IN THE NAME OF GOD

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
CERTAIN IRANIAN ASSETS

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

REPLY

OF THE ISLAMIC REPUBLIC OF IRAN

17 AUGUST 2020

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LIST OF ABBREVIATIONS AND ACRONYMS

AEDPA	Antiterrorism and Effective Death Penalty Act of 1996
a.k.a.	also known as
CAFTA	Central America Free Trade Agreement
Cir.	Circuit
Cong.	Congress
C.U.P.	Cambridge University Press
D.C.	District of Columbia
D.D.C.	District Court for the District of Columbia
DTC	Depository Trust Company of New York
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed.	edition
EDBI	Export Development Bank of Iran
E.D.N.Y.	Eastern District of New York
e.g.	*exempli gratia*
EHRR	European Human Rights Reports
E.O.	Executive Order
et al.	*et alii*
FCN	Friendship, Commerce and Navigation
Fed. Reg.	Federal Register
fn.	footnote
FRBNY	Federal Reserve Bank of New York
FSIA	Foreign Sovereign Immunities Act of 1976
F. Supp.	Federal Supplement
HRC	Human Rights Committee
H. R. Rep.	House of Representative Report
IAEA	International Atomic Energy Agency
Ibid.	*Ibidem*
I.C.C.	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
I.C.J.	International Court of Justice
I.C.S.I.D.	International Center for Settlement of Investment Disputes
i.e.	*id est*
I.L.C.	International Law Commission
IM	Iran's Memorial
Inc.	Incorporated
IOS	Iran's Observations and Submissions on the U.S. Preliminary Objections
IRGC	Islamic Revolutionary Guard Corps

IRISL	Islamic Republic of Iran Shipping Lines
ISIN	International Securities Identification Number
ITLOS	International Tribunal for the Law of Sea
ITRSHRA	Iran Threat Reduction and Syria Human Rights Act of 2012
IUSCT	Iran – United States Claims Tribunal
JASTA	Justice Against Sponsors of Terror Act of 2016
JCPOA	Joint Comprehensive Plan of Action
MKO	Mujahedin Khalgh Organization of Iran
MOIS	Iranian Ministry of Intelligence and Security
NAFTA	North American Free Trade Agreement
NCR	National Council of Resistance
NDAA	National Defense Authorization Act for Fiscal Year
NIGC	National Iranian Gas Company
NIOC	National Iranian Oil Company
NITC	National Iranian Tanker Company
No.	*numero*
NPC	National Petrochemical Company
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OFAC	Office of Foreign Assets Control
O.U.P.	Oxford University Press
p.	page
para.	paragraph
paras.	paragraphs
P.C.I.J.	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
pp.	pages
Pub. L.	Public Law
QSF	Qualified Settlement Fund
RCADI	*Recueil des Cours de l'Académie de Droit International*
Rec.	Record
R.I.A.A.	Reports of International Arbitral Awards
s.	section
S.D.N.Y.	Southern District of New York
TIC	Telecommunication Infrastructure Company
TRIA	Terrorism Risk Insurance Act of 2002
UCC	United States Uniform Commercial Code
UBAE	Unione delle Banche Arabe ed Europee
U.K.	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
U.N. doc.	United Nations documents
UNCITRAL	United Nations Commission on International Trade Law

UNSC	United Nations Security Council
U.N.T.S.	United Nations Treaty Series
U.S.	United States of America
U.S.C.	United States Code
U.S. CM	United States' Counter-Memorial
USD	United States dollar
U.S. PO	United States' Preliminary Objections
v.	versus
Vienna Convention	1969 Vienna Convention on the Law of Treaties
vol.	Volume
Y.I.L.C.	Yearbook of the International Law Commission

CHAPTER I.
INTRODUCTION

SECTION 1.
INTRODUCTORY OBSERVATIONS

1.1 The Islamic Republic of Iran ('Iran') filed its Memorial in this case on 1 February 2017. Since then the United States announced, on 3 October 2018,[1] its denunciation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights ('the Treaty of Amity'[2]) which is the legal basis of this case, and the Court delivered, on 13 February 2019, its decision on the preliminary objections raised in this case by the United States. Iran has taken due note of those developments and has adjusted its position and its submissions accordingly; but it is important to emphasise from the outset that the core of Iran's case, and likewise the rationale for instituting these proceedings and the importance of deciding on Iran's claims, remain intact.

1.2 Iran's core case was and is that in the Treaty of Amity, Iran and the United States accepted legally binding obligations to apply agreed rules and principles in their dealings with one another and in the treatment of each other's companies. Those rules and principles provided the foundation upon which the peoples of Iran and the United States would develop "mutually beneficial trade and investments and closer economic intercourse".[3] The Court's 13 February 2019 Judgment indicated that, contrary to Iran's submission, the rules and principles secured by the Treaty do not include rights to establish a claim where there has been a failure to comply with the rules of international law on sovereign immunity. Iran therefore does not pursue those of its original claims that were predicated on the United States' failure to accord immunity

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1 Diplomatic Note from the U.S. Department of State to the Ministry of Foreign Affairs of I.R. Iran, 3 October 2018 (IR, Annex 2).

2 Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States of America and Iran, 284 U.N.T.S. 93 (IM, Annex 1).

3 Treaty of Amity, preambular para. 1 (IM, Annex 1).

from jurisdiction and/or enforcement to the Government or Iran, Bank Markazi, or Iranian State-owned entities under the customary international law on sovereign immunity.[4] All of Iran's other claims remain before the Court.

1.3 The United States repeatedly insists on addressing the broad context of Iran-U.S. relations and global politics, rather than Iran's narrow legal claim. The United States and Iran have not made treaty agreements that put all aspects of their relationship into a legal framework that provides for the compulsory adjudication of disputes. But they have put the aspects in issue here within such a legal framework; and the question now before the Court is, essentially, whether when the United States binds itself under international law to act in a certain way it can decide unilaterally that it will not behave in that way. It is the most basic question of the application of the Rule of Law in international relations: whether States are free to abandon legal commitments in order to pursue foreign policy goals.

1.4 In its Counter-Memorial, the United States has engaged again in an attempt to "poison the well" and has also chosen to put before the Court a distorted account of Iran's case in order to bolster the credibility of its defences. It attempts, for example, to cut down Iran's case to claims regarding a few companies or entities, ignoring the violation of Iran's own rights under the Treaty of Amity, so as to transform this into a case of diplomatic protection.[5]

1.5 It is necessary to focus on Iran's claim as it has actually been presented in its Memorial, narrowed down by reference to the Court's decision on jurisdiction, rather than on the distorted version of Iran's claim as the United States has sought to re-cast it in its Counter-Memorial. The United States has submitted a pleading centred on Iran - U.S. relations generally and a multiplicity of spurious allegations of terrorism such that, remarkably, it is not until Chapter 12 of its Counter-Memorial that the United States starts to engage with Iran's actual claim, i.e. its claim for breaches of the Treaty of Amity. Yet that claim cannot be re-shaped into a case about alleged

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4 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, pp. 22, 25, 29 and 30, paras. 48, 58, 70 and 74.

5 U.S. Counter-Memorial, Chapter 10.

terrorism, with Iran's actual case then confined almost to a footnote in the United States (ill-founded) complaints as to Iran's conduct over the past 40 years.

1.6 At the heart of Iran's case is the United States' extraordinary disregard for, and deliberate nullification of, Iran's rights and interests protected by the Treaty of Amity. This includes the United States' legislative intervention into ongoing U.S. court proceedings in order to ensure that Iranian companies lose those proceedings, and its complete disregard for the separate juridical status of Iranian companies, both of which inflict injury on the Iranian economy. In the *Peterson* case, U.S. legislation targeted the specific proceedings, retroactively removing all defences that would usually have been available to Bank Markazi.[6] In the *Bennett* litigation, legislation pre-determined the outcome of the case against Bank Melli by providing that the assets of any entity regarded by U.S. law as an "instrumentality" of an alleged terrorist State were available to satisfy the "terrorism judgment", even though Bank Melli was not a party to the judgment and was not even alleged to have been involved in any terrorist activity.[7] These and other acts by the United States directly engage and breach protections accorded by the Treaty of Amity to the Islamic Republic of Iran itself and to Iranian companies.

SECTION 2.
BRIEF PROCEDURAL HISTORY

1.7 On 14 June 2016, Iran filed its Application based on the fact that the adoption by the United States of a series of measures directed against Iranian companies and their property "have had and/or are having a serious adverse impact upon the ability of Iran and of Iranian companies (including Iranian State-owned companies) to exercise their rights to control and enjoy their property, including property located outside the

6 See paras. 2.95-2.96 (*Peterson I*) and paras 2.103-2.107 (*Peterson II*) below. See also Iran's Memorial, pp. 96-97, paras. 5.44-5.45.

7 See paras. 2.70-2.78 below; see also *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016) (IM, Annex 64). See also *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010) at pp. 7-12 (IM, Annex 47).

territory of Iran/within the territory of the USA".[8] Iran submitted – and subject to the modifications entailed by the Court's judgment of 13 February 2019, still submits – that these measures violate the Treaty of Amity, and invoked Article XXI(2) of that Treaty as the basis for the Court's jurisdiction.

1.8 On 1 February 2017, Iran filed its Memorial, in which it elaborated upon the U.S. violation of its obligations under the Treaty of Amity through its stated policy of "imposing serious harm upon the Iranian economy and the Iranian nationals and companies who make up and depend on that economy, to the point where it has become necessary for Iran to seek the protection of its legal rights before this Court".[9] Iran explained that the U.S. legislature had abrogated certain procedural provisions and defences in its domestic law and that the "actual and intended effect of this is to deprive Iran and Iranian companies of the possibility of properly defending their legal rights before the U.S. courts, and to enable plaintiffs in the U.S. courts to satisfy judgment debts in cases against the Iranian State (again, in the U.S. courts) by seizing assets of juridically separate Iranian companies that are not even parties to those cases."[10] Indeed, that was not only the effect of those measures, it was their very purpose.

