussels (Mar. 25, 1957) **(U.S. Annex 137)** (During negotiations with Belgium, the Department noted that "this provision does nothing more than require each country to acknowledge that a corporation is actually existent and endowed with legal being when the law of the other country has created it and given it existence." In addition, the United States explained that any operating rights of a company not specified in the treaty would depend upon local law.)

purposes."[327] The Study goes on to explain that this sentence "establishes the place of charter or incorporation as the sole fact determining the nationality of the company."[328]

13.12 Herman Walker, a State Department official who served as the principal architect of U.S. FCN treaties, explained the purpose of these definitional provisions further. He stated: "on the subject of juridical status of entities, these treaties have sponsored a return to the 'classical' theory; that is, that the mere fact of lawful creation in either country shall *ipso facto* be sufficient *to endow the entity with lawful being and recognition in the other*, without any additional tests, such as where it maintains its seat, the nationality of its ownership or direction, the character of its aims or otherwise."[329] Thus, these sources confirm what is in fact clear from a plain reading, namely that Article III(1) was intended solely to ensure that legal persons could, on the basis of being incorporated in one of the Parties, have "legal being" in the territory of the other Party.[330]

(b) Iran's Interpretive Approach Is Untethered from the Text.

13.13 Iran's argument on the proper interpretation of Article III(1) rests on three propositions: (1) the definition of "companies" in the last sentence of Article III(1) is broad; (2) the Iranian state-owned entities subject to attachment proceedings that are at issue in the case qualify as "companies" under the Treaty; and (3) the United States has an obligation to recognize the separate juridical status of those Iranian companies.[331] It is the third prong of Iran's analysis, in particular, that veers significantly off-course by reading into the provision text that simply is not there.

13.14 Iran contends that "[t]he right to recognition of a company's juridical status is not qualified in any way, and includes the right to recognition of that company's separate legal

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[327] SULLIVAN STUDY at 318 (IM Annex 20).

[328] *Id*. This issue arose since some countries considered the principal place of business, rather than place of incorporation, to be the determining factor for nationality.

[329] Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 Pol. Sci. Q. 57, 67-68 (1958) (U.S. P.O. Annex 2) (emphasis added).

[330] Further support for this interpretation is found in U.S. Supreme Court precedent analyzing FCNs. Indeed, the U.S. Supreme Court considering the scope of a substantively identical provision in the U.S. FCN treaty with Japan noted that the "primary purpose of the corporation provisions of the Treaty was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982) **(U.S. Annex 142)**. This case was decided in 1982 and thus preceded the U.S. measures that Iran challenges in this case.

[331] Iran's Memorial, ¶ 4.3.

personality and its right to own and dispose of property."[332] Iran does not engage in a textual analysis to support this statement of the supposed content of Article III(1). Nor does it cite to any relevant context, negotiating history, or other sources of interpretive guidance for this position.

13.15 Instead, Iran engages in a sleight of hand. Iran refers repeatedly to the entitlement of Iranian companies under Article III(1) to the recognition of their "separate" or "independent" juridical status,[333] yet the words "separate" and "independent" do not appear in Article III(1). The text simply addresses recognition of "juridical status."

13.16 Through this sleight of hand, Iran purports to read into Article III(1) – without textual or other support – the proposition that Iranian state-owned companies must be treated separately from Iran itself and that they are therefore insulated from attempts to attach their assets to satisfy judgments obtained against Iran. This is methodologically flawed and detached from any interpretative rigor. In order to arrive at Iran's conclusion, the Court would have to follow Iran along an unsustainable analytical path. First, the Court would have to accept Iran's incorrect framing of Article III(1) as requiring recognition of "*separate* juridical status." Second, after accepting this false premise, the Court would have to endorse Iran's allegation that the U.S. legal framework for enforcement of terrorism-related judgments against the agencies and instrumentalities of a state sponsor of terrorism constitutes a violation of their "separate juridical status." Because Iran's allegation of a violation of Article III(1) rests on a flawed premise regarding the meaning and scope of that provision, the Court should reject it.

13.17 Article III(1) does not speak to the issue of the rights of a company in the context of an action to enforce a judgment obtained against one of its owners. As discussed above, Article III(1) is limited in scope, not even guaranteeing to companies the right to engage in the activities for which they were incorporated, let alone the right to be insulated from judgment enforcement actions. Iran's attempted injection of the word "separate" into the text cannot operate to change the scope of Article III(1) into a prohibition on enforcement against Iran's agencies and instrumentalities of judgments obtained against Iran, especially where doing so would enable Iran to evade responsibility for the harms caused by its support for terrorism.

13.18 Iran makes cursory mention of the Court's rulings in *Barcelona Traction* and *Diallo* to support its arguments regarding the scope of Article III(1). But these cases do not assist.

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[332] Iran's Memorial, ¶ 4.17.

[333] Iran's Memorial, Chapter 4, § 2 heading; *id.*, Chapter 4, § 2.A heading; *id.*, ¶¶ 4.19, 4.29, 4.35.

Both cases concern the parameters under which a State can, under customary international law, pursue a claim in the exercise of diplomatic protection on behalf of individuals or corporations. The primary issue addressed by the Court in those cases was whether the right that was being invoked was indeed a right of a national or corporation of the claimant state in circumstances where the corporate ownership structure was complex and involved multiple States.[334] Neither *Barcelona Traction* nor *Diallo* arose under a treaty provision similar to Article III(1), nor did they concern the much simpler question of what it means to recognize companies' legal personality. These cases, therefore, provide no insight into the meaning of Article III(1).

13.19 The text of Article III(1) makes clear that it is limited in scope, ensuring that companies of each Party are conferred with legal personality in the territory of the other Party. Iran's attempt to transform Article III(1) into a protection against judgment enforcement actions cannot be sustained.

ii. The U.S. Measures Satisfy the Recognition Requirement in Article III(1)

13.20 Iran has not and cannot establish that any of the U.S. measures violate Article III(1) when it is interpreted properly. Iran nowhere alleges that the U.S. measures at issue deny Iranian companies legal personality. Nor could it. None of the U.S. measures in any way interferes with or denies recognition of Iranian companies' legal personality. To recall, the legislative measures that Iran appears to challenge in the context of Article III(1) are TRIA, the 2008 amendments to the FSIA, and Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012. In addition, Iran challenges Section 7(b) of Executive Order 13599. As set forth in Chapter 6, these legislative and executive measures taken together comprise a legal framework that facilitates satisfaction of judgments held by U.S. persons against designated state sponsors of terrorism, including Iran, for death or injuries resulting from their support for terrorist acts. These measures make available for attachment certain property of States designated as sponsors of terrorism, including the property of their agencies and instrumentalities. In addition, Iran challenges specific attachment proceedings in U.S. courts. The very existence of these cases against the Iranian companies – as well as their participation

[334] *See* Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, STANFORD J. INT'L LAW (2006) **(U.S. Annex 138)** (in *Barcelona Traction*, the Court "articulated a rule, ostensibly based on custom, that a corporation is a national of a state in which it is incorporated for the purpose of diplomatic protection."); Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, N. CAROLINA J. INT'L LAW AND COMM. REG. (2008) **(U.S. Annex 139)** ("In *Diallo*, the ICJ ratified and further strengthened the rule set in *Barcelona Traction*, holding that the State in which a company is incorporated is the only one that can seek its diplomatic protection.").

in the U.S. legal proceedings to object to attachment – shows that the companies are in fact recognized as having legal personality.[335]

13.21 Iran's claims also fail even under its own flawed reasoning of Article III(1). Iran's position is that the provision precludes the United States from taking steps to enable victims of Iranian-sponsored terrorism, and their families, to obtain compensation for their injuries. This is untenable. It is true that the general principle that a distinction between a corporation and its shareholders should be observed is well-established, not only in the United States but throughout much of the world.[336] However, exceptions to that general principle are equally well established. For example, it is a well-established principle in both common law and civil law jurisdictions that it may be appropriate to pierce the corporate veil or otherwise disregard the distinction between a corporation and its shareholders in the interests of justice.[337] The U.S. measures at issue can only be viewed as serving the ends of justice as Iran has demonstrated no willingness to accept responsibility or provide compensation to the victims of the terrorist acts it has supported.

13.22 As stated above, Article III(1) does not in any way address, let alone limit the circumstances under which it is appropriate to attach the assets of a state-owned entity for purposes of enforcing a judgment obtained against the state. Accordingly, Iran's claims under Article III(1) should be dismissed.

Section B: Iran Has Failed to Establish a Violation of Article III(2) of the Treaty

13.23 Article III(2), like Article III(1), has a straightforward meaning that Iran has attempted to distort into a basis for its claims. As the Court recognized in the Preliminary Objections Judgment, Article III(2) protects the right of "freedom of access to the courts" but does not provide any additional substantive or procedural rights. Iran argues that its companies should have been able to pursue particular defenses and prevail in U.S. courts, but Article III(2)

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[335] If anything, the definitional provisions of Article III(1) simply build toward the right of companies to "prosecute or defend their rights in court as corporate entities." *See* Telegram from U.S. Dep't of State, No. 936, to U.S. Embassy in Tehran, (Nov. 9, 1954) **(U.S. Annex 135)**.

[336] Cheng-Han Tan et al., *Piercing the Corporate Veil: Historical, Theoretical, & Comparative Perspectives*, 16 BERKELEY BUS. L.J. 140, 140-41 (2019) **(U.S. Annex 140)**.

[337] *Id. See also First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633-34 (1983) **(U.S. Annex 141)** (the decision to disregard the distinction between Cuba, found to have expropriated property in violation of international law, and its separate juridical entities is "the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.").

affords no such rights. The salient facts—which Iran conveniently ignores—are that its state-owned companies actively participated in U.S. court proceedings and thus clearly enjoyed free access to those courts consistent with Article III(2).

i. The Court's Rejection of Iran's Overbroad Interpretation of Article III(2) Confirms That the Right of "Freedom of Access to the Courts" Does Not Guarantee Any Other Substantive or Procedural Rights

13.24 The Preliminary Objections Judgment has both narrowed the scope of Iran's claims under Article III(2) and established the appropriate interpretive standard for evaluating Iran's remaining claims. Article III(2) provides that:

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

13.25 In its Memorial, Iran attempts to use this provision to import customary international law principles of sovereign immunity. The Court's Preliminary Objections Judgment rejected this "broad interpretation suggested by Iran."[338] Specifically, the Court explained that Article III(2) "*does not seek to guarantee the substantive or even the procedural rights* that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, *but only to protect the possibility for such a company to have access to those courts* or authorities with a view to pursuing the (substantive or procedural) rights it claims to have."[339] In other words, Article III(2) simply grants a company the right of access to the courts to protect whatever other rights the company claims to have. It does not do anything more.

13.26 The significance of the Court's interpretation of Article III(2) extends beyond its specific finding that the provision does not incorporate the immunities that Iran alleged under customary international law. *First*, the proper interpretation of Article III(2) leaves no room for Iran's sweeping generalizations about the provision. Iran asserts that Article III(2) is "cast

[338] Preliminary Objections Judgment, ¶ 70.

[339] *Id.* (emphases added).

in mandatory and absolute terms," "formulated in the most comprehensive of terms," and "an unqualified entitlement."[340] Iran's attempt to characterize Article III(2) in terms favorable to its claims cannot change the fact that its text protects only "access to the courts."

13.27 *Second*, the Court's ruling exposes the baselessness of the four "entitlements" that Iran has attempted to locate within Article III(2). Specifically, Iran argues, without citing to any authority, that its companies and nationals have "entitlements" to (a) immunities from customary international law; (b) recognition of juridical personality from Article III(1); (c) separateness from "the Iranian State" for purposes of liability and damages; and (d) raising defenses regardless of subsequent legislation.[341] None of these alleged "entitlements" appear in the text of Article III(2), as interpreted in accordance with its ordinary meaning, in its context or in light of the object and purpose of the Treaty of Amity.

13.28 In sum, the Court properly rejected Iran's overbroad interpretation of Article III(2) and found that "freedom of access to the courts" does not guarantee any procedural or substantive rights, thus leaving no basis for Iran's claims under that provision.

ii. Consistent with Article III(2), the United States Granted Freedom of Access to the Courts in which Iranian Companies Regularly Appeared and Participated

13.29 The Preliminary Objections Judgment dismissed the bulk of Iran's claims under Article III(2) because they were based on the alleged violation of sovereign immunity protections that do not exist in the Treaty of Amity. Iran's remaining claims under Article III(2) fail not only because they are premised on a flawed interpretation of Article III(2), as set out above, but also because, as a factual matter, the Iranian companies in question regularly appeared as named defendants, were represented by experienced counsel, and made detailed legal submissions advocating for their positions in the attachment proceedings.[342] Whether or not the companies prevailed in these court proceedings is irrelevant. The companies' active participation in U.S. court proceedings is, by itself, a sufficient basis for rejecting Iran's claims that these companies did not have "freedom of access to the courts" under Article III(2).

[340] Iran's Memorial, ¶¶ 5.3, 5.4.

[341] *Id.*, ¶ 5.5.

[342] *See, e.g.*, *Bennett v. Islamic Republic of Iran*, Nos. 13-15442, 13-16100, slip op. at 12-13 (9th Cir. filed Feb. 22, 2016; amended June 14, 2016) (noting that Bank Melli "entered its appearance," "moved to dismiss the action," and "made four arguments for dismissal") (IM Annex 64).

13.30 Ignoring these facts, Iran nevertheless argues that the United States has breached Article III(2) in "five separate respects."[343] These allegations cannot withstand scrutiny. First, the Court has already dismissed Iran's argument that Bank Markazi should have been granted immunity defenses.[344] As explained above, the Court properly interpreted Article III(2) as providing no such right to immunities. Moreover, Iran's attempt to characterize Bank Markazi as both a sovereign entity entitled to immunity and as a "company" entitled to protection under Article III(2) must be rejected for the reasons set forth in Chapter 9.[345]

13.31 Iran's second alleged violation of Article III(2) fares no better, as it merely repeats Iran's flawed Article III(1) argument in another guise. Iran asserts that the alleged "abrogation . . . of separate juridical status" somehow violates Articles III(2),[346] but it cites to no support for the proposition that Article III(2) encompasses an obligation with regard to "separate" juridical status (and, as noted above, no such obligation is found in Article III(1) either). Instead, Iran seems to base this claim on the provision regarding the "defense and pursuit of . . . rights" in Article III(2). Yet this phrase does not create any new obligation or right. To the contrary, it simply clarifies that "freedom of access" includes access that is both defensive and offensive, that is, the ability to both bring claims and defend against claims in the courts. As explained above, Iran cannot argue that its companies did not enjoy this right when they in fact defended themselves in U.S. courts. Nor can Iran overcome these facts by stating that its companies were "denied . . . any right *properly* to defend their interests"[347] or to "*meaningfully* defend themselves."[348] Iran seems to imply that a defense can only be "properly" or "meaningfully" made if it proves successful. But, as the Court has already found, the right of "freedom of access" cannot be interpreted as providing other substantive or procedural rights, much less guaranteeing any outcome as a result of court proceedings.

13.32 Iran's third argument likewise seeks to invent a new right through the "defense and pursuit" clause of Article III(2). Iran asserts, without any support, that this clause prohibits default judgments against Iranian companies following proceedings to which they were not

[343] Iran's Memorial, ¶ 5.11.

[344] *Id.*, ¶¶ 5.12-5.13.

[345] *See also* U.S. Preliminary Objections, ¶¶ 9.1-9.20.

[346] Iran's Memorial, ¶ 5.14.

[347] Iran's Memorial, ¶ 5.14(b) (emphasis added).

[348] *Id.*, ¶ 1.26.

parties.[349] A default judgment cannot by itself violate Article III(2) because such judgments are simply a function of a party failing to appear in a proceeding. For example, Iran cannot now seek to benefit from electing not to appear in the *Peterson* case to face the allegations against it regarding serious acts of terrorism for which it has provided support. Only after such judgments were obtained and not satisfied did proceedings commence regarding other available means to satisfy that judgment consistent with U.S. law. At that stage, when the assets of state-owned entities were made available to satisfy judgments against Iran for its acts, the rights of those state-owned entities became relevant and they could, and in fact did, access the courts to defend those rights. To the extent Iran's grievance is with substantive provisions of U.S. law (TRIA, E.O. 13599, and Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012) and with the outcome of the enforcement proceedings, those issues are outside the scope of Article III(2) because, as the Court has found, the provision does not guarantee any substantive or procedural rights, only a right to access the courts with a view to pursuing and defending rights a company claims to have.

13.33 Iran's fourth argument likewise does not relate to "freedom of access," but instead, like the rest of its arguments under this provision, relates to substantive and procedural rights. Iran asserts that the U.S. measures in question had "retroactive effect that ultimately enabled seizure of the property of [the Iranian] companies."[350] But what *ultimately* transpired as a result of these court proceedings is irrelevant to whether the Iranian companies had "freedom of access" to those proceedings. Iran asserts based on Section 502, that the change in the law "depriv[ed] Bank Markazi of defenses upon which it had previously relied, thereby disabling Bank Markazi from defending its rights and preventing impartial justice from being done."[351] It strains credulity for Iran to argue that Section 502 deprived access to courts when Bank Markazi not only appeared in the courts, but also defended its interests all the way through the appellate process, including a challenge to the constitutionality of Section 502 in the U.S. Supreme Court. Iran's disappointment with the outcome of court proceedings in which Iranian companies participated cannot be a violation of "freedom of access" to the courts.

13.34 Iran's final argument under Article III(2) points to the requirement that "access shall be allowed, in any event, upon terms no less favourable than those applicable to national and

[349] *Id.*, ¶ 5.15.

[350] *Id.*, ¶ 5.16.

[351] *Id.*, ¶ 5.16.

companies of . . . any third country."[352] Aside from its repeated allegations regarding immunity, Iran has not identified any way in which Iranian companies had "less favourable" access to the courts than comparably-situated companies of third States, nor could it. Instead, Iran attempts again through this provision to invent a right to a particular outcome or defense that cannot be found in Article III(2). As the Court has explained, the right of "freedom of access" does not provide a right to any particular outcome or defense, such as immunity, and thus cannot give rise to the breach that Iran asserts.

13.35 Iran's claims under Article III(2), like its claims under Article III(1), therefore fail and must be dismissed.

CHAPTER 14: IRAN HAS FAILED TO ESTABLISH A BREACH OF ARTICLE IV

14.1 As with Article III, Iran has attempted to read into Articles IV(1) and IV(2) a variety of wide-ranging protections that these provisions simply do not contain. In each case, Iran makes little effort to justify its position, citing only a handful of authorities – where it cites authorities at all – and otherwise relying on mere assertions. Iran's interpretations of Articles IV(1) and IV(2) should therefore be rejected and the claims it asserts on the basis of these flawed interpretations should be dismissed.