1.9 On 1 May 2017, the United States filed a number of preliminary objections to the Court's jurisdiction and the admissibility of Iran's Application. Iran responded with its Observations and Submissions of 1 September 2017. The Court heard the oral arguments of the Parties on 8-12 October 2018. A few days before the hearings opened, the United States announced it was withdrawing from the Treaty of Amity in order to "limit[] its exposure to decisions by the International Court of Justice".[11] Iran stated that the "shift in the position of the United States" regarding its Treaty obligations "in no way prejudices the already acquired rights of the Iranian

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8 Iran's Application, p. 1, para. 1.

9 Iran's Memorial, p. 1, para. 1.3.

10 *Ibid*., p. 2, para. 1.6.

11 N. Gaouette & J. Crawford, "U.S. blasts international court on Iran ruling, pulls out of 1955 treaty", *CNN*, 3 October 2018 (IR, Annex 118).

government, nationals and companies as well as the legal claims made against the United States in accordance with the said Treaty".[12]

1.10 The Court issued its Judgment on Preliminary Objections on 13 February 2019. The Court unanimously rejected the first preliminary objection raised by the United States, that claims relating to Executive Order 13599 fell outside the scope of the Treaty of Amity by virtue of Article XX(1)(c) and (d) of the Treaty. The Court also unanimously rejected the U.S. objections to admissibility based on abuse of process and "unclean hands" arguments. By 11 votes to 4, the Court upheld the second preliminary objection by the United States that "Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity" and therefore do not fall within the Court's jurisdiction.[13] Also by 11 votes to 4, the Court declared that the third preliminary objection raised by the United States – that Bank Markazi is not a "company" for the purposes of Articles III, IV and V of the Treaty of Amity – did not possess an exclusively preliminary character.

1.11 The United States submitted its Counter-Memorial on 14 October 2019. This Reply responds to it.

SECTION 3.
THE SUBJECT MATTER OF THE CASE

1.12 Not only does the United States seek to distort the Court's Judgment on Preliminary Objections as set out above, but it also seeks to transform the very subject matter of the dispute. It attempts to change a case concerning rights and protections in economic and commercial relations into a case about terrorism. The United States asserts that "[i]t 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

[12] Diplomatic Note from the Ministry of Foreign Affairs of I.R. Iran to the U.S. Department of State, 13 November 2018 (IR, Annex 3). See also Note Verbale No. 211543 from I.R. Iran to the Government of the United States, 2 October 2019 (IOS, Annex 13).

[13] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 34 at para. 80.

to enforce those judgments against Iran, its Central Bank and other state-owned entities".[14] In an argument built on unproven allegations that Iran has sponsored terrorist attacks, the Respondent attempts to shift the Court's focus to the proposition advanced by the United States that the Treaty of Amity's provisions "do not and were never intended to protect a party who sponsors terrorist attacks directed at the other party and its nationals".[15]

1.13 It is not for a respondent to redefine the scope of a claim to suit its own preferred defensive arguments. It is for the Court, and not the Parties, to determine the scope of the claim; but the Court will give "particular attention to the formulation of the dispute chosen by the Applicant".[16]

1.14 The subject-matter of the dispute remains as Iran set out in its Application: a dispute concerning the adoption of U.S. measures in violation of the Treaty of Amity that are adversely impacting on the ability of Iran and Iranian companies to exercise their rights and to control and enjoy their property.[17] The Treaty sets out basic ground rules, agreed between the United States and Iran, governing how they will treat each other's companies as they pursue economic intercourse. As Iran's Memorial explained, the "case arises from the implementation of a policy of the United States that strips Iranian companies of respect for their rights including respect for their separate corporate personality, violates […] property rights of the State of Iran and Iranian entities […] and severely impedes trade between Iran and the United States, all in violation of the terms of the 1955 Treaty of Amity".[18]

1.15 Despite the United States' attempts to re-cast the issues, the case has not somehow changed into one that pivots on the question of whether the Treaty's provisions were

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14 U.S. Counter-Memorial, p. 6, para. 2.2.

15 *Ibid*., p. 1, para. 1.3.

16 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 448, para. 30; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* p. 848, para. 38; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177 at paras. 65, 69. See also Article 38(1) of the Rules of Court.

17 Iran's Application, p. 1, para. 1.

18 Iran's Memorial, p. 1, para. 1.1.

designed actively to "protect a party who sponsors terrorist attacks", which is how the United States presents matters. Rather, there is now a line of defence which requires the Court to consider whether allegations of terrorism somehow allow the United States to act in violation of obligations clearly set out in the Treaty. Those violations are plainly identified by Iran, and include the action of the United States in, *inter alia*, amending laws explicitly aimed at predetermining the outcome of specific court cases against Iran, adopted while those cases were pending before the U.S. courts and specifically in order to benefit the U.S. plaintiffs, and in passing laws allowing its courts to seize assets of juridically-separate Iranian companies that are not even parties to the cases. Such actions violate the basic principles of the Rule of Law; and they violate the Treaty of Amity. Further, the seizure of company assets has taken place in a context of specific cases in which Iranian companies have not even been accused of, let alone been found responsible for, support of terrorism.

1.16 The disconnect between the U.S. allegations against Iran and reality is illustrated by the litigation surrounding responsibility for sponsoring the 9/11 attacks in New York. In *Havlish v. Bin Laden*, a U.S. District Court implausibly held in 2011 that Iran has provided material support to Al Qaeda, and entered a default judgment holding that, among others, the State of Iran, and also several State-owned companies, are liable to the plaintiffs for the damages resulting from the 9/11 terrorist attacks.[19] But within the United States a different story is being told. Brian Hook, the U.S. special representative on Iran, testified to U.S. Congress in 2019 that Iran was *not* responsible "for the deaths on 9/11".[20] In 2016, the U.S. Congress has passed legislation aiming to expose Saudi Arabia to liability in U.S. courts for sponsoring the 9/11 attacks;[21] and U.S. courts have also found Iraq liable for those very same attacks.[22] The

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19 *Havlish, et al. v. Bin Laden, et al.*, U.S. District Court, Southern District of New York, 22 December 2011, No. 03 MD 1570 (S.D.N.Y. 2011) (IM, Annex 52; Iran's Memorial, pp. 38-39, para. 2.53).

20 Oversight of the Trump Administration's Iran Policy, Hearing before the Subcommittee on the Middle East, North Africa and International Terrorism of the Committee on Foreign Affairs, House of Representatives, 116th Congress, 1st session, 19 June 2019, serial no. 116-48 (IR, Annex 6).

21 Justice Against Sponsors of Terrorism Act ('JASTA') 2016; Iran's Memorial, p. 3, para. 1.9.

22 *Smith v. The Islamic Emirate of Afghanistan, The Taliban, Al Qaida/Islamic Army, Sheikh Usamah Bin-Muhammad Bin-Laden a/k/a Osama Bin Laden, Saddam Hussein, The Republic of Iraq, et al.*, U.S. District Court for the Southern District of New York, Opinion and Order, 7 May 2003 as amended 16 May 2003, 262 F. Supp. 2d 217 (2003) (IR, Annex 17).

incoherence and absurdity of the U.S. position is explained in greater detail in Chapter II below.

1.17 The United States contends that "[t]he 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".[23] But not only are its steps, which are punitive and go far beyond the goal of enabling victims to sue for compensation, neither "peaceful" nor "measured", but they also violate the principle of *pacta sunt servanda* and the object and purpose of the Treaty. The Court has already defined the object and purpose of the Treaty of Amity in terms that amply cover the claims made by Iran:

> "[…] The Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense".[24]

1.18 The United States refers to expansive "underlying principles" of the Treaty of Amity[25] rather than to the object and purpose of the Treaty in accordance with the principles of interpretation enshrined in the Vienna Convention on the Law of Treaties. Instead of complying with the real object and purpose of the Treaty, the United States speaks of the "Object and Purpose of the U.S. FCN Program".[26] In so doing, it manipulates the nature and scope of the Treaty to suit a political agenda that it tries to support by references to terrorism.

SECTION 4.

THE JUDGMENT OF 13 FEBRUARY 2019 ON PRELIMINARY OBJECTIONS

1.19 The United States overstates and misrepresents the effect of the Court's Preliminary Objections Judgment of 13 February 2019 in saying that it has "significantly narrowed

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23 U.S. Counter-Memorial, p. 3, para. 1.9.

24 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America) Preliminary Objections, Judgment, I.C.J. Reports 2019*, p 38, para 91.

25 U.S. Counter-Memorial, p. 14, para. 4.5.

26 *Ibid.*, pp. 13-15, paras. 4.2-4.6.

the scope of Iran's case" by "exclud[ing] from the scope of Iran's case going forward all claims advanced by Iran in its own right".[27]

1.20 While it is true that the Court has upheld the second preliminary objection, thus excluding from its jurisdiction Iran's claims based on alleged violations of its sovereign immunities under customary international law, it has not excluded *all* claims advanced by Iran in its own right. Iran's case is a State-to-State claim seeking remedies for the United States' violation of treaty obligations.[28] Even if this were solely a case of diplomatic protection, the duty to exhaust local remedies would be inapplicable because such remedies have in fact been exhausted, and any further pursuit of remedies within the U.S. judicial system is patently futile in the circumstances of this case.

1.21 To this end, the United States' argument that U.S. judicial decisions in Attachments 1 and 4 to Iran's Memorial, which arise in the course of litigation in cases directly affected by the measures of which Iran complains, are outside of the Court's jurisdiction is erroneous.[29] The cases listed in Attachment 1, with judgments dating from 1998 to 2017, remain relevant as a significant part of factual background to the U.S. measures of which Iran complains. The judgments are also relevant to the extent that they were solely issued against Iran but were enforced against Iranian companies, denying their separate juridical status, in breach of Iran's rights under the Treaty of Amity, and as instances of the blocking and seizure of Iran's assets in violation of the provisions of that Treaty.[30] Iran does not rely on the cases in Attachment 1 in respect of its previous claim of sovereign immunity, which was found by the Court to fall outside of its jurisdiction in its ruling of 13 February 2019 on preliminary objections.

1.22 The cases listed in Attachment 2, which concern the enforcement of U.S. judgments against assets that are treated by U.S. law as being "Iranian" and liable to seizure, remain as the basis of Iran's specific claims against the United States. So, too, do the

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27 *Ibid.*, p. 6, para. 2.2.

28 See Chapter IX below.

29 U.S. Counter-Memorial, p. 7, para. 2.7.

30 See, *e.g.*, in Attachment 1: No. 42 (*Peterson*), No. 41 (*Bennett*), and No. 11 (*Weinstein*), and many other judgments that were enforced by their judgment creditors against Iranian companies.

cases listed in Attachment 3, where attempts are made to apply the U.S. in other, non-U.S. jurisdictions, in order to obtain the recognition and enforcement of U.S. judgments in a manner that violates the Treaty of Amity, just as it does when the measures are applied via courts in the United States itself. Acts outside the United States that harm Iranian interests are a direct, foreseeable, and intended result of the U.S. measures and form part of the injury caused by the breach of the Treaty of Amity. Attachment 3 has been updated to reflect recognition and enforcement action against the Government of Iran and, in some cases, also against Iranian companies, taken in Canada, Luxembourg, France, and Italy.

1.23 Attachment 4, which lists claims against Iran and Iranian State entities known to be pending in U.S. courts as of 31 December 2019, is relevant as a factual exhibit demonstrating the extent to which the U.S. measures of which Iran complains remain a matter of real current concern to Iran and to Iranian companies.

1.24 In addition, certain arguments raised by the United States – and rejected by the Court – at the Preliminary Objections stage, now fall for consideration by the Court.

a. The first preliminary objection raised by the United States, that claims relating to Executive Order 13599 (which only concerns some of Iran's claims) falls outside the scope of the Treaty of Amity by virtue of Article XX(1)(c) (arms trafficking) and XX(1)(d) (essential security interests) of the Treaty of Amity. Article XX(1) was found by the Court to be irrelevant to the question of its jurisdiction, but to afford "a possible defence on the merits to be used should the occasion arise", in line with its holding in *Oil Platforms*.[31] Iran will show that that Article XX(1) does not excuse the United States' conduct with respect to Executive Order 13599, because the exceptions in the Treaty of Amity regarding arms production and trafficking and "essential security interests" are not engaged in this case.[32] Further, these Treaty exceptions are not self-judging

[31] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 25 at para. 45.

[32] See Chapter X below.

and, particularly when assessed as to their necessity and proportionality, the U.S. measures do not fall within their proper scope.

b. In an attempt to give the greatest prominence to its prejudicial allegations against Iran, the United States attempts to breathe life into its objections based on what it terms "unclean hands" and "abuse of rights". Each of these arguments is misconceived and should be rejected. The U.S. objection to admissibility on the basis of an alleged abuse of rights or "abuse of process" was rejected by the Court because the United States failed to show the exceptional circumstances and clear evidence that would justify rejecting on this ground a claim based on a valid title of jurisdiction.[33] Iran will show that the objection must be rejected also at the merits stage. Nothing that Iran has done can credibly be characterised as an abuse of its rights under the Treaty of Amity.[34] The U.S. objection based on "unclean hands" was also rejected by the Court finding that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient *per se* to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine".[35] The Court noted that the allegations made by the United States might possibly "provide a defence on the merits". [36] Iran will show that the "unclean hands" argument is unfounded.[37]

1.25 Finally, the Court left for the merits stage the examination of the question whether Bank Markazi is a "company" for the purposes of Articles III, IV and V of the Treaty of Amity, because this is a question that does not possess an exclusively preliminary character. In its Counter-Memorial, the United States cites the Court's conclusion that "an entity carrying out *exclusively* sovereign activities, linked to the sovereign functions of the State, cannot be characterised as a "company" within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections

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33 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 42 at para. 113.

34 See Chapter XI below.

35 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 44 at para. 122.

36 *Ibid.,* p. 44 at para. 123.

37 See Chapter XI below.

provided for in Articles III, IV and V".[38] But the United States then proceeds to substitute its own, quite different, test, according to which *any* entity that is entrusted with *some* "sovereign functions" (such as Iran's central bank) cannot engage in commercial activities and therefore can never be a "company" for the purposes of the Treaty of Amity.[39] Iran will show that the U.S. argument is wrong both in law and on the facts.

1.26 Furthermore, as a separate matter, the U.S. measures in blocking and seizing the assets of Bank Markazi and other Iranian companies in aid of the execution of judgments in the U.S. courts constitute violations of Iran's rights under Article X of the Treaty of Amity because those assets were the products of commerce between the two countries.

SECTION 5.
STRUCTURE OF THE REPLY

1.27 This Reply is structured as follows:

a. The factual and legal background of the case, including the impugned U.S. measures, and the Iranian companies and the assets of Iran and Iranian companies that have been subjected to those measures and the judicial proceedings against them, are described in more detail in the following chapter of this Introduction (Chapter II);

b. **Part I** sets out the U.S. breaches of Iran's rights under the Treaty of Amity that are the subject of Iran's claims in this case. It first shows that Bank Markazi is a "company" under the Treaty (Chapter III) and then addresses the U.S. violations of Articles III(1), III(2), IV(1), IV(2), V(1), VII(1) and X(1) (Chapters IV, V, VI, VII, and VIII);

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38 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 38 at para. 91 (emphasis added); U.S. Counter-Memorial, p. 8, para. 2.11.

39 U.S. Counter-Memorial, Chapter 9, see *e.g.* para. 9.17. See Chapter III below.

c. **Part II** addresses the other U.S. arguments and defences. The U.S. argument that local remedies must be exhausted cannot bar Iran's claims in this case because those remedies, to the extent effectively available, have in key cases been exhausted in practice, and exhaustion is in any event not a condition for the admission of Iran's claims (Chapter IX). It is also shown that Article XX(1) of the Treaty of Amity does not bar Iran's claims, in particular in relation to U.S. Executive Order 13599 (Chapter X). Further, the U.S. "unclean hands" objection is inadmissible and unfounded, and there is no "abuse of rights" by Iran in this case (Chapter XI). This Part of Iran's Reply concludes with an Appendix responding to U.S. allegations against Iran which, although legally irrelevant in these proceedings, cannot be allowed to stand on the record unchallenged.

d. **Part III** contains a summary of Iran's case and Iran's formal Submissions (Chapter XII).

CHAPTER II.

THE JUDICIAL DECISIONS IMPLEMENTING THE U.S. LEGAL AND REGULATORY MEASURES AGAINST IRAN AND IRANIAN COMPANIES

2.1 The United States contends that "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", it says that Iran's pleading "has hampered the U.S. effort to respond"[40] and has led the United States to postpone its "appropriate" response until Iran "elaborates on the inadequate factual support it has so far provided for its claims".[41] These assertions are untenable. Nothing – apart from the United States' own litigation choices – has prevented the United States from fully understanding and responding to Iran's case.

2.2 Indeed, putting the U.S. rhetoric to one side, the Parties are generally in agreement on the facts underlying Iran's claims. The United States does not dispute that, as described in Chapter II of the Memorial, the U.S. legal and regulatory measures at stake have consisted in the gradual abrogation of the protections previously afforded to Iran and to Iranian companies under the 1955 Treaty of Amity, international law and U.S. law, in the following sequence: (i) since 1996, the removal, under a "terrorism exception" introduced in the Foreign Sovereign Immunity Act ('FSIA'), of Iran's jurisdictional immunity in the United States, enabling U.S. nationals to obtain judgments awarding significant compensatory damages against the State of Iran;[42] (ii) since 2002, the allowing of the attachment of property and interests of Iran and of Iranian companies to satisfy such judgments, notwithstanding the separate juridical status of companies that, in addition, were not connected with the cases;[43] (iii) since 2008, the broadening of the so-called "terrorism exception" to allow – retroactively –

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40 U.S. Counter-Memorial, p. 10, para. 2.14. See also p. 94, para. 12.4.

41 *Ibid.*, p. 11, para. 2.18.

42 Iran's Memorial, pp. 16-19, paras. 2.4-2.8 (on the amendment of FSIA 1976 by the U.S. Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')). The "terrorism exception" was codified in Section 1605(a)(7) of Title 28 of the U.S. Code (28 U.S.C. § 1605(a)(7)). It provided that jurisdictional immunity would, as a matter of principle, not apply in respect of terrorism claims against States designated by the U.S. Executive as "sponsors of terrorism" – such as Iran since 1984.

43 Iran's Memorial, pp. 19-23, paras. 2.9-2.15 (on Section 201 of the U.S. Terrorism Risk Insurance Act of 2002 ('TRIA')).

punitive and additional damages to be awarded to plaintiffs against Iran[44] and expand the range of assets available for execution;[45] (iv) in 2012, the freezing of Iranian assets and the specific abrogation of Bank Markazi's immunity from measures of execution, while enforcement proceedings were pending against its assets in the amount of USD 1,895 billion, so as to guarantee the turnover of these assets to the holders of "terrorism judgments" against the State of Iran alone.[46]

2.3 The United States admits that the aim of this legal regime is to enable plaintiffs to sue Iran in U.S. courts and then to enforce "terrorism judgments" against Iran by attaching assets owned by Iran's agencies and instrumentalities.[47] It has turned out that seizures made against assets owned by Iran itself – such as the so-called "*Cubic* judgment" held by the Iranian Ministry of Defence in the amount of USD 9,462,750[48] – are not

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44 Iran's Memorial, pp. 23-27, paras. 2.16-2.26 on Section 1605A of FSIA as adopted by the U.S. National Defense Authorization Act for Fiscal Year 2008, signed into law on 28 January 2008 ('NDAA 2008'). Section 1083 of the NDAA 2008, revised the "terrorism exception" to sovereign immunity by repealing § 1605(a)(7) of Title 28 of the U.S. Code and replacing it with a separate section, § 1605A. As described by the U.S. Courts, "Section 1605A creates a private, federal cause of action against a foreign state that is or was a state sponsor of terrorism, and provides for economic damages, solatium, pain and suffering, and punitive damages" (*Beer, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law (Liability and Damages), 26 August 2008, Case No. 06-473, p. 18 (IR, Annex 24)).