14.2 This Section will begin with a discussion of the minimum standard of treatment provided under Article IV generally (in Section A), before addressing Iran's claims under Article IV(1) (in Section B) and Article IV(2) (in Section C).

14.3 As will be demonstrated below, Iran's approach to Articles IV(1) and IV(2) fails to adhere to the Court's conclusions that the provisions of the Article must be read in the context of Article IV as a whole. Article IV, paragraphs 1 and 2, when properly interpreted in accordance with customary rules of treaty interpretation, describe the minimum standard of treatment of aliens as it was understood at the time of the Treaty's conclusion. In particular, the Article IV(1) obligation includes the obligation not to deny justice to a Party's companies and nationals, while the two limbs of Article IV(2) respectively ensure that the property of a Party's companies and nationals will receive "most constant protection and security" and constrain the circumstances under which such property may be taken. Considered in the proper light, neither Article IV(1) nor Article IV(2) supports the claims that Iran is making in this case.

[352] *Id.*, ¶ 5.17.

14.4 Iran's claims under Article IV(1) do not meet the high threshold necessary to establish that its companies or nationals have been denied justice by the United States. To the contrary, the agencies and instrumentalities of Iran that have been subject to attachment and enforcement proceedings have had a full opportunity to defend themselves in U.S. courts and have been treated fairly throughout.

14.5 With respect to Article IV(2), Iran has sought to treat the first limb of that article as a guarantee of legal stability. This is simply not what is meant by "most constant protection and security," which has traditionally been understood as having been breached when a State fails to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.

14.6 Iran's interpretation of Article IV(2)'s second limb is likewise untenable. Iran asks the Court to focus solely on the magnitude of the alleged deprivation in assessing whether a taking has occurred and would have the Court ignore the nature and character of the challenged measure entirely. Among other problems, Iran's approach is incompatible with the longstanding principle that a *bona fide* exercise of a State's police power, even if it has a significant effect on property, is not a taking.

Section A: The Minimum Standard of Treatment under Article IV

14.7 In its decision on Preliminary Objections, the Court confirmed that the provisions of Article IV must be read in the context of Article IV as a whole, and further stated that "the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature."[353] The Court repeated that conclusion when rejecting Iran's argument that the reference to "international law" in Article IV(2) included sovereign immunity. The Court observed "[t]he 'international law' in question in this provision is that which defines the minimum standard of protection for property belonging to 'nationals' and 'companies' of one Party engaging in economic activities within the territory of the other . . . ."[354] As such, the Court's ruling recognized that the relevant provisions of Article IV are circumscribed by the customary international rules governing the minimum standard of treatment, contrary to the interpretation put forward by Iran.

[353] Preliminary Objections Judgment, ¶ 58.

[354] *Id.*, ¶ 57.

14.8 Article IV includes the minimum standard of treatment as it relates to the treatment of aliens with respect to their economic activities in the territory of the other Party. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[355] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[356] Customary international law has crystallized to establish a minimum standard of treatment in only a few areas, and Article IV's first two paragraphs were intended to obligate each Party to respect that minimum standard of treatment.

14.9 Article IV(1)'s first clause sets forth the obligation to provide "fair and equitable treatment." Subsumed within the term "fair and equitable treatment" is the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.[357] Article IV(1)'s second and third clauses, concerning "unreasonable or discriminatory measures" and "effective means," elucidate the denial of justice obligation, but were not independent obligations under the minimum standard of treatment, and thus are not independent obligations under the Treaty. Other components of the minimum standard of treatment are the obligation to provide "most constant protection and security" and the obligation not to expropriate property (except under specified conditions), which are found in Article IV(2).

14.10 With that framework in place, the United States will first address its alleged failure to accord Iranian companies the elements of the minimum standard of treatment embodied in

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[355] A fuller description of the U.S. position is set out in *Methanex Corp. v. United States,* NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000) **(U.S. Annex 143)**; *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* 12-21 (June 27, 2002) **(U.S. Annex 144)**; *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 216-22 (Sept. 19, 2006) **(U.S. Annex 145)**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America 84-101 (Dec. 22, 2008) **(U.S. Annex 146)**.

[356] *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) **(U.S. Annex 147)**; *Glamis Gold Ltd. v. United States of America,* NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) **(U.S. Annex 148)** ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."); *see also* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939) **(U.S. Annex 149)**.

[357] Further, the term "fair and equitable treatment" is sometimes used as shorthand to refer to all the obligations encompassed within the minimum standard of treatment, This is confirmed by the commentary to Article 1 of the Organisation for Economic Co-Operation and Development's Draft Convention on the Protection of Foreign Property, as explained in more detail in more detail in *Methanex Corp. v. United States,* NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America at 39-40 (Nov. 13, 2000) **(U.S. Annex 143)**.

Article IV(1), before turning to Iran's claims under the "most constant protection and security" and expropriation limbs of the minimum standard of treatment, as embodied in Article IV(2).

Section B: The United States Did Not Breach Article IV(1)

14.11 Article IV(1) provides as follows:

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

14.12 Although Iran argues that Article IV(1) provides "three discrete but related protections,"[358] Iran misinterprets the provision. As noted above and explained in more detail below, the first clause of Article IV(1) encompasses the obligation not to deny justice, while the second and third clauses inform how this obligation is to be interpreted and applied. The three clauses are thus intimately related, not discrete.

14.13 Iran's claims under Article IV(1) hinge on its misinterpretation of this provision and should be dismissed for this reason alone.

i. <u>The "Fair and Equitable Treatment" Clause in Article IV(1) Prohibits the Denial of Justice</u>

14.14 There is no dispute that the fair and equitable treatment obligation prohibits the denial of justice.[359] Iran, however, argues that the obligation also prohibits any conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic," "discriminatory," and/or "defeats the legitimate expectations of Iranian nationals and companies."[360] Iran's expansive reading of this clause is wrong, however. While the obligation not to deny justice has crystallized as part of the customary international law minimum standard of treatment, the three other obligations that Iran seeks to ground in Article IV(1) have not.

14.15 Iran's interpretation relies heavily on the arbitral tribunal's decision in *Waste Management, Inc. v. United Mexican States*, a decision interpreting the North American Free

[358] Iran's Memorial, ¶ 5.19.

[359] *Id.*, ¶ 5.26.

[360] *Id.*, ¶ 5.26.

Trade Agreement (NAFTA). Indeed, *Waste Management* is the only authority Iran cites for the test that it would have the Court apply in assessing the challenged measures.[361] In the submission of the United States, the *Waste Management* tribunal's test does not accurately reflect the fair and equitable treatment obligation under customary international law's minimum standard of treatment.[362] The decision fails to ground its test in a review of state practice and *opinio juris*, relying instead on other arbitral awards issued in investor-state dispute settlement proceedings.

14.16 As the Court has held, international law results from a general and consistent practice of States that they follow out of a sense of legal obligation.[363] Relevant State practice must be widespread and consistent[364] and accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation.[365] The twin requirements of State practice and *opinio juris* "must *both* be identified . . . to support a finding that a relevant rule of customary international [law] has emerged."[366]

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[361] Iran's Memorial, ¶ 5.27 n.265.

[362] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶¶ B.1, B.2 (July 31, 2001) **(U.S. Annex 150)** (issuing a binding interpretation pursuant to NAFTA Article 1131 that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens" and that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by [that standard].").

[363] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 1969 I.C.J. 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13, 29-30 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]").

[364] *See, e.g.*, *North Sea Continental Shelf*, 1969 I.C.J. at 43 (noting that in order for a new rule of customary international law to form, "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 9 and commentaries (May 22, 2014) (A/CN.4/672) (citing authorities).

[365] *North Sea Continental Shelf*, 1969 I.C.J. at 44 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."); ILC Second Report on the Identification of Customary International Law, Draft Conclusion 10 with commentaries (May 22, 2014) (A/CN.4/672) (citing authorities) **(U.S. Annex 152)**.

[366] ILC Second Report on the Identification of Customary International Law ¶¶ 22-23 **(U.S. Annex 152)** (citing these requirements as "indispensable for any rule of customary international law properly so called") (emphasis added).

14.17 The Court has articulated examples of the types of evidence that can be used to demonstrate that a rule of customary international law exists, most recently in its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*).[367] In that case, the Court emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[368]

14.18 Apart from the requirement to refrain from unreasonable or discriminatory measures in the context of a denial of justice, Iran has identified no such State practice or *opinio juris*, and the United States is aware of none, for the broad proposition that there are independent and generalized obligations for States to refrain from arbitrary conduct, discrimination, or the defeat of legitimate expectations in all economic contexts. Thus, to the extent Iran's claims rely on the United States' alleged breach of these three supposed obligations, rather than on the obligation not to deny justice, they must be dismissed.

14.19 Indeed, there is recent authority from the Court that casts doubt on the notion that the supposed doctrine of legitimate expectations, referred to by some investment arbitral tribunals as part of the fair and equitable treatment obligation, is part of general international law.

14.20 In *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Bolivia argued that Chile had violated the supposed doctrine of legitimate expectations by not further negotiating with Bolivia regarding the restoration of Bolivia's access to the sea. Chile rejected the notion that any such doctrine existed.[369] The Court agreed with Chile, stating:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's

[367] *Jurisdictional Immunities of the State*, 2012 I.C.J. at 120-22, ¶¶ 50-55.

[368] *Id.*, at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdiction immunity in foreign courts).

[369] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 2018 I.C.J. 50, ¶¶ 160-61 (Judgment of Oct. 1).

> argument based on legitimate expectations thus cannot be sustained.[370]

14.21 The United States submits that no doctrine of legitimate expectations exists as a component element of "fair and equitable treatment"[371] under customary international law that gives rise to an independent host State obligation.[372] The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations, and Iran submitted no evidence to the contrary.

14.22 In any event, to the extent the Court would determine that such a rule does exist under customary international law, any such rule would not apply to the United States,[373] as the United States has been a persistent objector to such a rule.[374]

14.23 Thus, for Iran's claims under Article IV(1) to succeed, it must establish that the challenged measures have resulted in a denial of justice.

ii. The Clauses Concerning "Unreasonable or Discriminatory Measures" and "Effective Means" in Article IV(1) Are Not Independent Obligations, but rather Are Subsumed within the Obligation Not to Deny Justice

14.24 The second and third clauses of Article IV(1) require respectively that a Party refrain from applying unreasonable or discriminatory measures to the extent they would impair legally acquired rights and interest, and assure lawful contractual rights are afforded effective means of enforcement. As discussed in the following sections, these clauses do not set forth

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[370] *Obligation to Negotiate Access*, 2018 I.C.J. at ¶ 162.

[371] In the expropriation context, however, the United States does recognize that "legitimate expectations" is a factor to help distinguish between non-compensable regulatory actions and an indirect expropriation.

[372] *See* PATRICK DUMBERRY, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105, at 158-59 (2013) **(U.S. Annex 153)** ("In the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations.").

[373] *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. 115, 131 (Dec. 18) ("In any event the ten mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.").

[374] The United States has consistently opposed this putative rule both as a respondent and as a non-disputing Party in investor-State proceedings. *See e.g.*, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 216 (Sept. 19, 2006) **(U.S. Annex 145)**; *Lone Pine Resources Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Submission of the United States of America, ¶ 26 (Aug. 16, 2017) **(U.S. Annex 154)**; *Italba Corp. v. The Oriental Republic of Uruguay*, U.S.-Uruguay BIT/ICSID Case No. ARB/16/9, Submission of the United States of America, ¶¶ 24-25 (Sept. 11, 2017) **(U.S. Annex 155)**.

independent obligations, but rather inform how the obligation in the first clause is to be interpreted. They are thus subsumed within the denial of justice obligation.

(a) The "Unreasonable or Discriminatory Measures" Clause Is Part of the Protection against Denial of Justice

14.25 Although Iran argues that the second clause of Article IV(1), the "unreasonable or discriminatory measures" clause, is a "further obligation" on the Parties,[375] this clause, properly interpreted, instead informs how the denial of justice obligation is to be interpreted. Indeed, it is well-established that non-discrimination is a principle encompassed within the denial of justice obligation, whether through access to judicial remedies or treatment by the courts.[376] Further, "unreasonable," as used in the context of the denial of justice obligation must be understood in terms of the high threshold required to establish a violation of the denial of justice obligation and the due regard international law gives to the principle of judicial independence, as described in more detail below in Section B.iii.

(b) The "Effective Means" Clause Is Part of the Protection against Denial of Justice

14.26 Iran also asserts that the third clause of Article IV(1) – which states that each Party shall assure that the "lawful contractual rights" of the other Party's companies and nationals "are afforded effective means of enforcement, in conformity with the applicable laws" – "is not merely a restatement of the prohibition on denial of justice," but rather "is a provision of broader scope, that requires a judicial framework that positively enables effective means of enforcement in conformity with the applicable laws."[377] According to Iran, this in turn requires the United States to permit Iran's companies "effective reliance upon rights" such as

[375] Iran's Memorial, ¶ 5.37.

[376] *See, e.g.*, C.F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 243 (1967) **(U.S. Annex 151)** ("Especially in a suit between State and alien it is imperative that there should be no discrimination between nationals and aliens in the imposition of procedural requirements. The alien cannot be expected to undertake special burdens to obtain justice in the courts of the State against which he has a complaint."); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 334 (1919) **(U.S. Annex 128)** (A national's "own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice."); *Report of the Guerraro Sub-Committee of the Committee of the League of Nations on Progressive Codification 1*, League of Nations Doc. C.196M.70, at 100 (1927) **(U.S. Annex 156)** ("Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, *although in the circumstances nationals of the State would be entitled to such access*.") (emphasis added).

[377] Iran's Memorial, ¶ 5.41.

recognition of juridical personality "in the context of the enforcement" of their contractual rights.[378]

14.27 In fact, when properly understood, the "effective means in conformity with applicable laws" clause articulates a specific – and, for the drafters of the Treaty in 1955, an important – element of the protection against denial of justice. The text of the clause makes clear that it applies to "lawful contractual rights." Enforcement of contractual rights naturally occurs through the judicial system of a Party, and indeed Iran agrees that the clause applies to the "judicial framework" of the host State. Moreover, as there is a variation in judicial systems worldwide, individual States can provide for the judicial enforcement of contractual rights in different ways; indeed, the Treaty should be assumed to respect the customary international law principles of judicial independence and deference to the decisions of domestic courts. This clause simply requires that the system that a State chooses "afford[s] effective means" of enforcing such rights. As an obligation with respect to the judicial system of a Party, the effective means clause thus is a component of the obligation not to deny justice (as further discussed below). Iran is therefore wrong to say that the effective means clause is not a component of the denial of justice obligation.

14.28 The applicable rules of international law establish that the Parties intended this clause to affirm and add clarity to a subset of the principles associated with the concept of denial of justice.[379] Denial of justice includes both substantive and procedural minimum standards of treatment.[380] The tribunal in the *Ambatielos* case broadly described the procedural aspect of the law on denial of justice:

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[378] Iran's Memorial, ¶¶ 5.41, 5.51.

[379] *See* Vienna Convention, art. 31(1), art. 31(3)(c) ("There shall be taken into account, together with context . . . [a]ny relevant rules of international law applicable in the relations between the parties.").

[380] *See* Institut de Droit International, *Resolution on the International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners* (1927), reproduced in *Documents of the Eighth Session Including The Report of The Commission to The General Assembly* (1956) 2 Y.B. Int'l L. Comm'n 228, U.N. Doc A/CN.4/SER.A/1956/Add.1 **(U.S. Annex 160)** (observing that denial of justice may occur where (i) tribunals that are necessary to assure protection do not exist or do not function; (ii) such tribunals are not accessible to foreigners; or (iii) those tribunals do not offer guarantees that are indispensable for the proper administration of justice); *Azinian v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/97/2, Award ¶¶ 102-103 (Nov. 1, 1999) **(U.S. Annex 161)** ("A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law."). *See also* ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 69 (1938, *reprinted* 1970) **(U.S. Annex 127)** ("The faculty of prosecuting an action before the local courts is an inescapable and essential corollary of the alien's substantive rights without which they would be hopelessly incomplete and meaningless."); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 180 (2d. ed. 2012) ("In principle, a host state is

> The foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[381]

As is evident from the interpretive analysis provided above, "effective means" is intended to encapsulate many of these procedural elements of the protection against denial of justice.[382]

14.29 This obligation to provide "effective means" for enforcement of contractual rights has also been historically considered a component of the customary international law protection against denial of justice.[383] For example, in 1926 the Committee of Experts for the Progressive Codification of International Law, convened under the auspices of the League of Nations, concluded in their report that a State's duty to protect foreign nationals within its territory includes the obligation to provide "the necessary means for defending their rights," and further noted that "these means can only be such as are made available by the laws and courts of the

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under an obligation to establish a judicial system that allows the effective exercise of substantive rights granted to foreign investors.") **(U.S. Annex 163)**.

[381] *Ambatielos Claim (Greece v. United Kingdom)*, 23 I.L.R. 306, 325 (March 6, 1956) **(U.S. Annex 121)**. *See also* ANDREAS ROTH, MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 185 (1949) **(U.S. Annex 164)** (including in a list of minimum requirements that states must extend to aliens under international law, certain "procedural rights," including "freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, [and] the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.")

[382] The first procedural element enumerated in the *Ambatielos* Award, relating to access to the courts, is encapsulated by Article III(2) of the Treaty, and is likewise a component of the more general protection against denial of justice. *See* Section B.iii.