45 Iran's Memorial, pp. 27-30, paras. 2.27-2.33 (on Section 1610(g) of FSIA as amended by the NDAA 2008). The new Section 1610(g) provides that all property of Iranian State-owned companies engaged in commercial activities in the United States, including "an interest held directly or indirectly in a separate juridical entity", can be attached, whether or not it has been "blocked", to satisfy judgments against the Iranian State.

46 Iran's Memorial, pp. 30-35, paras. 2.34-2.43 (on Executive Order 13599 blocking assets owned by Iran and its agencies or instrumentalities including Bank Markazi – the Central Bank of Iran – and located in the United States; also on Section 8772 of Title 22 of the U.S. Code as amended by Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 ('ITRSHRA')).

47 See for instance U.S. Counter-Memorial, pp. 1-2, paras. 1.2 and 1.5.

48 See Iran's Memorial, p. 43, para. 2.62. The "*Cubic* judgment", which confirmed an I.C.C. arbitral award of 1997 in favour of the Iranian Ministry of Defence against Cubic Defense Systems, a U.S. provider of military equipment, had been frozen in 2007 as a result of the designation of the Ministry by the U.S. Department of State under E.O. 13382 for "proliferation activities" (U.S. Department of Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism*, 25 October 2007 (IR, Annex 9) – contrary to what this fact sheet alleged, no elements of the Iranian Ministry of Defence had been targeted by the U.N. Security Council Resolution 1737 of 2006 imposing sanctions on Iran). In 2016, the *Rubin* judgment creditors have obtained the turnover of the "*Cubic* judgment" money (see *Ministry of Defense of Iran v. Cubic, et al.*, U.S. District Court, Southern District of California, 29 April 2016, No. 98 cv 1165 (S.D. Cal. 2016) (IM, Annex 67)). For the default judgments so enforced see *Campuzano, et al. v. The Islamic Republic of Iran, et al.* and *Rubin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 10 September 2003, Cases Nos. 00-2328 and 01-1655, 281 F. Supp. 2d 258 (D.D.C. 2003) (IM, Annex 33) and *Rafii v. The Islamic Republic of Iran*

sufficient by far to satisfy the extraordinary amounts of damages awarded by these default judgments.

2.4 However, the United States contends that most of the U.S. judgments on liability and enforcement proceedings that the Memorial listed in Attachments 1 to 4 are outside the ambit of the present case. As Iran explained above, that is incorrect.[49]

2.5 This Chapter describes further the ongoing judicial implementation of the relevant U.S. measures which, under the guise of providing justice to U.S. victims of terrorism, deprives major Iranian companies of their assets through execution of judgments awarding damages in billions of dollars in cases which these companies are not parties. It will focus on the Iranian companies concerned (Section 1), the judicial proceedings engaged against them (Section 2) and provide an update on the pending judicial proceedings against Iran (Section 3).

SECTION 1.
THE IRANIAN COMPANIES CONCERNED

2.6 Judicial proceedings in the United States have been targeting the major Iranian companies in each of the industrial and commercial sectors that are key to Iran's international trade: the banking industry, telecommunications, oil and energy, shipping and shipbuilding, and aviation.

A. Bank Melli

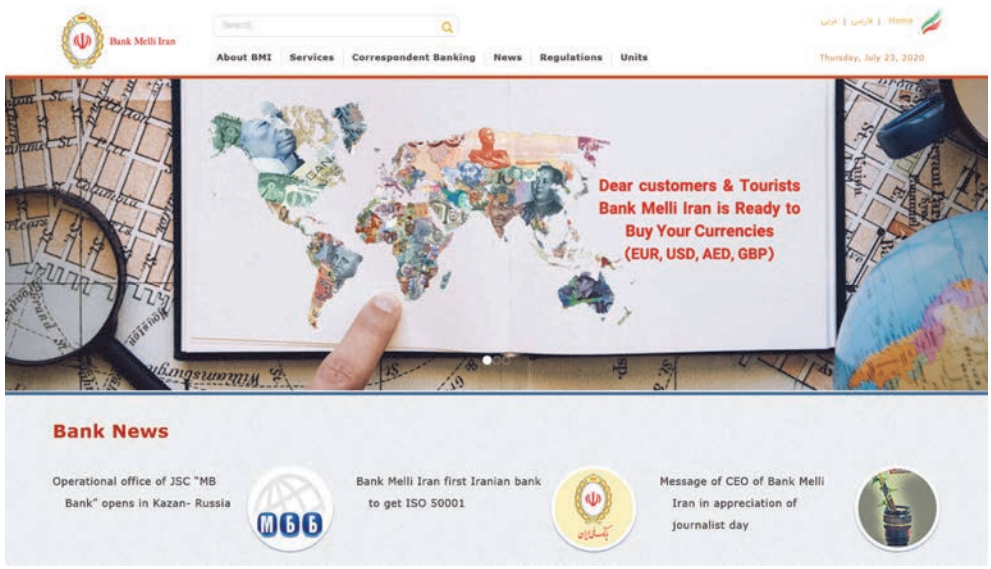
2.7 Bank Melli Iran, incorporated in 1927 under Iranian law, is the largest commercial bank in Iran.[50] It is a state-owned company, the legal personality of which is wholly separate from the State. Bank Melli is not subject to the laws and regulations

and The Iran Ministry of Information and Security, U.S. District Court for the District of Columbia, Findings of Facts and Conclusions of Law, 2 December 2002, Case No. 01-850 (IR, Annex 16).

49 See paras. 1.21-1.23 above.

50 Page "History of Bank Melli" on Bank Melli's website (IR, Annex 89).

applicable to Iranian Government organs and entities, unless expressly provided by law.[51] The objective of the Bank is to perform banking services and operations in Iran and abroad. It is active in domestic and foreign commerce and in production activities for the economic benefit of Iran.



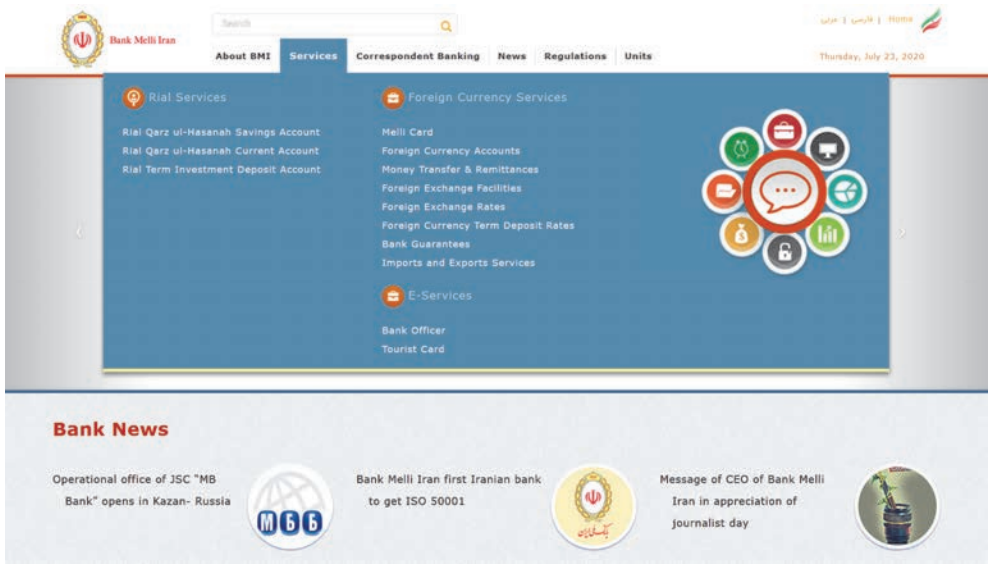
Homepage of Bank Melli's website[52]

2.8 Bank Melli owns assets in its own name and engages in any banking and financial operations authorised by law.[53] It provides its customers with conventional Islamic banking services. It also offers import and export banking services, such as issuing letters of credit and bank guarantees, providing foreign exchange facilities, as well as rendering correspondent banking services.

51 Article 1 of Articles of Association of Bank Melli Iran of 1981 (IM, Annex 74). See also Iran's Memorial, p. 67, para. 4.8.

52 Available at bmi.ir/En/Default.aspx (last consulted on 23 July 2020).

53 Article 6 of Articles of Association of Bank Melli Iran of 1981 (IM, Annex 74). Pursuant to this article such banking and financial operations include, without limitation, opening current or saving accounts, giving loans or receiving credits, engaging in foreign currency transactions, purchasing or selling bonds and securities, entering into partnership and making investments, purchasing or selling gold and silver, entering into insurance transactions, and issuing or accepting bank guarantees.