[383] Indeed, as the Special Rapporteur of the International Law Commission has observed: "Denial of justice . . . is inextricably linked with many features of the local remedies rule, including that of ineffectiveness, and as such may be said to have a secondary character. . . . [I]t [i.*e.*, ineffectiveness] may be seen as a secondary rule when it excuses recourse to further local remedies and as a primary rule when it gives rise to international responsibility. . . . [T]he local remedies rule and denial of justice are historically intertwined." John Dugard (Special Rapporteur on Diplomatic Protection), *Third Report on Diplomatic Protection*, ¶¶ 21-22 U.N. Doc. A/CN.4/523 (March 7, 2002) **(U.S. Annex 168)**. *See also* FREEMAN at 407 **(U.S. Annex 127)** ("With respect to original violations of international law prior to and unconnected with the administration of justice, [the local remedies rule] is a *procedural* condition precedent to diplomatic interposition. With respect to wrongful acts by private persons, it enjoys the *substantive* faculty of creating responsibility where local remedies function defectively, i.e., in the case of inadequate judicial protection."). However, the "effective means" under the local remedies rule and denial of justice diverge in that the former standard may be met in absence of defective judicial protection, for instance, where the courts lack personal jurisdiction, a statute of limitation applies to the claim or there is a well-established line of precedent averse to the claimant.

country and by the authorities responsible for public order and security."[384] Four years later, the United Kingdom proposed a definition of denial of justice that included where a foreign national "is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals."[385] The same obligation is reflected in the 1929 Harvard Law School draft codification of international law relating to the treatment of foreigners, which provides that foreign nationals must have "*effective means* of redress for injuries" that is at least on equal footing to that provided to nationals under domestic law.[386] Around the same time, Alwyn Freeman wrote that "every State is bound to possess a judicial organization guaranteeing that lawsuits will be impartially and competently adjudicated," and in particular, that the "procedural apparatus which is set up must . . . provide the alien . . . with *effective means* for the pursuit of his right[s]."[387]

14.30 More recently, the Inter-American Court of Human Rights has recognized that the right to "effective recourse" under Article 25(1) of the American Convention on Human Rights is closely intertwined with the protection against denial of justice.[388] In a 1987 Advisory Opinion, the court found that Article 25(1) "incorporates the principle . . . of the effectiveness of the procedural instruments or means designed to guarantee . . . rights."[389] It further found that recourse to the domestic judicial system is ineffective where "the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; *or in any other situation that constitutes a denial of justice*, as when there is an unjustified

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[384] Committee of Experts for the Progressive Codification of International Law, Annex Report of Sub-Committee, League of Nations Doc. *reprinted* in FREEMAN at 632 (1926) **(U.S. Annex 127)**.

[385] *Acts of Conference for the Codification of International Law, held at The Hague from March 13th to April 12th, 1930, Minutes of the Third Committee, 9th Meeting, Consideration of Bases for Discussion Nos. 5 and 6*, League of Nations Doc. C.351(c).M145(c).1930.V. (1930), *reprinted* in FREEMAN at 664 **(U.S. Annex 127)**.

[386] *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 131, 147 (No. 2 SUPPLEMENT: CODIFICATION OF INTERNATIONAL LAW) (Apr. 1929) (hereinafter "Harvard Draft Articles") (emphasis added) **(U.S. Annex 169)**.

[387] FREEMAN at 135 (emphasis added) **(U.S. Annex 127)**.

[388] Article 25 (1) of the Convention reads: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." American Convention on Human Rights art. 25(1), Nov. 22, 1969, 1144 U.N.T.S. 143.

[389] *Judicial Guarantees in States of Emergency,* Advisory Opinion (OC-9/87) Inter-Am. Ct. H.R. (ser. A) No. 3 (ser. A) No. 9, ¶ 24, (Oct. 6, 1987) **(U.S. Annex 170)**.

delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy."[390]

14.31 Given that effective means of enforcement is one of the subsidiary duties under customary international law to protect foreign nationals against a denial of justice, a claim that a host State has failed to provide effective means must satisfy the same requirements as a claim for denial of justice that are described in the next section. Therefore, not only must Iran establish the express requirements under the ordinary meaning of the Treaty's "effective means" clause, but Iran must also overcome the high threshold for establishing a denial of justice claim, including the requirements of exhaustion and due deference to the decisions of the U.S. courts in the interpretation and application of U.S. law.

14.32 The "unreasonable or discriminatory" and "effective means" clauses in Article IV(1) are subsumed within the denial of justice obligation, and are not independent obligations. It follows that the United States could not breach either of these clauses in the absence of a breach of the obligation not to deny justice. For the reasons explained in the next section, Iran has failed to establish any such breach.

iii. The United States Has Not Denied Justice to Any Iranian Nationals or Companies

14.33 In this section, the United States demonstrates that establishing a claim for denial of justice requires a claimant to meet a high threshold and, furthermore, that Iran has failed to meet that threshold with respect to any of the challenged measures.

(a) Legal Standard

14.34 Denial of justice in its "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[391] A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously

[390] *Id.* (emphasis added) **(U.S. Annex 170)**.

[391] BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 330 **(U.S. Annex 128)**; J.L. BRIERLY, THE LAW OF NATIONS 286-87 (Sir Humphrey Waldock ed., 6th ed.) (1963) **(U.S. Annex 172)** (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

unjust"[392] or "egregious"[393] administration of justice "which offends a sense of judicial propriety."[394]

14.35 More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[395] A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust.[396] To be manifestly unjust a court decision must "amount[] to an outrage, bad faith, willful neglect of duty, or an insufficiency of governmental action recognizable by every unbiased [person]."[397] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process.[398] However, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[399]

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[392] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (hereinafter "PAULSSON") (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) **(U.S. Annex 173)**; *B.E. Chattin (United States v. Mexico)*, 4 R.I.A.A. 282, 286-87 (General Claims Commission 1927) **(U.S. Annex 174)** ("Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

[393] PAULSSON at 60 **(U.S. Annex 173)** ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[394] *The Loewen Group, Inc. v. United States,* NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) **(U.S. Annex 175)** (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"); *Mondev International Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002) **(U.S. Annex 176)** (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); *see also generally Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, 144 (Separate Opinion of Judge Tanaka) (Feb. 5) ("[D]enial of justice occurs in the case of such acts as – 'corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, . . . But no merely erroneous or even unjust judgment of a court will constitute a denial of justice.'") (citations omitted).

[395] Harvard Draft Articles at 134 **(U.S. Annex 169)**.

[396] Harvard Draft Articles at 178 **(U.S. Annex 169)** (noting that a "manifestly unjust judgment" is one that is a "travesty upon justice or grotesquely unjust").

[397] *B.E. Chattin*, 4 R.I.A.A. at 295 **(U.S. Annex 174)**.

[398] Harvard Draft Articles at 175 **(U.S. Annex 169)**.

[399] *Id*. at 134 **(U.S. Annex 169)** ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 **(U.S. Annex 173)** ("The erroneous application of national law cannot, in itself, be an international denial of justice."); DUMBERRY at 229 **(U.S. Annex 153)** (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice); EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 196 (1919) **(U.S. Annex**

14.36 The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[400] the particular nature of judicial action,[401] and the unique status of the judiciary in both international and municipal legal systems. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice. In this connection, it is well established that international tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law.[402]

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128) ("[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, *State Responsibility for the Decisions of National Courts, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) **(U.S. Annex 177)** ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

[400] *See e.g., Barcelona Traction*, 1970 I.C.J. at 154 (Separate Opinion of Judge Tanaka) ("One of the most important political and legal characteristics of a modern State is the principle of judicial independence."). Judge Tanaka went on to explain that what distinguishes the judiciary from other organs of government is the "social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute)." *Id*. at 155.

[401] *See, e.g.,* Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L. & COMP. L.Q. 867, 876, 878 (2014) **(U.S. Annex 178)** ("[The] rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body "cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

[402] *Apotex Inc. v. United States,* NAFTA/UNCITRAL, Award ¶ 278 (June 14, 2013) **(U.S. Annex 179)** ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); *Robert Azinian et. al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 99 (Nov. 1, 1999) **(U.S. Annex 161)** ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."); *Barcelona Traction*, 1970 I.C.J. at 158 (Separate Opinion of Judge Tanaka) (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law "does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a '*cour de cassation*,' the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs."); *Mohammad Ammar Al Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability ¶ 237 (Sept. 2, 2009) **(U.S. Annex 180)** ("[I]t is not

14.37 It is equally well established that the international responsibility of States may not be invoked with respect to non-final judicial acts,[403] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. While acts of State organs, including acts of State judiciaries, are attributable to the State,[404] there will be a breach of Article IV(1) based on judicial acts (*e.g.*, denial of justice) only if the justice system of the State *as a whole* (*i.e.*, until there has been a decision of the court of last resort available) produces a denial of justice.[405, 406]

(b) Iran's Denial of Justice Claim Fails

14.38 Iran argues that the United States breached the obligation not to deny justice to Iranian companies on four grounds, devoting only a single sentence to each.[407] As explained below, Iran has not established a denial of justice on any of its four grounds.

14.39 First, Iran argues that Bank Markazi was denied the right to raise and be granted an immunity defense.[408] As discussed in Chapter 2, the Court rejected this argument in its

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the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant's claim of denial of justice."); PAULSSON at 82 **(U.S. Annex 173)**.

[403] *See* PAULSSON at 108 **(U.S. Annex 173)** ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); DOUGLAS at 868 **(U.S. Annex 178)** ("[I]nternational responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.").

[404] Int'l Law Comm'n Articles on Responsibility of States for Internationally Wrongful Acts, art. 4(1) **(U.S. Annex 181)** ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").

[405] Int't Law Comm'n, Draft Articles on State Responsibility for Internationally Wrongful Acts, With Commentary, Ch. II, cmt. 4, U.N. Doc. A/56/10 **(U.S. Annex 182)** (noting that the fact that conduct can be attributed to the State "says nothing . . . about the *legality* or otherwise of the conduct") (emphasis added); James Crawford (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, ¶ 75, U.N. Doc. A/CN.4/498 (July 19, 1999) **(U.S. Annex 183)** ("There are . . . cases where the obligation is to have a *system* of a certain kind, *e.g.* the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.") (emphasis in original).

[406] In this regard, the need to exhaust local remedies as part of a denial of justice claim is a requirement that a claimant must prove as part of the merits of its claim, unlike the exhaustion requirement discussed above in Chapter 10, which is a procedural requirement necessary to bring a claim. *The Loewen Group, Inc v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶¶ 143, 156 (June 26, 2003) **(U.S. Annex 175)**.

[407] Iran's Memorial, ¶ 5.46.

[408] *Id.,* ¶ 5.46(a).

Preliminary Objections Judgment, explaining that "the Court does not consider that the requirements of Article IV, paragraph 1, include an obligation to respect the sovereign immunities of the State and those of its entities which can claim such immunities under customary international law."[409] Thus, this argument for a denial of justice must be dismissed for lack of jurisdiction. Indeed, given the Court's decision that Article IV(1) does not include an obligation with respect to Iran's sovereign immunities,[410] none of the portions of the statutes Iran invokes dealing with sovereign immunity may serve as a ground for any alleged breach of Article IV(1) or (2).[411]

14.40 Iran's second and third grounds are related. Iran argues that certain Iranian companies were denied the right to raise and be granted a defense based on the recognition of having separate juridical personalities[412] and were "made liable" for the wrongful acts of the Iranian State in proceedings to which the companies were not a party.[413] First, as a technical matter, the relevant companies were not subject to liability imposed on the Iranian State; rather, the measures in question simply meant that the companies' assets could be attached and executed against to satisfy the *Iranian State's* liability under terrorism judgments. In any event, Iran has not shown how the U.S. courts' application of legislation allowing the assets of agencies and instrumentalities of a state sponsor of terrorism such as Iran to satisfy a terrorism-related judgment rendered against the State amounts to a denial of justice. Specifically, Iran has not shown that any of the proceedings about which it complains amounted to (i) an obstruction of access to courts; (ii) a failure to provide those guarantees which are generally considered indispensable to the proper administration of justice; or (iii) a manifestly unjust judgment. Nor could it.

14.41 To the contrary, Iran hired U.S. counsel and made arguments carefully considered by the courts, as reflected in their decisions. Iran ignores this, resorting to broad brush arguments, without regard to the facts of specific cases. For example, Iran fails to acknowledge that U.S. courts denied attachments in some cases, such as *Rubin v. Islamic Republic of Iran*, which was

[409] Preliminary Objections Judgment, ¶ 74.

[410] *Id.*, ¶¶ 74, 80.

[411] Thus, the immunity provisions that Iran complains about in the following statutes are no longer part of Iran's claim: the (i) Antiterrorism and Effective Death Penalty Act (Iran's Memorial, ¶¶ 2.4-2.8) (ii) Terrorism Risk Insurance Act of 2002 (TRIA) (*Id.*, ¶¶ 2.11-2.15); (iii) National Defense Authorization Act for Fiscal Year 2008 (*Id.,* ¶¶ 2.16-2.33); (iv) Iran Threat Reduction and Syria Human Rights Act of 2012 (*Id.,* ¶¶ 2.38-2.43).

[412] Iran's Memorial, ¶ 5.46(b).

[413] *Id.*, ¶ 5.46(c).

brought before the U.S. District Court for the Northern District of Illinois (a trial court). In *Rubin*, plaintiffs sought to attach and execute against property that consisted of artifacts held by the University of Chicago, to satisfy a default judgment entered against Iran. Applying relevant U.S. law, including some of the measures Iran has invoked as the basis for its claims, the court ruled in Iran's favor and denied the attachment effort.[414] The plaintiffs then appealed to the U.S. Court of Appeals for the Seventh Circuit, and that court also ruled in Iran's favor.[415] Finally, the plaintiffs appealed to the U.S. Supreme Court, which also ruled in Iran's favor, and property was later transported back to Iran.[416] It is inconceivable that *Rubin* could give rise to a denial of justice claim, and yet Iran is nevertheless pursuing a claim based on this case (as is evident from its inclusion in Iran's Attachment 2).

14.42 Iran has submitted no authority suggesting that it is a denial of justice to allow plaintiffs with terrorism-related judgments against a state sponsor of terrorism such as Iran to attach the assets of one of the State's agencies or instrumentalities in order to satisfy that judgment.

14.43 To the contrary, the corporate form is not inviolable, as this Court ruled in *Barcelona Traction* when it was discussing a claim brought in the context of diplomatic protection:

> Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. *Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes*. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges

[414] *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003, 1005-06 (N.D. Ill. 2014) **(U.S. Annex 184)**.

[415] *Rubin. v. Islamic Republic of Iran*, 830 F.3d 470, 489 (7th Cir. 2016) **(U.S. Annex 185)**.

[416] *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 827 (2018) **(U.S. Annex 75)**. At the time Iran filed its Memorial the first two courts had ruled in Iran's favor, although the U.S. Supreme Court had yet not ruled. Now that the U.S. Supreme Court has ruled in Iran's favor, the United States expects that Iran will withdraw all its claims with respect to the *Rubin* litigation.

> of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[417]

14.44 Indeed, both common law and civil jurisdictions allow for the corporate veil to be pierced.[418] As Mr. Albert Badia (a lawyer in Spain and a solicitor in England and Wales) writes in his treatise entitled *Piercing the Veil of State Enterprises in International Arbitration*, veil-piercing has a long history in municipal law,[419] including not just by courts but by legislation.[420] In municipal law, "[t]he concept of 'piercing the corporate veil' is equitable in nature and courts will pierce the corporate veil 'to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.'"[421] When it occurs, it can result in the assets of one entity being used to satisfy a liability that resulted from the malfeasance of another entity,[422] which is what the relevant U.S. measures authorized.

14.45 In the present case, the measures taken by the United States provide redress for victims of terrorism by allowing the attachment of assets of state-owned agencies and instrumentalities to satisfy judgments against state sponsors of terrorism – in this case against Iran. As set out in Chapter 5, Iran supported and directed acts of terrorism targeted against U.S. nationals and U.S. interests. It has failed to provide redress for the victims of these acts and avoided being held accountable. Iran failed to appear in the proceedings leading to the liability decisions, and has failed to pay any portion of the judgments obtained by its victims. Under these circumstances, it was both reasonable and justified to allow victims holding terrorism-related judgments against Iran to attach assets of Iran's agencies and instrumentalities "to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability."[423]

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[417] *Barcelona Traction,* 1970 I.C.J. at 39, ¶ 56 (emphasis added).

[418] Cheng-Han Tan et al., *Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives*, 16 BERKELEY BUS. L.J. 140, 140 (2019) **(U.S. Annex 140)** (discussing piercing the corporate veil in England, Singapore, Germany, China and the United States); ALBERT BADIA, PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 48-49 (2014) **(U.S. Annex 186)**.

[419] BADIA at 55-59 **(U.S. Annex 186)**.

[420] *Id.*, at 58 **(U.S. Annex 186)**.

[421] *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1376 (Fed. Cir. 1999) (quoting 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, § 41.20, at 598-601, 603 (Perm. Ed. 1999)) **(U.S. Annex 187)**.

[422] Cheng-Han Tan et al., *Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives*, 16 U.C. BERKELEY BUS. L.J. 140, 140-41 (2019) **(U.S. Annex 140)**.

[423] *In re Cambridge Biotech Corp.*, 186 F.3d at 1376 **(U.S. Annex 187)**.

14.46 The fourth and final ground Iran relies on in an attempt to establish its denial of justice claim is that Iran's ability to rely on three defenses (*res judicata*, limitation of actions and collateral estoppel) in U.S. courts was removed retroactively.[424] As a preliminary matter, these defenses were eliminated only to the extent that they are brought in an action under the Foreign Sovereign Immunities Act (FSIA) under Section 1605A of Title 28 of the U.S. Code, as expressly acknowledged by Iran.[425] This provision involves an exception to immunity from suit in U.S. courts for state sponsors of terrorism. Thus, this ground can no longer be part of Iran's claims, given the Court's earlier ruling that sovereign immunity is not included within the scope of Article IV(1).[426]

14.47 In any event, Iran has provided no basis for its position that a State is obligated under customary international law to provide these three defenses to litigants in connection with a denial of justice claim or otherwise. In addition, merely because a measure has retroactive application does not make the measure a denial of justice.

14.48 This is demonstrated by the *National & Provincial Building Society et al. v. United Kingdom* case from the European Court of Human Rights (ECtHR), which rejected claims by three building societies that the United Kingdom had, through *retroactive* legislation concerning tax rates: (i) deprived them of their right of access to a court for a determination of their civil rights in violation Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention);[427] (ii) sought to legalize an expropriation by depriving the societies of their legal rights to recover expropriated funds in violation of Article 1 of Protocol No. 1 to the Convention;[428] and (iii) had further violated both these provisions in conjunction with Article 14 of the Convention, which provides that the rights of the Convention shall be secured without discrimination.[429] With respect to the last claim, the three building societies noted that a fourth building society had not been made subject to the retroactive legislation,[430] and argued that this fourth building society was in a materially identical situation.

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[424] Iran's Memorial, ¶ 5.46(d).

[425] *Id.,* ¶ 2.26 (relying on the National Defense Authorization Act (NDAA) for Fiscal Year 2008, and noting (correctly) that this provision operates in FSIA cases).

[426] Preliminary Objections Judgment, ¶¶ 74, 80.

[427] *See National & Provincial Building Society et al. v. United Kingdom* (117/1996/736/933-935), Judgment ¶ 93 (Oct. 23, 1997) **(U.S. Annex 188)**.

[428] *Id.*, ¶ 52 **(U.S. Annex 188)**.

[429] *Id*., ¶ 49 **(U.S. Annex 188)**.