Homepage of Bank Melli's website, section relating to the services[54]

2.9 The Bank's activities are performed by the managing director and the board of directors in accordance with its Articles of Association. The managing director is the bank's highest administrative authority, who executes the decisions of the board of directors and ensures compliance with the Bank's Articles of Association and regulations. In accordance with the regulations in force, the managing director oversees day-to-day activities of the bank, which he or she represents in its dealings with government offices and private institutions. He or she can make or cancel any transaction and contract with third persons.[55] He or she has full authority to pursue or defend or settle claims brought by or against Bank Melli before courts, or administrative bodies.[56]

2.10 In 1931, the Iranian Parliament granted to Bank Melli the sole power to issue banknotes thus establishing that Bank as the State's bank of issue. Bank Melli was given responsibility for additional central bank functions including government banking operations, the regulation of currency circulation, maintenance of balance of payments surpluses, credit regulation as well as supervision of the State's banking

54 Available at bmi.ir/En/Default.aspx (last consulted on 23 July 2020).

55 Article 20(6) of Articles of Association of Bank Melli Iran of 1981 (IM, Annex 74).

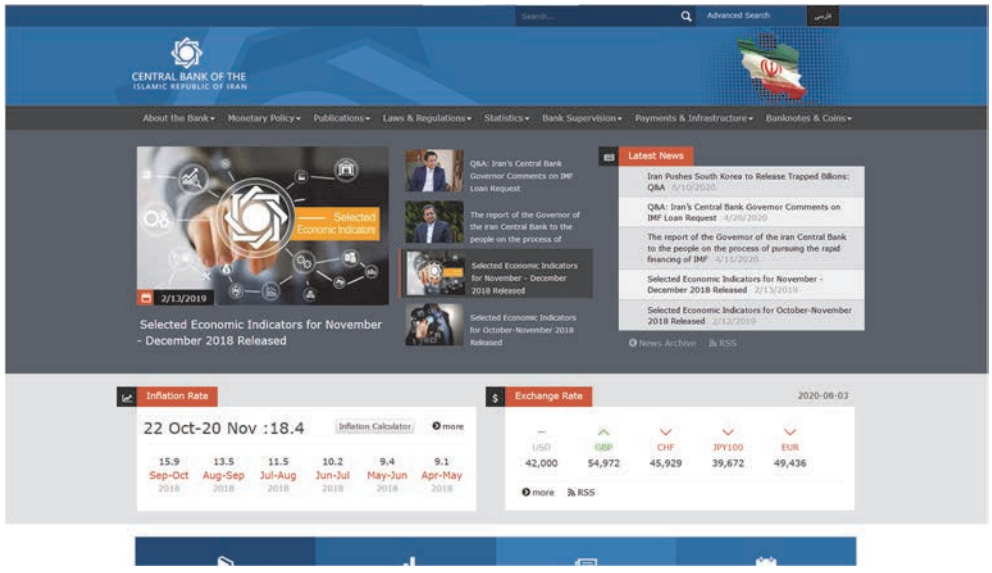
56 *Ibid.*, Article 20(9).

system. Bank Melli was replaced in respect of the functions of the central bank by Bank Markazi, pursuant to the Monetary and Banking Act 1960.[57]

2.11 Headquartered in Tehran, Bank Melli maintains a large network of domestic and international branches – the largest in terms of branches and employees – including Bank Melli PLC, the Bank's wholly owned subsidiary in the United Kingdom since 1967.[58]

B. Bank Markazi

2.12 Bank Markazi, also known as the Central Bank of the Islamic Republic of Iran,[59] came into existence, as "an independent institution", pursuant to Article 28 of the Monetary and Banking Act of 1960.[60]



Homepage of Bank Markazi's website[61]

57 This Act is available at www.cbi.ir/page/5298.aspx (last consulted on 23 July 2020).

58 See the page "About Us" on Bank Melli PLC's website, accessed on 3 May 2020 (IR, Annex 90).

59 As mentioned above, before establishment of Bank Markazi, Bank Melli Iran, which was Iran's first commercial bank, had assumed to act as Iran's central bank.

60 Under Article 28 (1) of the Act as approved on 27 May 1960, "in order to stabilize the value of currency and to regulate the volume of credit, an independent institution to be called the Bank Markazi Iran shall be established which shall have the monopoly of coin note issue"; available at: www.cbi.ir/page/5298.aspx.

61 Available at www.cbi.ir/default_en.aspx (last consulted on 23 July 2020).

2.13 The Monetary and Banking Act of 1972, which contains the statutes of Bank Markazi as amended, provides that the Bank "enjoys legal personality and shall be governed by the laws and regulations pertaining to joint-stock companies in matters not provided for by [the Monetary and Banking Act of 1972]."[62] Bank Markazi's shares are wholly owned by the State of Iran. It acts as a separate entity, distinct from its sole shareholder, and is administered by a governor, executive board, supervisory board and general meeting.[63]

2.14 As any other central bank, the Bank plays a critical role in supporting both domestic and international trade through the formulation, the implementation, and the supervision of Iran's monetary and credit policy. The objective of such policy is obviously to "maintain the value of the currency and equilibrium in the balance of payments, to facilitate trade transactions, and to assist in the economic growth of the country".[64] In addition to these functions which are key to commerce, Bank Markazi performs routine commercial activities, like any other private company doing business in a free and competitive market, and without having any exclusive role or special authority. For example, under Article 13 of the Monetary and Banking Act of 1972, Bank Markazi has, amongst others, the following powers:

> "3- Granting loans and credits to, and guaranteeing loans and credits granted government companies and municipalities, as well as to the Government and municipalities' affiliated entities against adequate collateral;
>
> 4- Rediscounting bills of exchange and short-term commercial instruments and granting credits to banks against adequate collateral;
>
> 5- Purchasing and selling treasury bills and Government bonds, and the bonds issued by foreign governments or accredited international financial institutions;
>
> 6- Purchasing and selling gold and silver;
>
> 7- Opening and holding current accounts with foreign banks, and/or holding accounts for domestic and foreign banks with itself, and carrying out all other

62 The Monetary and Banking Act of Iran, approved on 9 July 1972, Article 10(c) (IM, Annex 73).

63 *Ibid.*, Article 17 (General Meeting), Article 19 (Executive Board), Article 19(b) and footnote 35 (Governor), and Article 22 (Supervisory Board).

64 *Ibid.*, Article 10 (a) and (b). See also Article 11, enumerating the functions that the Bank shall fulfil as the regulatory authority of the monetary and credit system of the State, and Article 14 authorising the Bank to intervene in, and supervise monetary and banking affairs.

authorised banking operations[[65]], and obtaining credits inside the country and abroad on its own account or on behalf of domestic banks."[66]

2.15 As explained in Chapter III below, the most profitable of these various commercial activities are the selling of foreign currencies, mainly coming from Iran's oil exports, to commercial banks in the Iranian foreign exchange market, and the investment in foreign currencies and various financial – cash or derivative – instruments.[67]

2.16 As Bank Markazi earns profits from its commercial activities, it must pay income tax to the Government of Iran in accordance with the regulations applicable to the governmental companies.[68] To this end, pursuant to Article 24 (b) of the said Act, Bank Markazi prepares and submits each year to the Bank's supervisory board its balance sheet and profit and loss account at least one month before the annual general meeting.[69]

C. Other Iranian banks

2.17 Bank Saderat Iran, a public joint stock company since its privatisation in 2018, maintains the second largest banking network in Iran (approximately 3.000 branches), and operates 21 international branches and subsidiaries.[70] It is incorporated as an independent juridical entity under Iranian law.[71] The Government of Iran owns 16,9%

65 Article 2(7) of the Iranian Commercial Code (available on the website of the Iranian Ministry of Industry, Mine and Trade, en.mimt.gov.ir) describes "any kind of banking and exchanges operation" as "commercial transactions."

66 The Monetary and Banking Act of Iran, approved on 9 July 1972, Article 13 (IM, Annex 73).

67 See paras. 3.21-3.22 below.

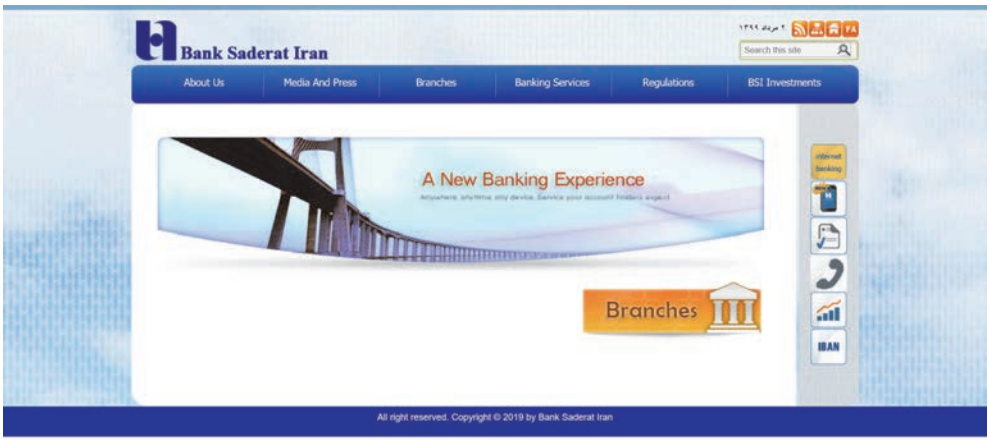
68 Article 25 (a) (1) of the Monetary and Banking Act of 1972 (IM, Annex 73).

69 *Ibid.*, such balance sheets, which attest to the Bank's engagement in commercial activities by indicating its profits and expenses and its income and payable taxes, are available at the Bank's website, webpage "Economic Report & Balance Sheet" (www.cbi.ir/category/EconomicReport_en.aspx) and, in relevant part, in IR, Annexes N23 to N30.

70 Page "History" on Bank Saderat's website (IR, Annex 92).

71 Articles of Association of Bank Saderat of 2014 (IM, Annex 77).

of its stock, the rest of which is divided among a large number of small Iranian shareholders.[72] Trade finance is Bank Saderat Iran's core business.[73]



Homepage of Bank Saderat's website[74]

2.18 Bank Sepah International PLC is a public company incorporated as an independent juridical entity under English law.[75]

Homepage of Bank Sepah PLC's website[76]

72 Page "Bank Saderat Iran" on the Tehran Stock Exchange's website (IR, Annex 93). Under the bank's Articles of Association, the legal entities whose shareholders include the Government of Iran or governmental companies or whose management is controlled by the public sector cannot be the bank's stockholders (note 1 to Article 7) and the Government of Iran may not hold more than 20% of the bank's capital (note 4 to Article 7) (IM, Annex 77).

73 *Ibid.*, see also Iran's Memorial, pp. 67-68, para. 4.10.