[430] *Id*., ¶¶ 33-34 **(U.S. Annex 188).**

As such, the three building societies contended that the United Kingdom had breached Article 14 (anti-discrimination) in conjunction with Articles 6(1) and Article 1 to Protocol No. 1.[431]

14.49 The ECtHR rejected all these claims,[432] even though all three building societies had already commenced legal proceedings, including judicial review, before the U.K. legislation had entered into force.[433] The ECtHR ruled that the U.K. authorities had "compelling public-interest motives" in enacting the legislation at issue because the challenge to the measures in question "created substantial uncertainty over . . . substantial amounts of revenue . . . ."[434] Further, the ECtHR determined that Article 6(1)'s mandate that "everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law"[435] could not be interpreted as meaning that the authorities had no right to take legislative action during pending legal proceedings.[436]

14.50 In sum, Iranian companies were not denied justice as a result of the challenged measures. Again, Iran has submitted no support for the proposition that it is a denial of justice to provide redress for victims of terrorism holding unpaid judgments against a state sponsor of terrorism by allowing them to enforce their judgments against the State's agencies and instrumentalities.

iv. <u>In Any Event, the U.S. Measures Were neither Unreasonable nor Discriminatory, and Iranian Nationals and Companies Had Effective Means to Enforce Their Lawful Contractual Rights</u>

14.51 Even if the second and third clauses of Article IV(1) could be read as independent obligations (rather than as components of the obligation not to deny justice), as Iran argues, Iran's claims would still fail because the challenged measures were neither unreasonable nor discriminatory, and Iranian nationals and companies were afforded effective means to enforce their lawful contractual rights, as discussed below.

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[431] *Id.*, ¶¶ 84-85, 114-15 **(U.S. Annex 188)**.

[432] *Id.,* ¶ 39 **(U.S. Annex 188)**.

[433] *Id*., ¶¶ 31-32, 38-41 **(U.S. Annex 188)**.

[434] *Id.,* ¶ 112 **(U.S. Annex 188)**.

[435] *Id.,* ¶ 93 **(U.S. Annex 188)**.

[436] *Id.*, ¶ 112 **(U.S. Annex 188)**.

(a) U.S. Measures Were Not Unreasonable: They Were a Peaceful Response to Iran's Support for Violent Terrorist Acts

14.52 By any standard the United States measures were not unreasonable. As explained in more detail in Chapter 5, Iran has a history of sponsoring terrorist bombings, assassinations, kidnappings and airline hijackings; and providing financial and other support for terrorism specifically targeting U.S. nationals and U.S. interests. The violence that Iran sponsored and directed has left many U.S. victims in its wake. The victims and their estates ultimately obtained judgments against Iran as a result, but Iran thwarted the satisfaction of the judgments. The U.S. measures that Iran complains of were a restrained response to Iran's sponsorship of these violent acts and evasion of its obligations as judgment-debtor, which enabled victims to be compensated for the harm caused by Iran's conduct.

14.53 Iran's Memorial makes only a cursory effort to show otherwise. Iran's argument that the challenged measures were unreasonable amounts to little more than a reiteration of the positions from the "fair and equitable treatment" argument in its Memorial, namely that the United States singled out Iran by (i) denying Iran an immunity defense, and (ii) disregarding the separate juridical personality of Iran's agencies and instrumentalities.[437] *First*, with respect to Iran's immunity argument, the Court has already ruled that a guarantee of sovereign immunity is not included within Article IV(1), and thus the lack of an immunity defense may not serve as a ground for a breach of this article.[438] *Second*, there is nothing unreasonable about permitting victims of Iran-sponsored terrorism to attach the assets of Iran's agencies and instrumentalities to enforce a lawfully obtained judgment against Iran where Iran itself has refused to satisfy the judgement or otherwise compensate its victims. *Third*, as discussed in the next section, the United States has not singled out the state-owned entities at issue in this case, but has instead accorded them treatment consistent with the treatment it has accorded to agencies and instrumentalities of other state sponsors of terrorism.

[437] Iran's Memorial, ¶ 5.48.

[438] Iran further argued that U.S. measures were arbitrary because as a consequence thereof, Iranian companies had been subject to the enforcement proceedings outside the United States. Iran's Memorial, ¶ 5.44(e). If anything, to the extent such actions are successful, this simply shows that the international community regards the judgment Iran complains about as valid. In any event, here Iran is complaining of measures from other States, for which the United States cannot be held responsible. *See Bridgestone Licensing Service & Bridgestone Americas v. Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶¶ 352-54 (Dec. 13, 2017) **(U.S. Annex 189)**.

(b) U.S. Measures Were Not Discriminatory: Companies of All State Sponsors of Terrorism Are Subject to Having Their Assets Used to Satisfy Judgments against the State

14.54 The policy goal behind the measures Iran challenges was to allow victims of terrorism to obtain compensation for their injuries. Although Iran variously contends that its companies were "singled out" or "targeted," this is simply not the case. For example, one measure Iran complains about is TRIA, and yet TRIA applies not just to Iran, but to any "terrorist party,"[439] which is defined to include any terrorists, terrorist organization (as that term is further defined in the Immigration and Nationality Act) and foreign states designated as state sponsors of terrorism.[440] Further, the 2008 NDAA applied to all state sponsors of terrorism, not just Iran.[441]

14.55 Indeed, for purposes of the U.S. provisions allowing agency and instrumentality assets to be attached to satisfy judgments against a state sponsor of terrorism, the United States treats Iranian agencies and instrumentalities the same as agencies and instrumentalities of other state sponsors of terrorism.[442] They are subject to the same legislative provisions setting out the legal framework for attachment in satisfaction of judgments against terrorist parties and state sponsors of terrorism in particular.

14.56 The only exception to this is Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, which did not include state sponsors of terrorism other than Iran. The policy goal of this measure was, however, the same as the policy goal of all the other relevant measures, which was to allow victims of terrorist acts to obtain compensation from terrorist parties. Section 502 was one element of the overall legal regime, and the circumstances that led to this statute involved questions of New York law that were unique to assets at issue in the *Peterson* litigation, and Iran's deceptive financial conduct, including conduct involving assets in the *Peterson* litigation. The measure was not needed to obtain compensation for victims of any other terrorist party, and there is no reason to think that if

[439] TRIA, § 201(a) (IM Annex 13).

[440] TRIA, § 201(d)(4) (IM Annex 13).

[441] 2008 NDAA § 1083 (amending title 28 of the U.S. Code by adding § 1605A thereto, which applies to any state designated as a state sponsor of terrorism) (IM Annex 15).

[442] That Iran was treated the same as other state sponsors of terrorism is exemplified by the case of *Weininger v. Fidel Castro*, where a U.S. district court ruled that judgments against the Republic of Cuba (designated as a state sponsor of terrorism at the time) could be enforced against Cuban agencies or instrumentalities. *Weininger v. Fidel Castro*, 462 F. Supp. 2d 457, 495-97 (S.D.N.Y. 2006) **(U.S. Annex 193)**.

other terrorist parties were similarly situated, that a similar measure would not be applied to them.

14.57 Further, it is beyond dispute that not all differential treatment constitutes discrimination. Iran conceded this very point in its Memorial, stating that "there is an important distinction to be drawn between 'discrimination' and 'differential treatment.' . . . However, any differential treatment must not be based on unreasonable distinctions and demands."[443]

14.58 Investor-State arbitral tribunals interpreting the word "discriminatory" have also concluded that not all differential treatment constitutes discrimination. As one tribunal stated: "Treating different categories of subjects differently is not unequal treatment."[444] And as another tribunal reasoned when rejecting a claim of discrimination: "The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors."[445]

14.59 In the present case, the initial relevant category of subjects are all terrorist parties as defined above. Within this group States designated as sponsors of terrorism were subject to a different legal regime with respect to immunity from jurisdiction than other States. This difference is also reflected in the 2008 NDAA, which applied to all state sponsors of terrorism (not just Iran), and furthered the goal that applied to all terrorist parties, which was to require them to compensate their victims.

(c) Iran Has Failed to Prove that U.S. Measures Denied Its Companies Effective Means of Enforcement of Their Contract Rights

14.60 Finally, with respect to the "effective means" clause of Article IV(1), Iran has offered little guidance on what this clause would require if it were, in fact, an independent obligation, rather than a component of the obligation not to deny justice. Iran asserts that the "effective means" clause "is not merely a restatement of the prohibition on denial of justice," but rather "it is a provision of broader scope, that requires a judicial framework that positively enables effective means of enforcement in conformity with the applicable laws."[446] Yet, Iran does not

[443] Iran's Memorial, ¶ 5.31.

[444] *Metalpar S.A. & Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award ¶ 162 (June 6, 2008) (interpreting the bilateral investment treaty between Chile and Argentina) **(U.S. Annex 191)**.

[445] *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award ¶ 282 (May 22, 2007) (interpreting the bilateral investment treaty between the United States of America and Argentina) **(U.S. Annex 192)**.

[446] Iran Memorial, ¶ 5.41.

articulate in what respect this clause is "broader" than the protection against denial of justice under customary international law. But even if the Court were to accept Iran's contention that the "effective means" clause is somehow broader than the protection against denial of justice, Iran still must establish each element of this clause based upon the ordinary meaning of its text. Specifically, Iran must (1) identify the specific contractual rights that are at issue, prove that (2) those rights belong to an Iranian company; (3) those rights comply with U.S. law; and (4) the Iranian company sought to enforce those rights in proceedings before the U.S. courts and was denied the ability to do so as a result of one of the challenged measures. Iran has failed to do this.

14.61 To conclude the discussion of Article IV(1), Iran has misconstrued this provision as granting a host of protections that are not part of the customary international law minimum standard of treatment. Properly interpreted, the three clauses of Article IV(1) are limited to the obligation that each Party not deny justice to the other Party's companies and nationals. Iran's claims under Article IV(1) therefore fail because it has not established that any of the challenged measures meets the high threshold necessary to establish a denial of justice. In any event, even if the Court were to accept Iran's argument that the second and third clauses of Article IV(1) establish independent obligations beyond the obligation not to deny justice, Iran has not established that any of the challenged measures are in breach of such obligations.

Section C: The United States Did Not Breach Article IV(2)

14.62 Turning now to Article IV(2), Iran has asserted claims under each of its two limbs, neither of which has merit. First, Iran argues that the measures taken by the United States violate its obligation to provide Iranian companies with "the most constant protection and security."[447] Second, Iran contends that the measures constitute takings in breach of the conditions imposed by Article IV(2).[448] As will be discussed below, both of Iran's claims are based on a misinterpretation of Article IV(2). In particular, Iran seeks to have the Court read the obligation to provide "most constant protection and security" as barring changes to a Party's legal system that might affect property, an area far removed from the traditional scope of these types of provisions, which is the protection of property from physical harm. Iran has also misconstrued the takings limb of Article IV(2) as prohibiting the measures at issue here, which are, to the contrary, the type of non-discriminatory regulatory measures that are not ordinarily

[447] *Id.*, ¶¶ 5.58-5.59.

[448] *Id.*, ¶ 5.69.

deemed expropriatory. Finally, with respect to both limbs of Article IV(2), Iran's application of the treaty text to the challenged measures is comprised primarily of conclusory assertions that are insufficient to establish a breach. Accordingly, the Court should dismiss Iran's claims under Article IV(2).

14.63 The text of Article IV(2) is set out below:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

i. Iran's Interpretation of Article IV(2)'s Most Constant Protection and Security Obligation Is Flawed

14.64 Iran's claim under the "most constant protection and security" prong of Article IV(2) hinges on an expanded interpretation of that language that goes far beyond its intended scope and traditional bounds, which are limited to the level of police protection required under customary international law. Iran would have the Court find that "most constant protection and security" guarantees both "physical *and* legal protection," and in particular protection "against any executive or legislative measures formulated specifically to remove legal protections."[449] Iran's interpretation of the first sentence of Article IV(2) is ill-founded and the single authority that Iran provides in support of its position is inapposite. The Court should therefore reject Iran's attempt to expand "most constant protection and security" far beyond its intended scope and traditional bounds.

14.65 Provisions extending "most constant protection and security" or "full protection and security" to the persons or property of foreign nationals have traditionally been understood to require States to provide protection against physical harm.[450] Thus, awards and judicial

[449] *Id.*, ¶ 5.57.

[450] *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 162 (July 3, 2010) **(U.S. Annex 194)** ("Traditionally, courts and tribunals have interpreted the content of [the full protection and security] standard of treatment as imposing a positive obligation upon a host State to exercise due diligence to protect the investor and his property from physical threats and injuries, not as imposing an obligation to protect covered investments and investors from all injuries from whatever sources."); *BG Group Plc. v. Argentina*, Final Award ¶¶ 324, 326 (Dec. 24, 2007) **(U.S. Annex 195)**

decisions finding a breach of the customary international law obligation of full protection and security have typically involved a State's failure to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.[451]

14.66 Iran's sole support for its more expansive interpretation of Article IV(2)'s "most constant protection and security" provision is the Court's judgment in *Elettronica Sicula S.p.A. (ELSI)*.[452] Iran contends that the *ELSI* judgment "confirmed" the extension of "most constant protection and security" to "legal as well as physical protection."[453] The *ELSI* judgment, however, did nothing of the kind: the Court neither sustained a claim for breach of the "most constant protection and security" provision of the applicable treaty, the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States (the "U.S.-Italy FCN"), nor expressed a view on whether that provision required the parties to guard against threats other than physical harm.[454] The Court simply did not decide the interpretive issue that Iran has put before it here. *ELSI* is therefore no help to Iran.

("The Tribunal observes that notions of 'protection and constant security' or 'full protection and security' in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised. . . . The Tribunal is mindful that other tribunals have found that the standard of 'protection and constant security' encompasses stability of the legal framework applicable to the investment. . . . However, . . . the Tribunal finds it inappropriate to depart from the originally understood standard of 'protection and constant security'."); *Saluka Investments B.V. v. Czech Republic*, Partial Award ¶ 484 (Mar. 17, 2006) **(U.S. Annex 196)** ("The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 236 (2015) **(U.S. Annex 197)** ("Traditionally, tribunals have interpreted provisions guaranteeing protection and security as protecting investors and their investments from *physical* injury caused by the actions of host governments, their agents, or third parties.") (emphasis in original); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 8.114 (6th ed. 2015) **(U.S. Annex 198)** ("Arbitral tribunals have traditionally found breaches of the 'full protection and security' obligation in situations in which the host state failed to prevent physical damage to qualifying investments by not taking measures that fell within the normal exercise of governmental functions of policing and maintenance of law and order.").

[451] *See, e.g.*, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3, 32, ¶ 67 (May 24) (failure to protect foreign nationals from being taken hostage); *American Manufacturing & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award ¶ 3.04 (Feb. 21, 1997) **(U.S. Annex 199)** (failure to prevent "destruction of property located in [an] industrial complex . . . and the looting . . . by certain members of the Zairian armed forces," who "broke into the commercial complex and the stores, destroyed, damaged and carried away all the finished goods and almost all the raw materials and objects of value found on the premises."); *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award ¶ 82 (Dec. 8, 2000) **(U.S. Annex 200)** (failure to prevent seizure of and damage to two hotels); *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award ¶ 3 (Jun. 27, 1990) **(U.S. Annex 201)** (failure to prevent destruction of claimant's farm).

[452] Iran's Memorial, ¶ 5.57.

[453] *Id.*, ¶ 5.57.

[454] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15, 63-67, ¶¶ 102-112 (July 20).

14.67 The claims in *ELSI* arose out of actions taken by the Italian government in relation to a manufacturing plant in Palermo, Sicily, after the plant's owners decided to close it.[455] In response to concerns about the effect that the closure would have on "general economic public interest . . . and public order," the Mayor of Palermo issued an order requisitioning the plant.[456] Subsequent to the requisition order, ELSI's employees occupied the plant.[457] ELSI appealed the Mayor's requisition order to the Prefect of Palermo, who ruled that the requisition was illegal – but only after a delay of sixteen months, by which point ELSI had been forced to initiate bankruptcy proceedings and sell off its assets.[458]

14.68 The United States made two claims under the U.S.-Italy FCN's "most constant protection and security" provision, both of which the Court rejected.[459] First, the United States alleged that the Italian authorities committed a breach by failing to prevent ELSI's employees from occupying its plant. Second, the United States alleged an "unreasonable and unwarranted" delay by the Prefect of Palermo in ruling on ELSI's appeal from the requisition of the plant.[460] With respect to the Prefect's delay, the Court opined that "[i]t must be doubted whether in all the circumstances, the delay . . . can be regarded as falling below [the minimum international] standard."[461] Likewise, after noting that the requirement to provide constant protection and security "cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed," the Court concluded that the United States had failed to "establish[] that any deterioration in the plant and machinery was due to the presence of the workers."[462] Accordingly, "the protection provided by the authorities could

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[455] *Id*., at 30, ¶ 27.

[456] *Id.,* at 32, ¶ 30.

[457] *Id.*, at 33, ¶ 33.

[458] *Id.*, at 33, ¶ 32; 38-39, ¶¶ 41-42.

[459] The relevant treaty provision, Article V(1), reads: "The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. To these ends, persons accused of crime shall be brought to trial promptly, and shall enjoy all the rights and privileges which are or may hereafter be accorded by the applicable laws and regulations; and nationals of either High Contracting Party, while within the custody of the authorities of the other High Contracting Party, shall receive reasonable and humane treatment. In so far as the term 'nationals' where used in this paragraph is applicable in relation to property it shall be construed to include corporations and associations." *See ELSI*, 1989 I.C.J. at 63, ¶ 103.

[460] *ELSI*, 1989 I.C.J. at 65-66, ¶¶ 109-110.

[461] *Id.*, at 66, ¶ 111.

[462] *Id.,* at 65, ¶ 108.

not be regarded as falling below 'the full protection and security required by international law.'"[463]

14.69 As this discussion makes clear, the Court did not sustain a claim for breach of the "most constant protection and security" provision of the treaty between the United States and Italy and did not rule on whether that provision required the parties to protect against something more than physical harm. Accordingly, Iran's attempt to use *ELSI* as support for its interpretation of Article IV(2)'s first limb must fail.

14.70 To the extent Iran is suggesting that the Court implicitly endorsed an expansion of the "most constant protection and security" provision beyond its traditional scope, there is likewise no merit to that argument. Both aspects of the U.S. claim were rooted in an alleged failure to protect ELSI's physical assets, namely its plant and equipment. The Mayor of Palermo expressly justified his actions in requisitioning the plant and appointing a temporary manager, at least in part, as an effort to prevent "damage to the equipment and machinery" on the plant's premises[464] and the U.S. complaint was that these actions were inadequate – as shown by the plant's subsequent occupation by ELSI's employees – and also that it was effectively denied an opportunity to have them reviewed by the Italian authorities.

14.71 Nothing in *ELSI* could be read to support the expansive interpretation of Article IV(2)'s first sentence that Iran is putting forward in this case. Iran does not delineate the precise scope of its reading of the "most constant protection and security" provision, but the crux of its argument appears to be that this provision prohibits "any executive or legislative measures formulated specifically to remove legal protections."[465] In other words, Iran contends that any reduction or removal of "legal protections" that would otherwise apply to Iranian property should be considered a breach of Article IV(2)'s first sentence.

14.72 Iran's reading of the provision would effectively transform it into a guarantee that the legal framework applying to Iranian property must forever remain unchanged. This would allow for neither the natural evolution of the law – essentially an impossibility in any legal system – nor changes made as a result of intervening actions taken by Iran and its nationals. The *ELSI* judgment provides no support for the standard of protection that Iran is advocating.

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[463] *Id.*

[464] *Id.,* at 33, ¶ 31.

[465] Iran's Memorial, ¶ 5.57.

14.73 In sum, Iran's sole authority – the *ELSI* judgment – simply does not support its effort to expand the first sentence of Article IV(2) far beyond the traditional scope of protection from physical harm. The Court should therefore reject Iran's interpretation of this provision.

ii. The U.S. Measures Do Not Amount to a Denial of Most Constant Protection and Security under Article IV(2)

14.74 There is no allegation in this case that the property of Iranian companies has been subjected to physical invasion by criminal actors, let alone that any of the challenged U.S. measures exposed Iranian property to such an invasion. Accordingly, the challenged measures do not violate the traditional interpretation of the "most constant protection and security" standard. Thus, unless this obligation extends further, as Iran contends, Iran's claims must fail.

14.75 For the reasons explained in the previous section, however, the Court should reject Iran's attempt to expand "most constant protection and security" far beyond its traditional bounds. Iran has not referenced any authority that would justify the Court in concluding that the first sentence of Article IV(2) prohibits "any executive or legislative measures formulated specifically to remove legal protections."[466]

14.76 The Court should therefore dismiss Iran's claims under the first limb of Article IV(2) in their entirety.

iii. Iran's Interpretation of Article IV(2)'s Restrictions on the Taking of Property is Flawed

14.77 Iran's interpretation of Article IV(2)'s second limb, which imposes restrictions on the taking of property, is both flawed and supported almost entirely by bare assertions, rather than any authority. The Court should therefore reject it.

14.78 There are two primary flaws in Iran's interpretation of Article IV(2)'s second limb. The first is Iran's insistence that the Court must ignore the "nature of" the challenged measures in favor of focusing exclusively on their "impact."[467] This is not what Article IV(2) requires. To the contrary, while the degree of impact of a measure is part of the analysis under this limb of Article IV(2), it is also critically important for the Court to take into account the nature of the challenged measures and, in particular, to consider whether they are an expression of U.S.

[466] *Id*.

[467] *Id.*, ¶ 5.65(b), (c).

police powers.[468] It has long been understood that a *bona fide*, non-discriminatory regulation, enacted as an exercise of a State's police powers, will not be deemed expropriatory:

> State measures, prima facie lawful, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions such as quotas, revocation of licenses for breach of regulations, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.[469]

[468] UNCTAD Report, *Expropriation: A Sequel* at 78 (2012) **(U.S. Annex 202)** ("[i]t has long been accepted in international law that State acts are in principle not subject to compensation when they are an expression of the police powers of the State.").

[469] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 621 (8th ed. 2012) (internal citations omitted) **(U.S. Annex 203)**. Similar language has appeared in PRINCIPLES OF PUBLIC INTERNATIONAL LAW since the first edition, *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 432 (1st ed. 1966) **(U.S. Annex 204)**. *See also* Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 554 (1961) **(U.S. Annex 205)** (providing in Article 10(5) of the draft convention: "An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws, from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful . . . ."); *id.* at 561 (noting in the comment to Article 10(5) that "[b]y a taking or deprivation of property which is 'otherwise incidental to the normal operation of the laws of the State' is meant the carrying out of a judgment of a court in a civil case or a fine or penalty in criminal proceedings.").

14.79 This proposition is supported by state practice,[470] commentators,[471] and a number of arbitral awards.[472] Moreover, a State is entitled to significant deference in determining what measures are necessary to serve its chosen purpose, whether that is protecting public health, safety or some other legitimate end.[473]

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[470] *See, e.g.*, Ministerial Statement on the Multilateral Agreement on Investment, ¶ 5 (April 28, 1998) ("Ministers confirm that the MAI [Multilateral Agreement on Investment] must be consistent with the sovereign responsibility of governments to conduct domestic policies. The MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation."), *quoted in* UNCTAD Report, Expropriation: A Sequel at 81-82 (2012) **(U.S. Annex 202)**; Convention Establishing the Multilateral Investment Guarantee Agency, Article 11(a)(ii) **(U.S. Annex 206)** (permitting the Agency to guarantee investments against a loss resulting from "Expropriation and Similar Measures," which the Convention defines as "any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of nondiscriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 712, Comment (g) (1987) **(U.S. Annex 207)** ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.").

[471] *See, e.g.*, JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES at 327 (2d ed. 2015) **(U.S. Annex 197)** ("As numerous cases have indicated, in evaluating a claim of expropriation it is important to recognize a state's legitimate right to regulate and exercise its police power in the interests of public welfare. Such actions should not be confused with acts of expropriation."); KATIA YANNACA-SMALL, ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS – A GUIDE TO THE KEY ISSUES ¶ 22.09 (2d ed. 2018) **(U.S. Annex 208)** ("It is an accepted principle of customary international law that, where economic injury results from a bona fide non-discriminatory regulation within the police powers of the state, compensation is not required."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962) **(U.S. Annex 209)** ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property."); *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004/04, at 18 **(U.S. Annex 210)** ("The notion that the exercise of the State's 'police powers' will not give rise to a right to compensation has been widely accepted in international law.").

[472] *See, e.g.*, *Chemtura Corp. v. Canada*, Ad Hoc Tribunal (UNCITRAL), Award ¶ 266 (Aug. 2, 2010) **(U.S. Annex 211)** ("[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. . . . [T]he [Pest Management Regulatory Agency (of Canada)] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation."); *Saluka Investments B.V. v. Czech Republic*, Partial Award ¶ 255 (Mar. 17, 2006) **(U.S. Annex 196)** ("It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 103 (Dec. 16, 2002) **(U.S. Annex 212)** ("[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary law recognises this.").

[473] *See* Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 555-56 (1961) **(U.S. Annex 205)** ("It is not without significance that what constitutes a 'public purpose' has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be other than for a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy

14.80 Iran itself acknowledges this proposition but notes that it is not expressly reflected in the text of Article IV(2).[474] Whatever inference Iran seeks to have the Court draw from the absence in Article IV(2) of language articulating the boundary between compensable takings and non-compensable regulatory action, it is of no significance. Such a boundary is inherent in the concept of expropriation as it has developed in international law. Indeed, it could not be otherwise. If a State had an absolute duty to provide compensation for any action that affected the value of property or interests in property, the duty would effectively bar a wide range of critical governmental actions like taxation and regulations to promote public health.[475]

14.81 In considering the nature of the government action, the Court should also take into account the branch of government responsible for the act. In its Memorial, Iran attempts to erase any meaningful line between acts of the executive and legislative branches of government and acts of the judiciary in the Court's analysis of whether a taking has occurred in breach of Article IV(2), claiming they should all be treated the same.[476] Again, Iran has offered no authority for this reading of Article IV(2)'s second limb. To the contrary, decisions of domestic courts acting in the role of neutral and independent arbiters of legal rights should be considered separately from legislative and executive branch actions. Such decisions do not give rise to a claim for expropriation.

14.82 The second major flaw in Iran's interpretation of the takings provisions in Article IV(2) is that it understates the severity of the economic impact that a challenged measure must have on a property holder in order to support a successful expropriation claim. Specifically, while Iran concedes that "Article IV(2) requires some form of actual or substantial taking,"[477] this does not accurately state the applicable principle. Rather, Iran must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of the

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upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied."); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 332 (1962) **(U.S. Annex 209)** ("But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.").

[474] Iran's Memorial, ¶ 5.71.

[475] Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 561 (1961) **(U.S. Annex 205)** (noting that, if exercises of a State's police power were deemed expropriatory, "a State would be denied the means of depriving an alien of property, without compensation, under circumstances which are universally recognized as properly calling for such action.").

[476] Iran's Memorial, ¶ 5.64.

[477] Iran's Memorial, ¶ 5.65(b).

affected property, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[478] Put another way, the Court must first determine "if the [property holder] was radically deprived of the economical use and enjoyment of its [property], as if the rights related there . . . had ceased to exist."[479]

14.83 In sum, Iran's interpretation of Article IV(2)'s second limb ignores key elements that the Court must consider in assessing the challenged measures and understates the test for evaluating a measure's economic impact. For these reasons, the Court should reject it.

iv. The U.S. Measures Do Not Amount to an Unlawful Expropriation

14.84 Iran challenges a wide array of U.S. measures taken to respond to Iran's support for international terrorism and to provide redress for victims of such terrorism. These include a variety of U.S. legislative acts, executive acts, and certain judicial decisions. In its memorial, Iran merely asserts, in conclusory fashion, that all of these acts are expropriatory, without any support or analysis. The thrust of Iran's argument is that the legislative and executive acts are themselves expropriatory and that, as a result, any judicial decisions giving effect to those acts must also be deemed expropriatory. Iran is wrong on both points.

14.85 The legislative and executive acts do not, standing alone, deprive Iranian nationals or companies of any property. Moreover, even when these acts are relied on by courts in permitting plaintiffs to attach property of Iranian nationals or companies or to enforce judgments against such property, this does not constitute an expropriation because the challenged legislative and executive acts, together with the judicial decisions relying on them, are *bona fide*, non-discriminatory exercises of U.S. police power. Accordingly, they do not trigger a right to compensation against the United States.

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[478] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 357 (June 8, 2009) **(U.S. Annex 148)**. *See also Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15, 63-67 (July 20, 1989) (noting in dicta that the "requisition . . . could not, in the Chamber's view, amount to a 'taking' contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett's interest in ELSI's plant"); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 147 (Jan. 12, 2011) **(U.S. Annex 214)** (noting "the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests."); *Total S.A. v. Argentine Republic*, NAFTA/ICSID Case No. ARB/04/1, Award ¶ 195 (Dec. 27, 2010) **(U.S. Annex 215)** (an expropriation requires "a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if formal title continues to be held. This is supported by the general direction of the case law under BITs, other international jurisprudence and scholarly legal opinions."); UNCTAD Report, *Expropriation: A Sequel* at 63 (2012) **(U.S. Annex 202)** (in order for an expropriation to be found, "[t]he impact of the measure or degree of interference must be such as to render the property rights useless, i.e. to deprive the owner of the benefit and economic use of the investment.").

[479] *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 357 (June 8, 2009) **(U.S. Annex 148)**.

(a) Legislative and Executive Measures

14.86 As an initial matter, Iran's challenges with respect to two significant categories of legislative acts can be dismissed out of hand. The first category comprises measures that affected the scope of Iran's sovereign immunity or created rights of action against Iran – measures that the Court has, in any event, dismissed from this case on other grounds.[480] These measures did not deprive Iranian nationals or companies of any property or any interest in property at all, let alone to the extreme degree required for a measure to be judged expropriatory. Accordingly, these measures did not violate the second limb of Article IV(2). Second, measures that solely affected Bank Markazi – such as the Iran Threat Reduction and Syria Human Rights Act of 2012 – do not give rise to a claim under Article IV(2) because it only applies to the "[p]roperty of nationals and companies of either High Contracting Party" and, as explained in Chapter 9 above, Bank Markazi is not a "company."[481]

14.87 The remaining legislative measures are those that allow for claimants with terrorism-related judgments against Iran to execute those judgments against the assets of Iran's agencies and instrumentalities or to attach those assets in aid of execution. Iran asserts that these measures are "expropriatory . . . as they are expressly directed at the taking of the property of Iranian companies."[482] Iran is wrong – again, the measures are directed at enforcing judicial judgments, thereby satisfying a debt owed by Iran, and at achieving legitimate regulatory purposes – but in any event it is not sufficient, even under Iran's own flawed reading of Article IV(2), for a measure to be "*directed*" at the taking of property. Rather, as even Iran concedes, the measure must result in "some form of actual or substantial taking."[483] Iran has not even attempted to show that any of the challenged legislative or executive measures, standing alone, deprived Iranian companies of property or interests in property. While these measures created the possibility that an Iranian company, to the extent it was judged to be an agency or instrumentality of Iran, might someday be subject to an enforcement action, this impact is far too contingent and tenuous to constitute an expropriation under international law. In any event, as discussed further below, the attachments of assets at issue in this case are not takings of property requiring compensation by the government.

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[480] *See* Chapter 2.

[481] *See* Chapter 9.

[482] Iran's Memorial, ¶ 5.69.

[483] *Id.*, ¶ 5.65(b).

14.88 Turning to Executive Order 13599, Iran's claims are equally meritless. First, as explained in Chapter 11 above, Article XX(1) bars any claim with respect to Executive Order 13599. Second, the Executive Order is directed, in part, at Iran's central bank, Bank Markazi. Again, Bank Markazi is not a "company" within the meaning of Article IV(2) and, as a result, any blocking of Bank Markazi's property is not actionable under this provision. Likewise, the blocking of Iranian state property is not actionable because Article IV(2) only applies to the property of Iranian companies and nationals. Third, blocking orders – specifically including orders issued, like Executive Order 13599, pursuant to the International Emergency Economic Powers Act (IEEPA) – are not expropriatory, including because they are by nature temporary and do not themselves alter ownership of the blocked assets.[484] For these reasons, the Court should conclude that Executive Order 13599 is not expropriatory under international law and therefore not a breach of Article IV(2).

14.89 Accordingly, Iran's challenges to the legislative and executive acts at issue in this case fall at the first hurdle because they do not have the level of impact required under international law for a measure to be deemed expropriatory.

14.90 Iran's challenges to these measures must also be dismissed because each and every one was a *bona fide*, non-discriminatory exercise of U.S. police powers. The United States enacted the challenged legislation to provide victims of terrorist acts with the ability to obtain redress from the sponsors of those acts, including Iran.[485] Likewise, Executive Order 13599 was promulgated to address Iranian activities that caused grave national security concern to the

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[484] U.S. courts have repeatedly found that blocking orders are not expropriatory for this reason. *See, e.g.*, *Paradissiotis v. United States*, 304 F.3d 1271, 1274 (Fed. Cir. 2002) **(U.S. Annex 216)** ("On several occasions, this court has addressed Fifth Amendment takings claims raised by persons or entities that have been adversely affected by actions taken for national security reasons to freeze the assets of, or prohibit transactions by, foreign entities, and on each occasion we have held that the actions have not violated the Takings Clause."); *Zarmach Oil Servs., Inc. v. U.S. Dep't of the Treasury*, 750 F. Supp. 2d 150, 159 (D.D.C. 2010) **(U.S. Annex 217)** ("It is well-established that the blocking of assets pursuant to an executive order is not a taking within the meaning of the Fifth Amendment."); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 51 (D.D.C. 2005), *aff'd in part and remanded sub nom. Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007) **(U.S. Annexes 218, 219)** ("[T]o the extent that the plaintiff seeks to challenge the blocking of assets pursuant to an Executive Order, such an order is not, as a matter of law, a takings within the meaning of the Fifth Amendment."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 77-78 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) **(U.S. Annex 220)** ("The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context."); *Glob. Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779, 802 (N.D. Ill. 2002), *aff'd*, 315 F.3d 748 (7th Cir. 2002), **(U.S. Annex 221)** ("Takings claims have often been raised—and consistently rejected—in the IEEPA context.").

[485] *See* Chapter 6.

United States, including arms trafficking, support for terrorism, and the pursuit of ballistic missile capabilities.[486]

14.91 Iran is not entitled to any compensation for these sorts of measures under Article IV(2). Indeed, to conclude otherwise would place the cost of Iran's wrongful acts on the United States and would also deprive Executive Order 13599, and any other similar blocking orders or asset freezes, of any force as a deterrent to illicit conduct.[487] Such an interference with a State's regulatory prerogative is precisely the sort of outcome that international law forecloses by excluding exercises of police power from the scope of compensable takings.

14.92 Moreover, for the reasons discussed in Section B above, the measures at issue are also not discriminatory, unreasonable or otherwise in breach of international law.

14.93 The factors that the Court must assess in determining whether any of the challenged legislative and executive measures violate Article IV(2) therefore weigh against finding that the United States has committed a compensable taking and Iran's claims with respect to these measures must fail.

(b) Judicial Decisions

14.94 Turning to the judicial decisions that Iran has challenged, Iran's claims should be dismissed because the legislative and executive measures on which these decisions rely in permitting plaintiffs to enforce judgments against agencies and instrumentalities of Iran are proper exercises of U.S. police powers, as explained in the preceding section. Thus, the legislative and executive measures themselves are not in breach of Article IV(2) and, accordingly, decisions by a neutral and independent judiciary applying those measures cannot be deemed treaty breaches.

14.95 In addition, while the full or partial satisfaction of a judgment against an agency or instrumentality of Iran results in the transfer of that entity's assets to the judgment creditor, it also has the corresponding effect of reducing Iran's outstanding liability under the judgment. For example, if a court directs a state-owned Iranian bank to turn over $1 million to a plaintiff in satisfaction of a $3 million judgment against Iran, Iran's liability under the judgment drops to $2 million. Thus, where, as here, it is appropriate for holders of judgments against Iran to

[486] *See* Chapter 11.

[487] *See, e.g.*, *Paradissiotis*, 304 F.3d at 1278 **(U.S. Annex 216)** ("Economic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.").

look to Iran's agencies and instrumentalities for satisfaction,[488] the overall impact of the measures should be considered economically neutral: the reduction in assets held by Iran's agencies and instrumentalities is offset by a $1 million reduction in Iran's liabilities. This is not the type of radical deprivation that is required for Iran to establish a breach of Article IV(2) – it is no deprivation at all.

14.96 The Court should therefore dismiss Iran's expropriation claims under Article IV(2) in their entirety.

CHAPTER 15: IRAN HAS FAILED TO ESTABLISH A BREACH OF ARTICLE V(1)

15.1 Turning now to Article V(1) of the Treaty of Amity, Iran's claims under this provision are likewise groundless and must be dismissed. Article V(1) protects property ownership rights, but only when those rights change hands through lease, acquisition, or disposition. Iran's claim, which is brought only under the paragraph's disposition element, must fail because Iran has failed to show that any owners of the properties at issue were attempting to dispose of those properties, let alone that any such attempt was prevented by the challenged U.S. measures. Iran's claim must also fail because Iran cannot pass the provision's most-favored-nation ("MFN") test, having failed to point to a single comparator for the purposes of satisfying that test.