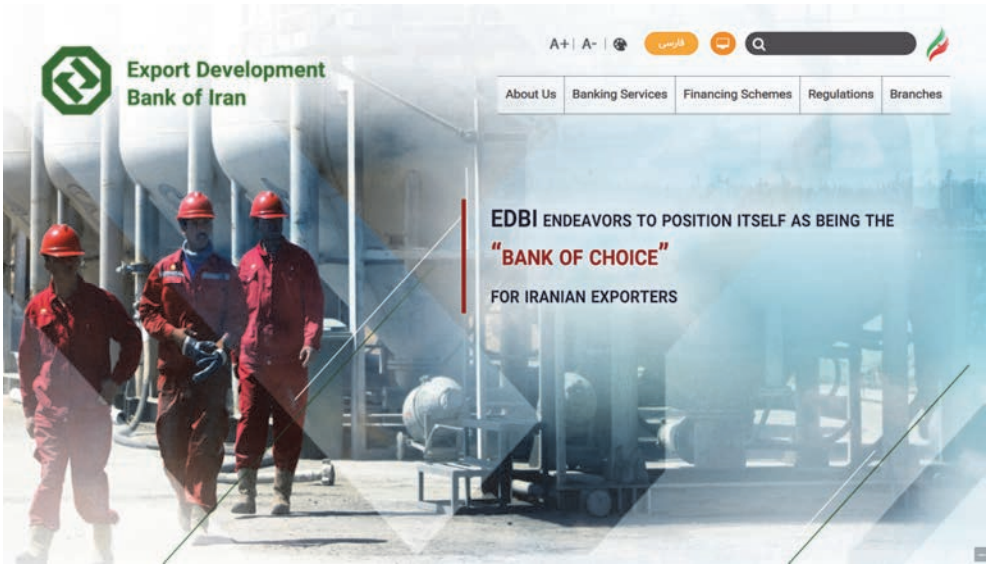
74 Available at www.bsi.ir/en/Pages/HomePage.aspx (last consulted on 23 July 2020).

75 See Memorandum and Articles of Association of Bank Sepah International PLC (IR, Annex 100).

76 Available at www.banksepah.co.uk (last consulted on 23 July 2020).

2.19 It is the London-based wholly owned subsidiary of Bank Sepah, the oldest Iranian bank – established in 1925 and itself a State-owned bank –, whose financial activities focus on the implementation of economic projects in Iran.[77] Bank Sepah International PLC provides financial services including international trade finance and corporate banking.

2.20 The Export Development Bank of Iran ('EDBI') is a public company founded in 1991. It offers banking and advisory services to Iranian exporters and their foreign counterparts and clients, mainly in the non-oil trade.[78] It has separate juridical personality and financial independence.[79]



Homepage of EDBI's website[80]

D. Telecommunication Infrastructure Company

2.21 Telecommunication Infrastructure Company ('TIC') is a public company incorporated in Iran, and its head office is in Tehran.[81] The company is responsible

77 See homepage of Bank Sepah's website, accessed on 8 May 2020 (IR, Annex 91).

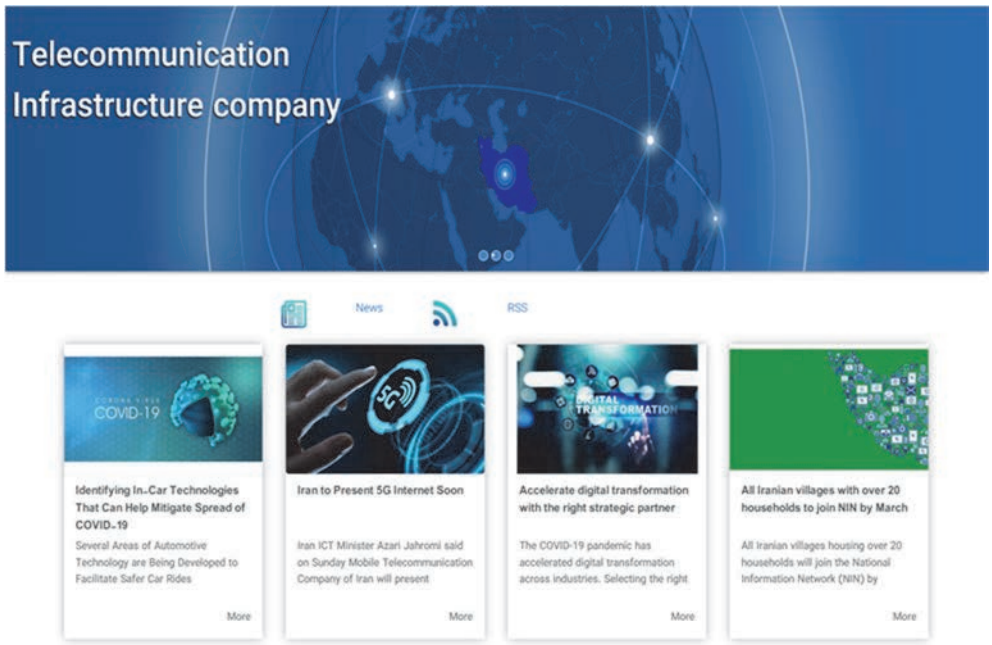
78 Page "EDBI at a glance" on EDBI's website, accessed on 3 May 2020 (IR, Annex 94). See also Iran's Memorial, p. 67, para. 4.9.

79 See preamble of EDBI's Articles of Association of 1991 (IM, Annex 75).

80 Available at en.edbi.ir (last consulted on 23 July 2020).

81 Articles of Association of TIC of 2008 (IM, Annex 76).

for telecommunication networks infrastructure in Iran, with the aim of creating, developing, managing, organising, supervising, maintaining and implementing the main telecommunication backbone of the country and its continuous infrastructural activities.[82] It is not engaged in telecommunications as such: that was transferred to the private sector in 2004.



Homepage of TIC's website[83]

2.22 Pursuant to Article 5 of its Articles of Association, the company is administrated in the form of private joint stock company, and enjoys legal, financial, administrative and recruitment independence.[84]

2.23 TIC owns assets in its own name,[85] is entitled to make profits and can appear before courts of law to litigate or defend claims.

2.24 According to Article 8 of its Articles of Association, the operations and functions of the company *inter alia* consist of:

82 See webpage "About us" of TIC's website, accessed on 3 May 2020 (IR, Annex 95).

83 Available at www.tic.ir/en (last consulted on 15 July 2020).

84 Articles of Association of TIC of 2008 (IM, Annex 76).

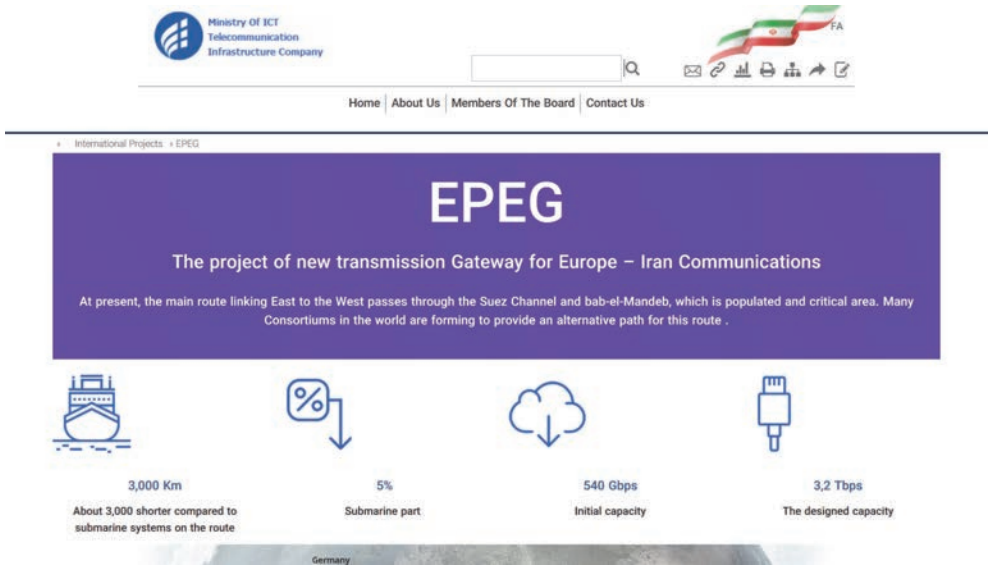
85 *Ibid.*, Article 7.

a. Preparing and compiling comprehensive plans in the areas of communication infrastructure.

b. Marketing in respect of establishment, development, improvement, implementation, maintenance and operation, as well as supervision over the management of the State infrastructural communication network.

c. Satisfying all infrastructural requirements – with respect to the development, operation and optimisation of telecommunication networks – of authorised applicants including those of the governmental, private and cooperative sectors providing information technology and communications through such networks in accordance with national and international standards.

2.25 Among the most important projects currently developed by TIC are the deployment of the 5G technology in Iran, the exploitation of Iran's fibre optic network to ensure transit of Iraq data through Iran, and the installation of a new transmission gateway for Europe/Iran communications with a very significant increase in capacity.

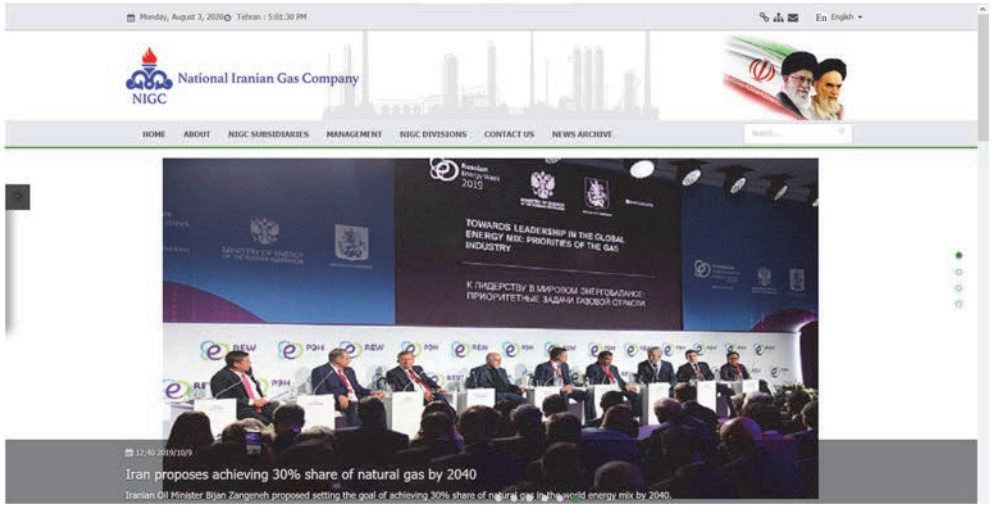


Page of TIC's website regarding the EPEG project[86]