Section A: Iran's Article V(1) Claim Invokes Only a Limited Subset of That Paragraph's Provisions

15.2 Article V(1) addresses a specific, circumscribed set of economic activities, namely the acquisition and disposition of property:

> Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament, or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

15.3 Clauses (a) through (c) of Article V(1) obligate the Parties to permit each other's companies and nationals to lease "real property," to purchase or acquire "personal property of

[488] *See supra* Section B.iii.

all kinds," and to dispose of "property of all kinds," all subject to the most-favored-nation standard of treatment specified in the provision's final sentence. Article V(1) thus imposes obligations only with respect to certain specific events impacting the property of a Party's companies or nationals: a lease, a purchase or other acquisition, or a disposition. Each of those events involves a change in ownership of, or rights with respect to, the property. This list of specific events notably excludes the holding and use of property, aspects of property ownership which are thus outside the scope of Article V(1). Iran's claims in this case rely solely on clause (c), regarding disposition of property.

15.4 Applying principles of treaty interpretation based in customary international law as reflected in the Vienna Convention, the phrase stating the crucial requirement of Article V(1), "shall be permitted," must be read in terms of the ordinary meaning of its words. Synonyms of *permit*, from a leading U.S. legal dictionary, include *allow*; to permit an activity is to allow it to happen.[489] Conversely, to permit an activity does *not* mean to facilitate it, to make it as easy as possible, or to leave it entirely unregulated or unencumbered. Article V(1), therefore, is not violated by rules and procedures related to the transfer of property that impose some sort of burden, obstacle, or requirement (for example, requirements that transfers of real property must be recorded and give rise to a tax or fee, or the burden that transferred property is subject to zoning restrictions), so long as the measures do not entirely bar the transfer of property.

15.5 Furthermore, Article V(1) must be read as a whole, with each of its terms considered in context. In particular, the Court should read the two sentences of Article V(1) together and use each one to help interpret the other. The MFN standard stated in the second sentence of Article V(1) establishes the threshold applicable to the requirements stated in its first sentence. It means that those requirements apply to conduct that is nationality-based rather than to universally applicable aspects of ordinary property law.

Section B: Iran Has Not Stated a Claim under Article V(1)(c)

15.6 Iran's claims under Article V(1)(c) fail for two independent reasons. First, the provision of Article V(1) invoked by Iran applies only to the disposition of property, but Iran has put forward no evidence whatsoever of any attempt by its companies to dispose of property, much less evidence that such an attempt was prevented by the U.S. measures.

[489] *Permit*, BLACK'S LAW DICTIONARY (11th ed. 2019) **(U.S. Annex 157)**.

15.7 The second reason Iran's Article V(1) claim fails is that the provision imposes a nationality-based test, but Iran fails to establish how the challenged measures single out Iran's companies for treatment inconsistent with that standard.

15.8 The MFN test is a relative standard that requires the claimant to identify a similarly-situated person or company that received more favorable treatment on the basis of its nationality. As one tribunal held while interpreting an MFN provision in an investment treaty, in order to establish a "claim for relief for an alleged breach of the MFN clause," "a claimant must normally establish the existence of a comparator and then demonstrate that such comparator has received better treatment."[490] A viable claim under Article V(1), therefore, requires a comparator – some other company that received better treatment in like circumstances on the basis of its nationality.

15.9 Iran, however, has failed to meet this straightforward and fundamental requirement applicable to an MFN claim; it has failed to identify any comparator. Specifically, Iran has not specified any third-country company in a like situation – that is, an agency or instrumentality of a state sponsor of terrorism – that received better treatment than the companies that are the subject of its Article V(1) claims.

15.10 For the two reasons set out above, Iran has not established any viable claim to relief under Article V(1).

CHAPTER 16: THE U.S. HAS NOT VIOLATED ARTICLE VII(1)

16.1 Iran's Article VII claim must be dismissed because Iran misinterprets the text of the provision. Iran contends that Article VII prohibits any conceivable restrictions on payments, remittances, and other transfers of funds. But in advancing its position, Iran improperly isolates a few words, ignoring their immediate context, the text of the Article as a whole, and the relevant negotiating history, contrary to the applicable rules of treaty interpretation. As demonstrated in this Chapter, Iran is wrong. Article VII must be read as an exchange control provision, addressing the standards to be observed in the event either Party found it necessary to control the availability of foreign exchange. The relevant portion of Article VII(1) can only be understood in its context as establishing a general prohibition on exchange restrictions, with

[490] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction ¶ 435 (Oct. 22, 2012) **(U.S. Annex 224)**; *see also* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 224-225 (2009) ("the comparison made between the treatment of two investors or investors requires the identification of the applicable comparator . . . .") **(U.S. Annex 225)**.

a series of exceptions set out in the text. Moreover, the Treaty's negotiating history reflects significant discussion surrounding Article VII, with both parties characterizing it as an exchange control provision and nothing more.

16.2 The United States further contends that even under Iran's overly broad interpretation of Article VII, its claim still fails. Iran alleges that the United States violated Article VII by restricting payments, remittances, and other transfers of funds, but the U.S. measures at issue are simply designed to enable the enforcement of valid court judgments. As a result, Iran's Article VII claim does not pass muster.

16.3 The text of Article VII reads as follows:

> 1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.
>
> 2. If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party of: (a) the compensation referred to in Article IV, paragraph 2, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investment and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.
>
> 3. Either High Contracting Party applying exchange restrictions shall in general administer them in a manner not to influence disadvantageously the competitive position of the commerce, transport or investment of capital of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country; and shall afford such other High Contracting Party adequate opportunity for consultation at any time regarding the application of the present Article.

Section A: Article VII(1) Applies to Exchange Restrictions and Iran Fails to Identify Any Exchange Restriction Imposed by the U.S.

16.4 The Paragraphs of Article VII all work together to form a comprehensive whole. Paragraph 1 imposes a general prohibition on restricting payments, remittances, and other transfers of funds to or from the territories of the Parties, subject to two exceptions. Under the first exception, Parties are relieved of their general obligation when necessary to assure availability of foreign exchange for the health and welfare of their people. Under the second exception, Parties are relieved of their general obligation when the International Monetary Fund ("IMF") specifically approves the restriction. These two exceptions, which form the immediate context for the general prohibition in Paragraph 1 ("Neither High Contracting Party shall apply restrictions"), indicate that "restrictions" means the kinds of restrictions to which these sorts of exceptions would apply, namely exchange restrictions.

16.5 Paragraphs 2 and 3 confirm this interpretation. Paragraphs 2 and 3 apply in the event a High Contracting Party imposes exchange restrictions pursuant to the exceptions in Paragraph 1. Under Paragraph 2, when exchange restrictions are applied, a Party has to reasonably furnish foreign exchange in the currency of the other Party for certain priority payments. Paragraph 2 also sets methods for determining the proper exchange rate for these priority payments when more than one exchange rate is in force. Under Paragraph 3, when exchange restrictions are applied, they must not competitively disadvantage the other Party. Paragraph 3 also obliges the Party imposing the exchange restrictions to consult with the other Party at that Party's request. Paragraphs 2 and 3 clearly apply to exchange restrictions and refer back to Paragraph 1 in its entirety. When reading Article VII as a whole, as one must do, it is clear that the Article, including Paragraph 1's general prohibition, addresses exchange restrictions.

16.6 It is well understood that "special words, according to elementary principles of interpretation, control . . . general expressions."[491] Thus, in *Payment of Various Serbian Loans Issued in France*, the Permanent Court of International Justice interpreted bonds that referred both to "gold francs" and to "francs" without the specification of gold.[492] The Court held that both terms referred to a promise to pay in gold because "[t]he special words, according to elementary principles of interpretation, control the general expressions" and because the text

[491] *Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats, and Slovenes)*, 1929 P.C.I.J. (ser. A) No. 20, at 30 (July 12).

[492] *Id.*

of the bonds had to be read as a whole. The same principle applies here. The special reference to "exchange restrictions" in Paragraphs 2 and 3 informs the meaning of the general expression "restrictions" in Paragraph 1, and Article VII must be read as a whole. Iran's attempt to take terms out of their context contorts the provision.

16.7 The Treaty's negotiating history confirms that Article VII addresses exchange restrictions, not all restrictions on payments, remittances and other transfers.[493] During negotiations, there were significant discussions about Article VII, with both the U.S. and Iran characterizing the provision as imposing a general prohibition on exchange restrictions.[494] When the U.S. Department of State sent the Embassy in Tehran the first draft of a potential treaty, the draft included a table of contents meant to facilitate discussion. The table of contents labeled Article VII as "Exchange Control,"[495] and the draft was delivered to Iranian officials on August 3, 1954.[496]

16.8 Along with this first draft, the Department also sent to the U.S. Embassy in Tehran explanations of certain provisions to assist the Embassy officials in negotiating with their Iranian counterparts. Regarding Article VII, State Department officials explained that

> Article VII, relating to exchange restrictions, is considered by the Department to be of importance in relation to the general treaty objective of improving conditions for foreign investment. It provides rules of conduct which would not impose undue hardship on parties to the treaty, assuming a country accepts the principle that exchange controls should not be unnecessarily discriminatory or applied for protectionist reasons . . . .
>
> Foreign officials sometimes argue that it is undesirable to include provisions on exchange restrictions in a bilateral treaty, since to do so might appear to derogate from the Articles of Agreement of the IMF. However, the IMF was not intended to deal with the specific questions covered by the type of treaty here considered, and exchange control provisions adapted to the specific purposes of the bilateral treaty are in no sense a reflection on the IMF. A member of the Fund might be authorized by the IMF, for example, under the Fund's Article VIII, to impose exchange restrictions, and under this general

[493] Vienna Convention, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31[.]").

[494] Telegram from U.S. Embassy Tehran to U.S. Dep't of State, at 6 (Oct. 16, 1954) **(U.S. Annex 226)**.

[495] Instructions from U.S. Dep't of State to U.S. Embassy Tehran, A-18 (July 23, 1954) **(U.S. Annex 227)**.

[496] Telegram from U.S. Embassy Tehran to U.S. Dep't of State (Sept. 15, 1954) **(U.S. Annex 228)**. The text of Article VII(1) in this draft is identical to the text of Article VII(1) in the signed Treaty.

> authorization might allocate exchange generously for luxury imports but deny exchange for the service of capital. The treaty seeks to establish agreed principles with respect to the application of restrictions, both those authorized by the IMF and those not coming under the jurisdiction of the IMF as in the case of restrictions on capital transfers. The proposed Article VII in no sense overrides or is in conflict with the IMF. [497]

It is clear that Article VII was viewed as addressing exchange restrictions and that the United States had considerable experience with the provision. Further, the U.S. State Department pointed out that although the IMF's jurisdiction was related, it was distinct from the application of the Treaty's Article VII.

16.9 After Iran and the United States began treaty negotiations, Iranian officials expressed many reservations about Article VII. Initially, Dr. Abdoh from the Ministry of Foreign Affairs informed the U.S. embassy of several concerns. For example, Bank Melli was concerned about the role of the IMF:

> Abdoh, Ministry Foreign Affairs, informed Embassy that in inter-ministerial committee studying draft treaty amity and economic relations certain objections to Article 7 re[garding] exchange restrictions had been raised, particularly by Bank Melli representative. Apparently one objection concerned [the] requirement that proposed exchange restrictions should be specifically approved by IMF. Bank Melli believed this provision could not (repeat not) be met when exchange crises arose, e.g., September 1954, which required bank to impose restrictions on certain currency transactions immediately.[498]

While the Bank Melli representative's concern reflected a misunderstanding of the role of IMF approval, it also demonstrated an understanding that Article VII covered exchange restrictions.[499]

16.10 Dr. Abdoh reported other initial reservations to U.S. officials at the same time, including the concern that if Iran agreed to Article VII, Iran's obligation not to impose exchange restrictions would extend to other countries that had MFN guarantees with Iran,

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[497] Instructions from U.S. Dep't of State to U.S. Embassy Tehran, A-18 (July 23, 1954) **(U.S. Annex 227).**

[498] Telegram from U.S. Embassy Tehran to U.S. Dep't of State (Oct. 2, 1954) **(U.S. Annex 229)**.

[499] The misunderstanding was later clarified as U.S. representatives explained that Article VII did not impose any independent IMF approval requirement. The exception based on specific IMF approval was inserted as a precaution to avoid "any implication [that the] treaty seeks [to] encroach [on] IMF authority and [the exception] does not impose any new obligations on Iran." *See* Telegram from U.S. Dep't of State to U.S. Embassy Tehran (Oct. 26, 1954) **(U.S. Annex 230)**.

potentially enabling non-American foreign investments to acquire priority access to Iran's foreign exchange. Indeed, as a general matter, Iranian officials expressed considerable concern about the order of priority to be given to foreign exchange requests should there be a shortage of exchange.

> Another objection mentioned by Abdoh concerned [the] requirement that in [the] event exchange restrictions [were] imposed, reasonable provisions would be made for withdrawal of foreign exchange to cover charges connected with foreign loans and investments. Some Iranian officials expressed [the] view that if in [the] treaty with [the] US such commitment [was] made, it would be extend[ed] to other countries with which Iran has treaties with MFN clause. Implication that servicing charges on certain non-American foreign investments might acquire priority on Iran's foreign exchange appeared to be sensitive subject with some Iranian officials with experience on compensation issue in oil negotiations. Abdoh also implied that Bank Melli did not (repeat not) want [to] assume treaty responsibility to furnish foreign exchange to meet Plan Organization and other Government commitment to foreign suppliers. Amount [of] such commitments still not (repeat not) known.[500]

All of these initial reservations were clearly based on the Parties' understanding of Article VII as an exchange control provision.

16.11 On October 13, 1954, U.S. embassy officials and Iranian officials met to further discuss specific provisions of the draft treaty. U.S. embassy officials summarized the meeting in a dispatch to the U.S. State Department as follows, seeking advice, *inter alia*, on how to respond to Iranian concerns about Article VII:

> It was apparent that the scope, intent and standards of execution of Article VII in its entirety had given rise to much concern on the part of the Iranian representatives. The difficulties which the Iranian officials made explicit included: (a) the conditions which would have to be met before either party could apply restrictions on foreign exchange; (b) the question of who would be the judge as to the extent to which restrictions on foreign exchange transactions could be applied; and (c) in the event restrictions on foreign exchange were applied, the order of priority that would be given to various requirements for the foreign exchange which was being rationed by either contracting party.
>
> With regard to the conditions which would have to be met before either contracting party could apply restrictions on foreign

[500] Telegram from U.S. Embassy Tehran to U.S. Dep't of State (Oct. 2, 1954) **(U.S. Annex 229)**.

> exchange, Mr. Mohamed Nemazee, in particular, stressed his understanding that either party could impose restrictions on foreign exchange whenever it felt that it did not have sufficient exchange to cover the financing of essential imports and to cover the other requirements such as servicing of foreign obligations and transfers relating to foreign investment.
>
> Mr. Nemazee stated that his interpretation of paragraph 1 which would govern the interpretation of paragraphs 2 and 3 of Article VII, was that [a] country should be enabled to cover its requirements for the financing of essential imports and thereafter, to the extent that exchange was available, make reasonable provision for the servicing of loans and other obligations.[501]

Thus, discussions regarding Iran's concerns about Article VII were all within the context of foreign exchange. Further, it is apparent that the Parties specifically interpreted Paragraph 1 as addressing foreign exchange, and that Article VII was generally viewed as a cohesive unit, with one paragraph informing the meaning of the others.

16.12 The same dispatch from the U.S. Embassy in Tehran summarized other Article VII concerns expressed by Iranian officials:

> The question of who was to be the judge as to the need for imposing exchange restrictions and the compatibility of those restrictions with the requirements of Article VII seemed to be uppermost in the minds of the Iranian officials. . . .
>
> The Iranians had given considerable thought to the order of priority among the various requirements for foreign exchange in the event such exchange had to be restricted. As indicated above, they made it clear that the essential import requirements of each country would have overriding priority on available foreign exchange.[502]

The U.S. Embassy in Tehran also reported that Iranian officials expressed a number of other concerns, including that the provision would require Iran to make scarce foreign exchange available to facilitate "hot money" transfers.[503] Again, all of the concerns that Iranian officials expressed emanated from the understanding that Article VII applied to exchange controls and Paragraph 1's general prohibition applied to exchange restrictions.

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[501] Telegram from U.S. Embassy Tehran to U.S. Dep't of State, at 6 (Oct. 16, 1954) (internal reference omitted) **(U.S. Annex 226)**.

[502] *Id*. at 6-7 **(U.S. Annex 226)**.

[503] *Id*. at 7 **(U.S. Annex 226)**.

16.13 Other historical sources confirm the understanding that Article VII applied to exchange controls. Like the table of contents in the first draft of the Treaty, the Sullivan Study characterizes Article VII as a provision on "Exchange Controls."[504] Further, the Sullivan Study specifically correlates Article VII, Paragraph 1 to the standard Article XII, Paragraph 2, which addresses "Exchange Restrictions."[505]

16.14 In sum, Iran's attempt to read Article VII(1)'s "restrictions" as applying to anything other than exchange restrictions is an improper and opportunistic reading of the Treaty. To interpret Article VII(1)'s general prohibition as covering any conceivable restrictions on payments, remittances and other transfers would ignore text, context, negotiating history, and other historical sources. The Court should reject such an approach and should likewise reject Iran's Article VII claim.

Section B: Even If Article VII Prohibited Restrictions on Payments, Remittances, and Transfers Other than Exchange Restrictions, Iran's Claim Still Fails

16.15 In the alternative, even under Iran's broad interpretation of Article VII(1), Iran's claim still fails. Iran asserts that all of the challenged U.S. measures constitute prohibited restrictions on transfers, in violation of Article VII, as Iran interprets the provision. But Iran fails to support this sweeping claim and the claim is fatally overbroad.

16.16 As discussed in Chapter 6, the United States has enacted a series of measures that govern terrorism-related litigation in U.S. courts and that enable victims of terrorism with unpaid judgments against Iran to enforce those judgments against the property of Iran's agencies and instrumentalities. Such measures do not constitute restrictions on payments, remittances or other transfers to or from the territories of the other High Contracting Party. Rather, they are designed to enable the enforcement of valid court judgments. Indeed, under Iran's approach, judgments against any Iranian national or company could never be enforced against the assets of that national or company if it refused to pay the judgment: Iran's interpretation would make such enforcement a prohibited transfer. But there is nothing to suggest that when the Parties concluded the Treaty, they intended to displace the Parties' judicial mechanisms for enforcing judgments. (Commercial relations in fact depend in part on the existence of a system of contract law, courts to adjudicate disputes, and mechanisms to

[504] SULLIVAN STUDY at 206 (IM Annex 20).

[505] *Id.,* at 206, 370 (IM Annex 20).

ensure enforcement of the judgments issued by those courts.) To interpret Article VII as prohibiting judicial attachments in furtherance of satisfaction of valid court judgments would expand Article VII's reach far beyond the intended scope and purpose.

16.17 With respect to Executive Order 13599, which operates as part of the U.S. sanctions program and blocks specified categories of Iranian assets for national security reasons,[506] the United States contends that it falls within Article XX(1) and is therefore outside the Treaty's application, as demonstrated in Chapter 11. Consequently, any claims premised on Executive Order 13599 must be dismissed.

CHAPTER 17: THE U.S. LEGAL REGIME THAT ALLOWS VICTIMS OF TERRORISM TO ENFORCE JUDGMENTS DOES NOT VIOLATE ARTICLE X(1)

17.1 Turning now to Article X, Iran's claims under this provision are premised on an improper and overly broad interpretation of the relevant text. Iran contends that everything from judicial liens to central banking falls under Article X(1), which provides, in its entirety, that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." Though Iran advances a nearly limitless interpretation of the phrase "freedom of commerce," in the Preliminary Objections Judgment this Court ruled that the violations of sovereign immunity alleged by Iran did not fall within the scope of Article X(1).[507]

17.2 The United States will demonstrate herein that Iran's other alleged violations of Article X(1) likewise must fail, for three reasons. *First*, Article X(1)'s reference to "commerce" must be interpreted in its context to mean commerce that is related to navigation. To the extent this interpretation conflicts with the Court's ruling in *Oil Platforms*, the United States respectfully requests that the Court revisit its prior conclusion. In the alternative, if Article X(1)'s reference to "commerce" extends beyond the navigational context, it must be read to mean trade in goods, including ancillary activities integrally related to that trade, in accordance with the *Oil Platforms* judgment. Iran's Article X(1) claim, however, does not identify any underlying trade in goods that was disrupted by the challenged measures. *Second*, Iran's Memorial plainly disregards Article X(1)'s important territorial limitation, which this Court addressed in the *Oil Platforms* judgment, and Iran's Article X claim should be dismissed for that reason alone. *Third*, Article X(1) cannot properly be read to apply to the rules

[506] Exec. Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (IM Annex 22).

[507] Preliminary Objections Judgment, ¶ 79.

governing terrorism-related litigation in U.S. courts as those rules simply have too tenuous a connection, if any connection, to the commercial relations between the Parties.

17.3 Article X reads as follows:

> 1. Between the territories of the two High Contracting Parties, there shall be freedom of commerce and navigation.
>
> 2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.
>
> 3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.
>
> 4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.
>
> 5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.
>
> 6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

Section A: Article X(1)'s "Commerce" Must be Interpreted as Commerce Related to Navigation

17.4 As its full text makes clear, Article X creates a detailed, inter-connected system for non-discriminatory access to ports and for other commercial shipping matters, which must be

construed together in context. Aside from Paragraph 1, every paragraph in Article X explicitly focuses on vessels.[508] Paragraph 1 and Paragraph 3 are the only paragraphs that even mention commerce, and both do so alongside the term navigation, in the phrase "commerce and navigation." Moreover, Paragraph 3's "commerce" can only relate to a navigational context, and it would be incongruous to read "commerce" differently in Paragraphs 1 and 3.

17.5 The Treaty's negotiating history confirms that Article X(1)'s reference to "commerce" must be understood in the context of navigation. On June 23, 1954, the U.S. Department of State sent the U.S. Embassy in Tehran a summary of the various intended Treaty of Amity provisions. The summary explained the U.S. intent behind Article X as follows:

> Article X: In view of the present, and the presumably greater, future *interests of Iran as a maritime state*, it has been thought appropriate to propose the navigation provisions of the standard FCN treaty[.][509]

The negotiating history further shows that both Parties generally understood Article X as a navigation provision. A July 23, 1954 cable to the U.S. Embassy in Tehran – which was also discussed in Section A of this chapter – included the first draft of a potential treaty, with a table of contents meant to facilitate discussion. The table of contents labeled Article X "Navigation,"[510] and the draft was delivered to Iranian officials on August 3, 1954.[511]

17.6 Moreover, the negotiating history demonstrates that under no circumstances can Article X(1) have the broad meaning that Iran attributes to it. During negotiations, Iranian officials expressed initial reservations about the requirements for the nondiscriminatory treatment of vessels that pervade Article X. Rather than agreeing to a treaty provision that might have tolerated discriminatory treatment, the United States determined it would prefer to abandon Article X. The State Department wrote to the U.S. Embassy in Tehran that if Iran maintained its reservations, the United States should simply drop the provision from the Treaty

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[508] *See also Oil Platforms,* 1996 I.C.J. at 60, ¶ 40, (Separate Opinion of Judge Higgins) ("[I]n the context of the paragraphs that follow in Article X itself, it does seem to me that the commerce there referred to is maritime commerce or – as in the *Oscar Chinn* case – commerce integral to, closely associated with, or ancillary to maritime commerce."); *Id.,* at 87-88 (Dissenting Opinion of Vice-President Schwebel) ("[W]hen the Treaty means to address more than freedom of maritime commerce, it does so in other articles . . .").

[509] Instructions from U.S. Dep't of State to U.S. Embassy Tehran, A-18, at 7 (July 23, 1954) (emphasis added) **(U.S. Annex 227)**.

[510] *Id.* at 17.

[511] Telegram from U.S. Embassy Tehran to U.S. Dep't of State (Sept. 15, 1954) **(U.S. Annex 228)**.

altogether.[512] If Article X(1)'s "commerce" had the breadth and importance that Iran now claims, the United States would not have been so ready to drop the provision.

17.7 As part of the circumstances of the conclusion of the Treaty, a Senate Report prepared in connection with ratification likewise emphasized that Article X(1)'s "commerce" cannot have the broad meaning Iran now reads into it. The Senate Report summarized Article X as a provision that "details the rights of vessels flying the flag of either party in the ports of the other and in general provides national and most-favored-nation treatment, except for coastwise, inland, and fishing traffic."[513] If Article X(1)'s "freedom of commerce" were understood as a limitless guarantee of unimpeded commercial activity, as Iran presently submits, the U.S. Senate's summary certainly would have mentioned the fact.

17.8 Other historical sources similarly reflect the understanding of Article X as a navigation provision focused on the nondiscriminatory treatment of vessels. The Sullivan Study correlates Article X to the "Navigation" provision in the Standard Draft FCN treaty, explaining that the article "contains all of the provisions needed in order to prevent the discriminatory treatment of vessels and cargoes."[514] A principal U.S. negotiator of FCN treaties similarly interprets Article X.[515] Moreover, with respect to Paragraph 1 specifically, the Sullivan Study explains that it "is considered as having special relevance to seaborne traffic."[516]

17.9 In light of Article X's textual focus on vessels and navigation, and especially given that the Parties understood Article X as a navigation provision, Article X(1)'s "commerce" should be understood in its context to mean commerce that is related to navigation. The United States recognizes that in *Oil Platforms*, the Court rejected the U.S. argument that Article X(1)'s "commerce" was limited to maritime commerce. To the extent the *Oil Platforms* Judgment conflicts with the position of the United States set forth herein, the United States respectfully

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[512] Telegram from U.S. Dep't of State to U.S. Embassy Tehran, at 2 (Nov. 4, 1954) **(U.S. Annex 231)** ("Interests international commerce served best by policy permitting free competition vessels all countries for carriage commercial cargoes. If Iranians maintain position, only alternative is deletion Article X.").

[513] S. REP. No. 84-9, at 3 (1956) **(U.S. Annex 112)**.

[514] SULLIVAN STUDY at 283-284 (IM Annex 20).

[515] Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 73 (1958) ("[I]t may be noted that a navigation article reaffirms a liberal regime of treatment to be applied to international shipping. The rules set forth reflect the practices which have historically been developed by leading maritime nations[.]") (U.S. P.O. Annex 2). *See also* Don C. Piper, *Navigation Provisions in United States Commercial Treaties*, 11 Am. J. Comp. L. 184 (1962) **(U.S. Annex 234)**.

[516] SULLIVAN STUDY at 286 (IM Annex 20).

requests that the Court revisit its prior conclusion for the reasons above. The circumstances of *Oil Platforms* differ from those of the present case in many respects. In particular, the factual allegations in *Oil Platforms* focused on activity in the Persian Gulf, ensuring that Iran's Article X claim at least retained some connection to a navigational context. Here, however, neither Iran's interpretation of Article X nor its factual allegations have anything to do with navigation, maritime trade, or even the coast. In effect, Iran has simply read the term "navigation" out of Article X. Iran should not be permitted to do so, and the Court should reject the Article X claim.

Section B: In the Alternative, Article X(1)'s "Commerce" Means Trade in Goods

17.10 If the Court nevertheless determines that "commerce" in Article X(1) extends beyond the navigational context, the term "commerce" must still have a carefully circumscribed meaning. In the *Oil Platforms* Judgment, the Court interpreted Article X(1)'s reference to "commerce" to mean purchase and sale, including ancillary activities integrally related to such purchase and sale.[517] As the Court explained, freedom of commerce under Article X(1) could be impeded with respect to "goods destined to be exported, or capable of affecting their transport and their storage with a view to export."[518] Thus, with its *Oil Platforms* analysis, the Court explicitly grounded Article X(1) "commerce" in the movement of goods between the territories of the Parties. The United States therefore submits, in the alternative, that Article X(1)'s reference to "commerce" must mean trade in goods.

17.11 The text of Article X demonstrates that it is a navigation provision, focusing on the non-discriminatory treatment of vessels. Each paragraph other than Paragraph 1 addresses vessels. Paragraph 6 generally excludes fishing vessels and vessels of war from the definition of "vessels," highlighting that the article focuses on commercial vessels and commercial navigation. Thus, taken in context, the type of commerce that Article X(1) refers to is the type of commerce that can take place via vessel: trade in goods.

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[517] *Oil Platforms*, 2003 I.C.J. at 43, ¶ 80 (commerce "includes commercial activities in general – not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce") (quoting *Oil Platforms*, 1996 I.C.J. at 20, ¶ 49).

[518] *Oil Platforms,* 1996 I.C.J. at 20, ¶ 50. *See also Oil Platforms,* 2003 I.C.J. at 46, ¶ 89 ("[W]here a State destroys another State's means of production and transport of *goods destined for export*, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce.") (emphasis added); *Oil Platforms*, 2003 I.C.J. at 156, ¶ 25 (Separate Opinion of Judge Owada) (quoting *The Shorter Oxford Dictionary* (10th ed.) definition of commerce as "mercantile transaction" and submitting that it refers to the "unimpeded flow of *mercantile transactions* in goods and services between the territories of the Contracting Parties") (emphasis in original).

17.12 The shipping of goods was the prevalent means of commerce between the Parties at the time they negotiated the Treaty. According to the Sullivan Study, Article X "contained detailed provisions on the treatment of vessels, for shipping was the most important service needed by traders in order to do business with foreign countries[.]"[519] Further, specifically with respect to Paragraph 1, Mr. Sullivan explains that it uses "traditional terminology" and is "directed against mercantilist restrictions of the kind commonplace in the Nineteenth Century."[520]

17.13 Iran has provided no examples of an instance in which Article X(1) or its equivalent has been interpreted to mean anything other than the movement of goods between countries, and in the present case, Iran has failed to identify any underlying trade in goods at issue. Nothing in the text of the Treaty supports the application of Article X(1)'s "commerce" to the broad financial transactions, untethered to trade, that are at issue in the present case. In sum, Iran's claim takes "commerce" significantly beyond what is provided for in the text of Article X, what was contemplated when the Parties negotiated the Treaty of Amity, and what was contemplated in *Oil Platforms*. The Court must therefore reject it.

Section C: Iran's Article X(1) Claim Fails to Satisfy the Provision's Territorial Requirement

17.14 Iran's Article X(1) claim should also be dismissed for the independent reason that it fails to address, much less to satisfy, the provision's territorial requirement. The plain text of Article X(1) provides for freedom of commerce and navigation "[b]etween the territories of the two High Contracting Parties." As the Court recognized in *Oil Platforms*, this is an important territorial limitation.[521] "In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran."[522] Thus, in *Oil Platforms* the Court held that Article X(1) would not protect Iranian oil exports in general, but would protect Iranian oil that was exported to the United States. Furthermore, any protected commerce and navigation must implicate direct trade between the territories of the Parties. Correspondingly, the Court held that Article X(1) did not protect "indirect commerce" in

[519] SULLIVAN STUDY at 283 (IM Annex 20).

[520] SULLIVAN STUDY at 286-87 (IM Annex 20).

[521] *Oil Platforms*, 2003 I.C.J. at 43, ¶ 82; *Id.*, at 57, ¶ 119.

[522] *Oil Platforms*, 2003 I.C.J. at 57-58, ¶ 119 (emphasis in original.)

Iranian oil between Iran and the United States when it passed through Western European refineries.

17.15 Iran's Memorial does not even attempt to address Article X(1)'s important territorial limitation. This is a serious omission. The international financial transactions that Iran construes as "commerce" cannot be assumed to have taken place directly between the territories of Iran and the United States, given the inherent complexity of the modern financial system.

17.16 Moreover, in the specific case of Iran and the United States, since 1995, Iranian and U.S. banks have been largely prohibited from dealing directly with each other, and while there were mechanisms in place that allowed for indirect transactions for a period of time, those were subsequently eliminated.[523] In U.S. federal court, Bank Markazi's Head of Foreign Exchange Negotiable Securities, Ali Ashgar Massoumi, submitted an affidavit explaining the obstacles to conducting direct financial transactions between Iran and the United States.[524]

> The following year, however [1995], the U.S. enacted new sanctions in an attempt to restrict Iranian access to U.S. dollar markets. The relevant executive order provided, among other things, that Iranian banks could not have direct dealings with U.S. banks. Bank Markazi and others successfully avoided the most harmful portion of these new sanctions through the use of so-called "U-turn" transactions. The U-turn transaction exemption allowed U.S. banks to indirectly process transactions involving Iran or the Iranian Government if they began and ended with a non-Iranian bank and only passed through the U.S. financial system on their way between the two offshore non-Iranian financial institutions.[525]

17.17 Mr. Massoumi explained that since 1995, these U-turn transactions had allowed Bank Markazi to have "*indirect* access to dollar services" via Clearstream Banking S.A. ("Clearstream") a licensed European bank specializing in custody and settlement operations, based in Luxembourg.[526] Then on November 6, 2008, this type of indirect transaction was

[523] Exec. Order 12959, 60 Fed. Reg. 24757 (May 9, 1995) (U.S. P.O. Annex 131).

[524] Affidavit of Ali Asghar Massoumi ¶ 20, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Aug. 31, 2017) (U.S. P.O. Annex A02).

[525] *Id.* (U.S. P.O. Annex A02).

[526] *Id.,* ¶¶ 15, 21 (U.S. P.O. Annex A02) (emphasis added). It appears, however, that by late 2007, Clearstream informed Bank Markazi that it would soon not be able to handle U-turn transactions for Iran and indeed not do business of any kind with Bank Markazi. *Id*., ¶ 22 (U.S. P.O. Annex A02).

prohibited by the United States with the issuance of a new rule barring U.S. banks from processing U-turn transactions.[527]

17.18 The specific facts underlying the *Peterson* case are further illustrative of Iran's indirect relationship with U.S. markets and are all the more salient since Iran bases much of the present case on *Peterson*. In seeking Iranian assets to attach for purposes of enforcing the *Peterson* judgment, the judgment holders became aware of dollar-denominated bonds owned by Iran and custodied in New York. Iran did not directly purchase these bonds, however. Iran instead used many intermediaries, as Bank Markazi explained in its Petition for a Writ of Certiorari before the U.S. Supreme Court:

> As part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank. UBAE, in turn, held corresponding security entitlements in an account with another intermediary, Clearstream Banking, S.A., in Luxembourg. Clearstream then held corresponding security entitlements in an omnibus account at Citibank, N.A., in New York.[528]

17.19 Thus, it appears that Iran had an account with an Italian bank, which had an account with a Luxembourg intermediary, which then had an account in New York. Iran has not explained how its dealings with an Italian bank qualify as direct commerce between the territories of Iran and the United States. Nor has Iran explained how the specific sovereign and supranational bonds at issue here qualify as direct commerce between the territories of Iran and the United States.

17.20 Iran's failure to address the territorial requirement of Article X(1) at all dooms its claims.

Section D: Article X(1) Cannot Properly Be Read to Apply to the Rules Governing Terrorism-Related Litigation in U.S. Courts

17.21 Iran's unbounded Article X(1) claims also fail because its theory extends to cover the measures applying to terrorism-related litigation in U.S. courts. There is no basis in the Treaty for such an application, nor can Article X(1) make sense in that context. Like the alleged violations of sovereign immunity addressed during the Preliminary Objections phase, measures

[527] Iranian Transactions Regulations, 73 Fed. Reg. 66541 (Nov. 10, 2008) **(U.S. Annex 232)**.

[528] Petition for a Writ of Certiorari at 7-8, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2014) (No. 14-770) (internal citations omitted) **(U.S. Annex 117)**.

applying to terrorism-related litigation have too tenuous a connection to the commercial relationship between the Parties to be covered by Article X(1), if they have any connection at all.

17.22 Iran argues that *any* impediment to commerce violates Article X(1)'s "freedom of commerce." Iran concedes that it is adopting a novel approach to Article X(1), in that the provision has previously been considered in the context of physical impediments to commerce, whereas Iran's present claims are based on "legal" impediments to commerce.[529] But Iran finds this distinction meaningless, and there appears to be no limit as to what Iran construes as a potential impediment to commerce.

17.23 It cannot be, however, that any impediment to commerce violates the Treaty. Taking the rules that govern the enforcement of judgments against the assets of Iranian companies as an example, enforcing judgments against Iranian companies must be appropriate in some circumstances. For example, if an Iranian company were found to have breached a commercial contract with a U.S. company, if the court awarded damages to the U.S. company, and if the Iranian company did not pay, a reasonable legal system would look to the available assets of the Iranian company to enforce the damages award. Nothing suggests that such an approach would violate the Treaty. According to Iran, however, any enforcement action against an Iranian entity would impede freedom of commerce between the Parties in violation of Article X(1).

17.24 Furthermore, Iran's expansive interpretation of Article X(1) does not align with the text of the Treaty as a whole. Many other parts of the Treaty clearly contemplate and allow for certain impediments to commerce under specified conditions. For example, Article VIII addresses the entry and treatment of goods, and Article IX addresses customs administration. Under Iran's limitless interpretation, Article X(1) would swallow up these other provisions.