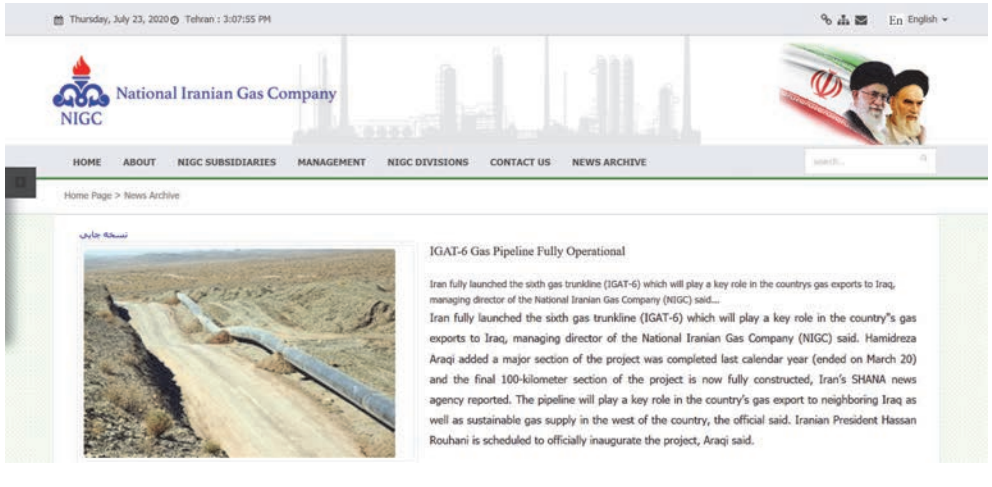
86 Available at www.tic.ir/en/international/epeg (last consulted on 15 July 2020).

E. Iranian energy companies

2.26 National Iranian Gas Company ('NIGC') plays a leading role in the Iranian gas sector. It is a public company, the shares of which are owned by the State of Iran, enjoying independent juridical status.[87] NIGC's activities include the refining, domestic supply and export of natural gas and liquefied petroleum gas, mainly from the South Pars field, and the supervision of the gas distribution network in Iran.[88]



Homepage of NIGC's website[89]



Homepage of NIGC's website, section "News Archive"[90]

87 Articles of Association of NIGC of 1977, Articles 1 and 4 (IM, Annex 85).

88 Articles of Association of NIGC of 1977 (IM, Annex 85).

89 Available at www.iraniangas.ir (last consulted on 3 August 2020).

90 Available at www.iraniangas.ir (last consulted on 23 July 2020).

2.27 The National Iranian Oil Company ('NIOC') is the largest Iranian energy company. It is a public company established in 1951 and has its own legal personality as a separate juridical entity.[91]

Homepage of NIOC's website[92]

2.28 It is responsible for the exploration, drilling, production, distribution and export of Iran's crude oil and natural gas resources.[93]

Page "Sale in Iran Energy Exchange" of NIOC's website[94]

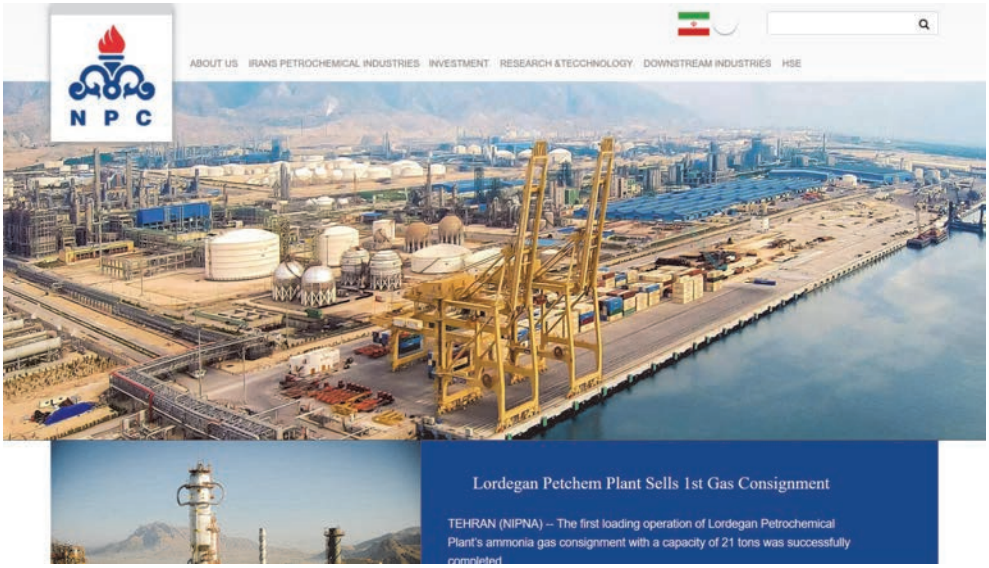
91 Articles of Association of NIOC of 2016, Articles 1 and 4 (IM, Annex 78).

92 Available at en.nioc.ir/portal/home (last consulted on 23 July 2020).

93 See also Iran's Memorial, p.68, para. 4.12.

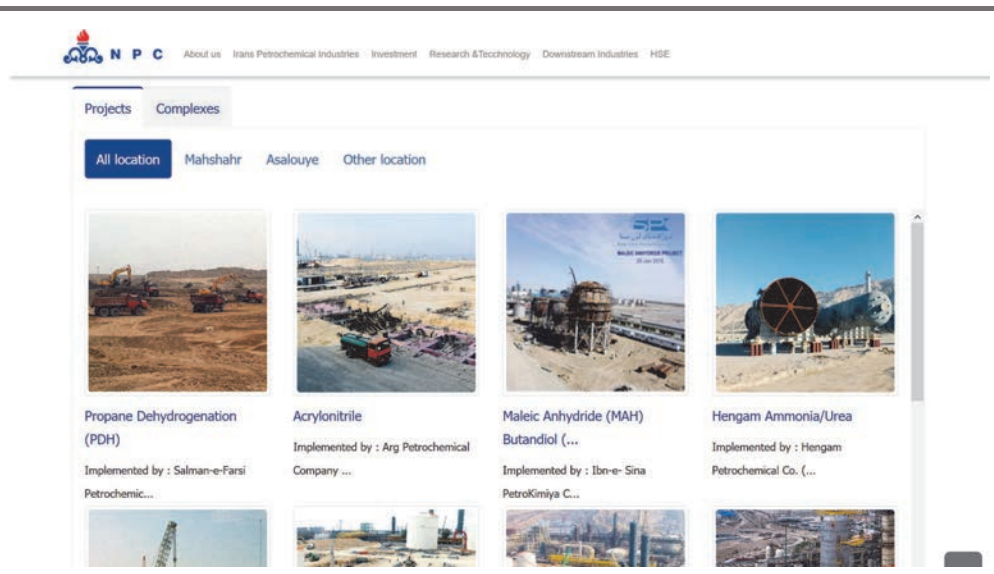
94 Available at bourse.nioc.ir/portal/home (last consulted on 23 July 2020).

2.29 National Petrochemical Company ('NPC') was the main producer and exporter of petrochemicals in Iran until it evolved, in 2018, into a regulatory and policy-making company responsible for the development of Iran's petrochemical industry.[95]



Homepage of NPC's website[96]

2.30 To this end, it enters into contracts with other companies investing in Iran's numerous petrochemical projects.



Homepage of NPC's website, section relating to ongoing projects[97]

95 See "National Petrochemical Company – The History and Structure" on NPC's website (IR, Annex 96).

96 Available at en.nioc.ir/portal/home (last consulted on 15 July 2020).

97 *Ibid.*,

2.31 NPC is fully state-owned and affiliated to Iran's Ministry of Petroleum.[98] It has a separate juridical personality with all rights attached to such status.[99]

2.32 Established in 1963 as a joint venture with Exxon Mobil in Iran, Behran Oil Company is the leading lubricant manufacturing company in Iran and in the Middle East, mainly producing automotive and industrial lubricants.[100] Under its Articles of Association of 2011, it is a public joint stock company, incorporated under Iranian law as having separate juridical personality.[101]

Homepage of Behran Oil's website[102]

2.33 Founded in 1955, the National Iranian Tanker Company ('NITC') is a private joint stock company whose stocks belong to three funds managing pensions for millions of

98 Articles of Association of NPC of 1977, Article 4 (IM, Annex 86).

99 Articles of Association of NPC of 1977 (IM, Annex 86).

100 See the page "About Us" on Behran Oil website (IR, Annex 97). See also Iran's Memorial, p. 69, para. 4.15.

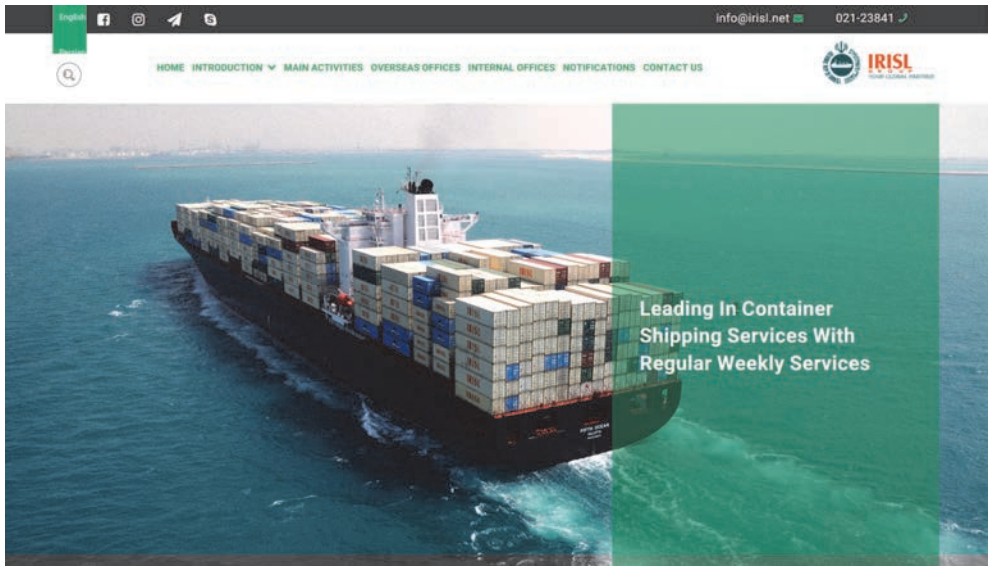
101 IM, Annex 81. See the page "Behran Oil Company" on the Tehran Stock Exchange website, mentioning that the two largest shareholders – Mostafazan Foundation and Sina Energy Development Company – respectively hold 29,95 and 21,18 % of the company's capital (IR, Annex 98).