17.25 Thus, reading Article X(1) to cover the rules governing terrorism-related litigation in the U.S. courts is unsupported, unworkable, and misaligned both with the text of the Treaty as a whole and with the Treaty's object and purpose. Consequently, and for the other reasons in this Section, the Court should reject Iran's Article X(1) claim.

[529] Preliminary Objections Hearings, Day 2, 3pm (Oct. 10, 2018) at ¶ 40.

CHAPTER 18: TO THE EXTENT THAT THE COURT FINDS THAT IRAN'S SUBSTANTIVE RIGHTS UNDER THE TREATY OF AMITY ARE ENGAGED, THEIR EXERCISE IS AN ABUSE OF IRAN'S RIGHTS

18.1 In the event that the Court concludes that Iran does have rights under the Treaty of Amity, *quod non*, Iran's claims under the Articles in question constitute an abuse of right, and Iran is therefore precluded from exercising any of its rights under the Treaty in this case on that basis.

18.2 The present submission is distinct from the United States' primary contention that the Court should apply the doctrine of unclean hands to deny Iran's claims. Like the doctrine of unclean hands, the doctrine of abuse of rights has its genesis in the principle of good faith and is another application of that principle.[530] However, the prohibition on a party's abuse of its rights is concentrated on that party's invocation of its substantive rights, not on its entitlement to the relief requested or the admissibility of its application as a whole. Nor does the invocation of the prohibition involve a discretionary assessment in the same way. Instead, it requires the Court to consider Iran's exercise of the substantive treaty right on which it relies to assess whether it offends the prohibition on the abuse of rights.

18.3 There are two distinct but complementary reasons for which Iran runs afoul of that prohibition. *First*, Iran impermissibly seeks to stretch the rights under the Treaty of Amity to apply to factual circumstances that the Parties obviously never intended them to address. *Second*, it is an abuse of rights for Iran to seek to prosecute rights as a shield against its accountability for its wrongful acts. The rights under the Treaty cannot be invoked to protect Iran from its unlawful conduct outside the framework of the Treaty. Against the background of the extraordinary circumstances of this case, either ground provides a sufficient basis for the Court to dismiss Iran's claims.

[530] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121 (1953) **(U.S. Annex 87)**. *See also* Chapter 8.

Section A: The Doctrine of Abuse of Rights and the Circumstances in which It May Be Applied

18.4 The doctrine's status as a general principle of law has been widely recognized as such by eminent scholars[531] and by Members of this Court.[532] It has also been frequently invoked by States before this Court.[533] Moreover, the Court has accepted the potential application of the prohibition, both in the Court's judgments[534] and in separate and dissenting opinions of individual Members of the Court.[535] Further, the doctrine of abuse of rights is commonly

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[531] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121 (1953) **(U.S. Annex 87)**; *Report of the International Law Commission Covering the Work of its Fifth Session, 1 June – 14 August 1953*, 2 Y.B. INT'L L. COMM'N 200, 218-219, UN Doc. A/2456 (1953) **(U.S. Annex 235)**; International responsibility: Fifth report by F.V. García Amador, Special Rapporteur, 2 Y.B. INT'L L. COMM'N 41, 58, UN Doc. A/CN.4/125 (1960) **(U.S. Annex 236)**; G. D. S. Taylor, *The Content of the Rule against Abuse of Rights in International Law*, 46 BRIT. Y.B. INT'L L. 323, 352 (1972-73) **(U.S. Annex 237)**; Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 431 (2002) **(U.S. Annex 238)**; CHARLES KOTUBY & LUKE SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 108 (2017) **(U.S. Annex 240)**. (The citation to the sources in this section supports the general proposition that the abuse of rights doctrine has been widely recognized and may not reflect U.S. endorsement of all of the views expressed by these authors, States, or decisions.)

[532] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, 1948 I.C.J. 57, 79, ¶ 6 (Individual Opinion of Judge Azevedo) (May 28) ("the doctrine of relativity of rights [is] already accepted in international law . . . a long-established principle"); *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 4, 15 (Dissenting Opinion of Judge Alvarez) (Mar. 3) ("But in no case may the exercise of these rights degenerate into a misuse of right . . . . This concept [abuse of right] is relatively recent in private law, but it is already generally accepted . . . . [I]t is necessary to-day to find a place for this concept, and the International Court of Justice must take its share in this evolution"); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7, 95 (Separate Opinion of Vice-President Weeramantry) (Sep. 25) (the abuse of rights is a "well-established area of international law").

[533] *See, e.g.*, *Nottebohm Case (Liechtenstein v. Guatemala)*, Memorial submitted by the Government of the Principality of Liechtenstein, ¶ 52 (May 14, 1952); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* Preliminary Objections of the Federal Republic of Nigeria, ¶¶ 1.17-1.18 (Dec. 18, 1995); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Transcript 54-71 (May 1, 1996, 10am session); *id.*, Transcript 80 (May 3, 199, 3pm session); *see also id.*, 1993 I.C.J. 325, 336, ¶ 19 (Order of Sep. 13); *Aerial Incident of 10 August 1999 (Pakistan v. India)*, 2000 I.C.J. 12, 30, ¶ 40 (June 21, 2000); *Legality of Use of Force (Yugoslavia v. Belgium)*, Preliminary Objections of the Kingdom of Belgium, ¶¶ 479-80 (July 5, 2000); *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* Memorial of Australia, ¶¶ 4.60, 5.135-36 (May 9, 2011); *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Transcript 53, ¶ 21 (Feb. 19, 2018, 10am session); *id.*, Judgment, ¶ 139 (June 6, 2018); *Jadhav Case (India v. Pakistan)*, Judgment, ¶¶ 51-52, 122 (July 17, 2019).

[534] *See Certain German Interests in Polish Upper Silesia (Merits)*, 1926 P.C.I.J. (ser. A) No. 7, at 30, 37-38; *Free Zones of Upper Savoy and the District of Gex (Second Phase)*, 1930 P.C.I.J. (ser. A) No. 24, at 12 (Order of Dec. 6); *Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (Judgment of June 7); *Fisheries (United Kingdom v. Norway),* 1951 I.C.J. 116, 141-142 (Dec. 18). *See also Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Judgment ¶¶ 146-151 (June 6, 2018); *Jadhav Case (India v. Pakistan)*, Judgment ¶¶ 54-58 and 121-124 (July 17, 2019).

[535] *See Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa,* 1955 I.C.J. 67, 120 (Separate Opinion of Judge Lauterpacht) (June 7); *Nottebohm Case (Liechtenstein v. Guatemala),* 1955 I.C.J. 4, 37 (Dissenting Opinion of Judge Read) (Apr. 6); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway),* 1993 I.C.J. 38, 217, ¶ 17 (Separate Opinion of Judge Weeramantry) (June 14); *Fisheries Jurisdiction (Spain v. Canada),* 1998 I.C.J. 432, 509, ¶ 48 (Dissenting Opinion of Vice-President Weeramantry) (Dec. 4); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* 1997 I.C.J. 7, 231,

recognized in other international tribunals[536] and has been reflected in various legal regimes at both the domestic[537] and international level.[538]

18.5 In the United States' submission, and as relevant to this case, the prohibition has at least the following scope: it prohibits a State exercising a right in a manner other than that in which it was intended to be exercised.[539] Furthermore, invocation of an abuse of rights defense requires a showing that four conditions are met: *first*, there is an identified right; *second*, the applicant State has abused that right; *third*, the respondent has presented "clear" evidence in

¶ 22 (Sep. 25), Dissenting Opinion of Judge Parra-Aranguren; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* 2008 I.C.J. 177, 279, ¶ 5 (Declaration of Judge Keith) (June 4).

[536] *See, e.g.*, the WTO (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 156, WT/DS58/AB/R (Oct. 12, 1998) **(U.S. Annex 239)**; Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.259, WT/DS135/R (Sep. 18, 2000) **(U.S. Annex 241)**; inter-State arbitrations; *Case Concerning Filleting within the Gulf of St. Lawrence between Canada and France*, 19 R.I.A.A. 225, ¶ 28 (July 17, 1986) **(U.S. Annex 243)**; *Award in the Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 R.I.A.A. 35, ¶¶ 202-205 (May 24, 2005) **(U.S. Annex 242)**; investor-State arbitrations (successful applications of the doctrine include, e.g., *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility ¶ 585 (Dec. 17, 2015) **(U.S. Annex 244)** and *Capital Financial Holdings Luxembourg SA v. Cameroon*, ICSID Case No ARB/15/18, Award ¶ 366 (June 22, 2017) **(U.S. Annex 245)**.

[537] *See, e.g.*, Swiss Civil Code of 10 December 1907 (as at 1 January 2019), Art. 2 **(U.S. Annex 246)** ("(1) Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. (2)The manifest abuse of a right is not protected by law"); Bürgerliches Gesetzbuch (BGB) (German Civil Code) § 226 **(U.S. Annex 247)** ("The exercise of a right is not permitted if its only possible purpose consists in causing damage to another"); Québec Civil Code, Article 7 **(U.S. Annex 248)** ("No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith."). *See also* CHARLES KOTUBY & LUKE SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 110 n.128 (2017) **(U.S. Annex 240)**.

[538] *See, e.g.*, United Nations Convention on the Law of the Sea, art. 300, Dec. 10, 1982, 1833 U.N.T.S. 397 **(U.S. Annex 249)** ("States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right"); European Convention on Human Rights, art. 17, Nov. 4, 1950, 213 U.N.T.S. 221 **(U.S. Annex 250)** ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"); International Covenant on Civil and Political Rights, art. 5(1), Dec. 16, 1966, 999 U.N.T.S. 171 **(U.S. Annex 252)**: Universal Declaration of Human Rights (1948), art. 30 **(U.S. Annex 253)**. *See also* Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, art. 4(5) **(U.S. Annex 251)**.

[539] *See, e.g.*, *Free Zones of Upper Savoy and the District of Gex (Second Phase)*, 1930 P.C.I.J. (ser. A) No. 24, at 12 (Order of Dec. 6); *Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (Judgment of June 7) (where the Court observed that France would not be permitted to invoke its right to establish a police cordon around a particular area, as a guise for a customs barrier, given the existence of its obligation to maintain the zones). *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 131 (1953) **(U.S. Annex 87)** ("[T]he reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect . . .") .

support of any underlying factual allegations;[540] and *fourth*, there are "exceptional circumstances" justifying the application of the doctrine.[541]

18.6 The usual consequence is that the holder of the right is precluded from exercising that specific right in the asserted abusive manner. This may require that the applicant State's claim is circumscribed or even dismissed outright, depending on the precise relationship between the abused right and the claim advanced by the applicant State.

Section B: Iran Is Precluded from Exercising Substantive Rights under the Treaty of Amity

18.7 Iran seeks to invoke the substantive protections of seven provisions of the Treaty of Amity: Articles III(1), III(2), IV(1), IV(2), V(1), VII(1) and X(1).

18.8 This submission operates in the event that the Court were to find that Iran has a right to substantive protection under any of these provisions in the circumstances of this case. In such circumstances, the United States contends that it would be an abuse of Iran's rights for it to be permitted to invoke any of the protections contained in Articles III(1), III(2), IV(1), IV(2), V(1), VII(1) and X(1) of the Treaty of Amity. This is because Iran seeks to exercise those substantive rights to protection under the Treaty in a manner manifestly apart from that in which they were intended to be exercised. This is contrary to the aspect of the prohibition against abuse of rights discussed above.

18.9 Iran's abuse of its substantive rights under the Treaty has two relevant and distinct aspects.

18.10 The first is the Parties did not intend the substantive protections set out in the Treaty of Amity to be available for exercise in the factual circumstances and legal context present in this case. The Treaty is a commercial and consular agreement. It sought to protect the Parties' interests in those limited fields of activity by conferring the specific rights to substantive protection. This is confirmed both by the title of the Treaty[542] and by its stated object, by which "mutually beneficial trade and investments and closer economic intercourse generally" was encouraged and by which consular relations were regulated. It sought to achieve bilateral

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[540] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Judgment ¶ 150 (June 6, 2018); Preliminary Objections Judgment ¶ 113; *Jadhav (India v. Pakistan)* Judgment ¶ 49 (July 17, 2019).

[541] *See Immunities and Criminal Proceedings (Equatorial Guinea v France),* Judgment ¶ 150 (June 6, 2018); Preliminary Objections Judgment ¶ 113; *Jadhav (India v. Pakistan)*, Judgment ¶ 49 (July 17, 2019).

[542] *See Oil Platforms (Islamic Republic of Iran v. United States of America),* 1996 I.C.J. 803, ¶ 27 (Dec. 12).

friendship in the specific fields of trade and investment, economic intercourse and consular relations,[543] as the circumstances of its conclusion[544] and the Treaty's plain preambular terms reinforce. It is this "spirit and intent" which "animate[s]" the interpretation of each provision of the Treaty.[545]

18.11 However, Iran does not seek to invoke its substantive rights for the purposes of commerce or consular relations. Instead, by its application to this Court, Iran purports to challenge U.S. measures directed at providing a meaningful forum for U.S. victims to obtain reparation for acts of terrorism that Iran itself has sponsored. On any reasonable view, the impugned U.S. measures bear no relation whatsoever either to commerce or to consular relations as protected under the Treaty. Neither the object and intended scope of Treaty of Amity nor the substantive provisions on which Iran relies bear any "common point of reference with the facts as claimed by Iran," as Judge Higgins recognized in analogous circumstances in the *Oil Platforms* case.[546] To the extent that its substantive rights under the Treaty are engaged in this case, Iran cannot properly exercise them in circumstances so far beyond the parties' contemplation. The doctrine of abuse of rights precludes it from doing so.

18.12 The second relevant aspect of Iran's conduct is that it seeks to exercise its substantive rights for an improper purpose. Iran plainly attempts to circumvent its obligations to make reparation to victims of its state-sponsored terrorist acts, as has been explained in detail above.[547] It does so by challenging the very steps that the United States has taken to provide a forum for victims to obtain compensation for Iran's wrongful acts, under the "guise"[548] of invoking its substantive rights to protection. In this way, it seeks to use its substantive Treaty rights as a shield against its accountability for those wrongful acts. This is a manifest abuse of Iran's substantive rights which cannot be endorsed or permitted by the Court.

18.13 This is an "exceptional" case in which the doctrine of abuse of rights may be applied by the Court. This exceptional character lies in the fact that it was Iran's own conduct which led to the measures that the United States has adopted. Iran seeks to use that wrongful conduct

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[543] *See id.,* ¶ 28.

[544] *See* Chapters 4.

[545] *See Oil Platforms,* 1996 I.C.J. at ¶¶ 28, 52.

[546] *Id.,* at 858, ¶ 39 (Separate Opinion of Judge Higgins).

[547] *See* Chapter 6.

[548] *See Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (Judgment of June 7).

to its own advantage, in order to circumvent its responsibility to make reparation to victims of its State-sponsored terrorism. This is egregious and wrongful conduct that cannot be countenanced by the Court.

18.14 For all of the reasons set out above, Iran is precluded from exercising any right to substantive protection that the Court may find that Iran holds under the Treaty of Amity.

CHAPTER 19: IRAN IS NOT ENTITLED TO ANY REMEDY

19.1 For the reasons set out in the foregoing chapters, Iran's claims should be dismissed in their entirety, and, accordingly, it is not entitled to any remedy.

19.2 The United States will, nevertheless, briefly address the three forms of relief that Iran has requested. *First*, regardless of the merits of Iran's claims, its request for an order directing the United States to cease conduct in breach of the Treaty of Amity[549] must be rejected because the Treaty is terminated. *Second*, for the same reason, the Court should reject Iran's request for an order directing the United States to "provide Iran with an assurance that it will not repeat its unlawful acts."[550]

19.3 *Third*, with respect to Iran's claim for reparation, Iran has declined to specify the quantum of its losses, explaining that this calculation is "a matter reserved in the Application for a later stage in these proceedings."[551] Thus, there is nothing that requires a response from the United States at this stage.

19.4 Iran has also failed to identify the full universe of entities that have allegedly been affected by the U.S. measures or the specific harms that they have suffered. Iran instead pleads in generalities such as "Iranian companies have also suffered, and continue to suffer, losses that are less easily quantifiable" and "restrictions upon the transfer of funds to or from the United States entail trading costs for affected companies, which are real and quantifiable losses."[552] Such assertions are simply too vague to merit a response.

19.5 Iran has been similarly vague in its Memorial about injuries that it has allegedly suffered as a result of the challenged U.S. measures. To the extent that any of this alleged harm is related to the purported failure by the United States to recognize the sovereign immunity of

[549] Iran's Memorial, ¶ 7.13.

[550] *Id.,* ¶ 7.15.

[551] *Id.,* ¶ 7.6.

[552] *Id.,* ¶¶ 7.4, 7.5.

Iran, its Central Bank or other state entities, this harm is not cognizable under the Treaty of Amity, as the Court has held in its Preliminary Objections Judgment.[553] But in any event, Iran has not identified with any specificity the harm that it has allegedly suffered, resorting again to generalities. For example, Iran refers to "the loss of commercial opportunities" without providing any indication as to what these commercial opportunities might be, how they were lost or how this loss might be connected to the challenged U.S. measures.[554]

19.6 In sum, the Court should reject Iran's request for remedies because its claims are meritless but, regardless, Iran has not come close to justifying its request in its vaguely pled Memorial.

[553] *See* Chapter 2.

[554] Iran's Memorial, ¶ 7.7.

SUBMISSIONS

On the basis of the facts and arguments set out above, the United States of America requests that the Court, in addition or in the alternative:

1. Dismiss all claims brought under the Treaty of Amity on the basis that Iran comes to the Court with unclean hands.

2. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to Bank Markazi.

3. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to companies that have failed to exhaust local remedies.

4. Dismiss on the basis of Article XX(1)(c) and (d) of the Treaty of Amity all claims that U.S. measures that block or freeze assets of the Iranian government or Iranian financial institutions (as defined in Executive Order 13599) violate any provision of the Treaty.

5. Dismiss all claims brought under Articles III, IV, V, VII, and X of the Treaty of Amity on the basis that the United States did not breach its obligations to Iran under any of those Articles.

6. To the extent the Court concludes that Iran, notwithstanding the foregoing submissions, has established one or more of its claims brought under the Treaty of Amity, reject such claims on the basis that Iran's invocation of its purported rights under the Treaty constitutes an abuse of right.

Respectfully submitted,

Marik A. String

Agent of the United States of America

October 14, 2019

CERTIFICATION

I, Marik A. String, Agent of the United States of America, hereby certify that the copies of this pleading and all documents annexed to it are true copies of the originals and that all translations submitted are accurate.

Marik A. String

Agent of the United States of America

October 14, 2019

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