102 Available at www.behranoil.co (last consulted on 15 July 2020).

Iranians.[103] It has a separate juridical status with all rights attached to such status.[104] Operating the largest tanker fleet in the Middle East, it transports Iranian crude oil to export markets and crude oil from other origins in cross-trade transactions.

F. Iranian shipping and shipbuilding companies

2.34 Islamic Republic of Iran Shipping Lines ('IRISL') is Iran's major shipping company. Its shares are traded in the Tehran Stock Exchange, and it has a separate juridical personality.[105]



Homepage of IRISL's website[106]

103 The company's capital is shared between NIOC's Pension and Saving Fund (34%), Iran's Civil Servants Pension Fund (33%), and Iran's Social Security Organization (33%) (Article 7 of NIPC's Articles of Association of 2000 (IM, Annex 84), which translates as follows:

> "Article 7 – Capital. The company's capital is equal to thirty-two billion Rials (32,000,000,000 Rials) which are divided into thirty-two million (32,000,000) shares, each with a par value of 1000 Rials, and have been paid for in full. The shareholders of the company and the number of their shares are as follows:

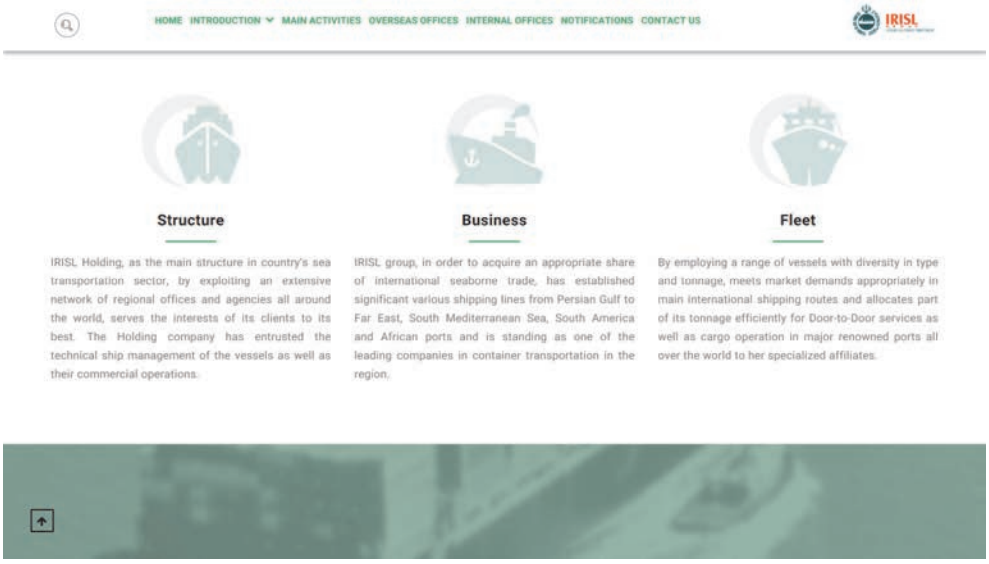
Shareholders	Percentage	Number of Shares	Amount of Capital
NIOC Pension Fund	34	10,880,000	10,880,000,000
Civil Servants Pension Fund	33	10,560,000	10,560,000,000
Social Security Organisation	33	10,560,000	10,560,000,000
TOTAL	100	32,000,000	32,000,000,000").

104 Articles of Association of NITC of 2000 (IM, Annex 84).

105 Articles of Association of IRISL of 2008 (IM, Annex 87).

106 Available at www.irisl.net (last consulted on 15 July 2020).

2.35 IRISL has the largest merchant fleet in the Middle East and it is ranked 21st among the top 25 containership operators in the world in 2017.[107] Its fleet carries bulk and general cargo as well as chemical and petrochemical cargo. IRISL operates shipping lines from the Persian Gulf to the Far East, South Mediterranean Sea, South America, and Africa. It provides shipping and logistical services in major renowned ports all over the world.



Homepage of IRISL's website, section relating to activities[108]

2.36 IRISL has numerous subsidiaries, including Iranohind Shipping Company – an Iranian private limited company founded as a joint-venture with the Indian State-owned company Shipping Corp. of India Ltd[109] –, and IRISL Benelux NV – a limited liability company incorporated in Belgium in 2003 which represents IRISL shipping and logistical services in Belgium and the Netherlands.[110]

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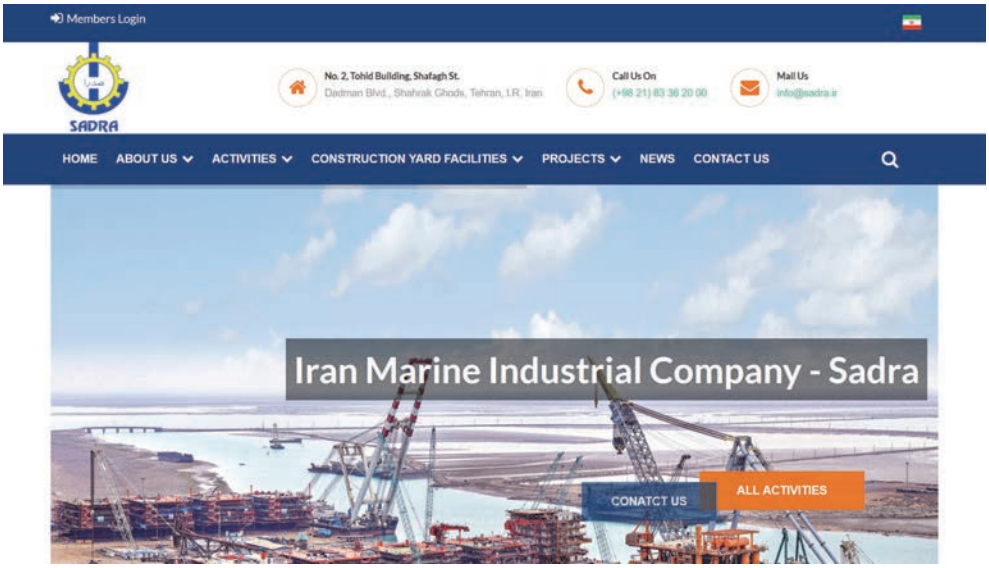
107 International Chamber of Shipping, "25 Largest Containership Operators", 2017 (IR, Annex 113).

108 Available at www.irisl.net (last consulted on 15 July 2020).

109 A. Lakshmi, "India to revive Irano Hind Shipping Company", *www.marine link.com*, 4 September 2016 (IR, Annex 117). The distribution of the company's capital is as follows: IRISL 51% and Shipping Corp. of India 49% (see articles 5 to 8 of Iranohind's Articles of Association of 2000(IM, Annex 83). See also Iran's Memorial, p. 68, para. 4.13.

110 See Ministry of Economy of Belgium website, "*Banque-Carrefour des entreprises et Registre du Commerce* – Public Search", accessed on 3 May 2020 (IR, Annex 111). See also Articles of Association of IRISL Benelux NV (IM, Annex 88).

2.37 Iranian Marine and Industrial Company, also known as SADRA, is the main shipbuilding and ship-repairing company in Iran, specialising in building ships, docks and oil rigs.[111] It is a public joint stock company whose shares belong to a large number of legal persons – the Government of Iran is *not* among its shareholders.[112] It has an independent legal personality and all the rights attached to such status.[113]



Homepage of SADRA's website[114]

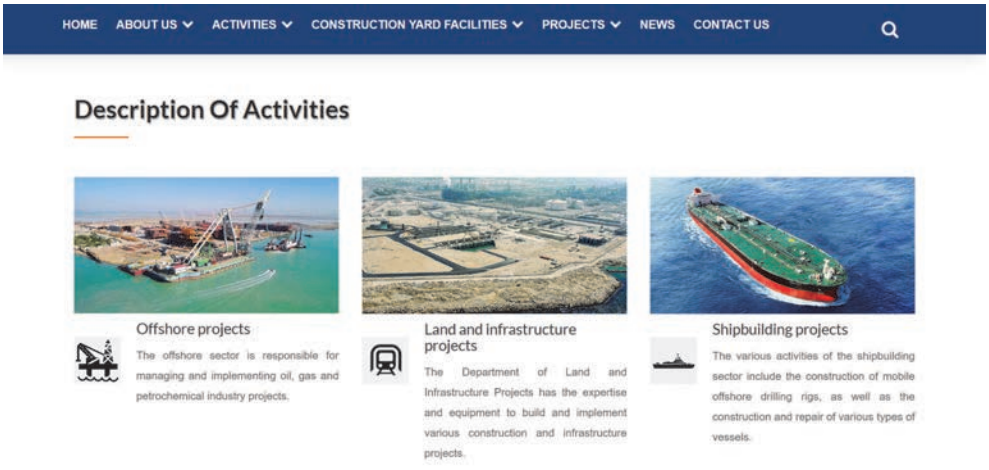
2.38 SADRA is currently engaged in several onshore – on the South Pars gas field – and offshore Engineering Procurement and Construction (EPC) projects for the oil and gas industry in Iran. It is also building four 113,000-ton oil tankers, and various vessels dedicated to offshore oil and gas production.

111 See also Iran's Memorial, p. 68, para. 4.14, and IM, Annex 82.

112 See the page "Iranian Marine and Industrial Co." on the Tehran Stock Exchange website (IR, Annex 99).

113 Articles of Association of Iran Marine Industrial Co. of 2011 (IM, Annex 82).

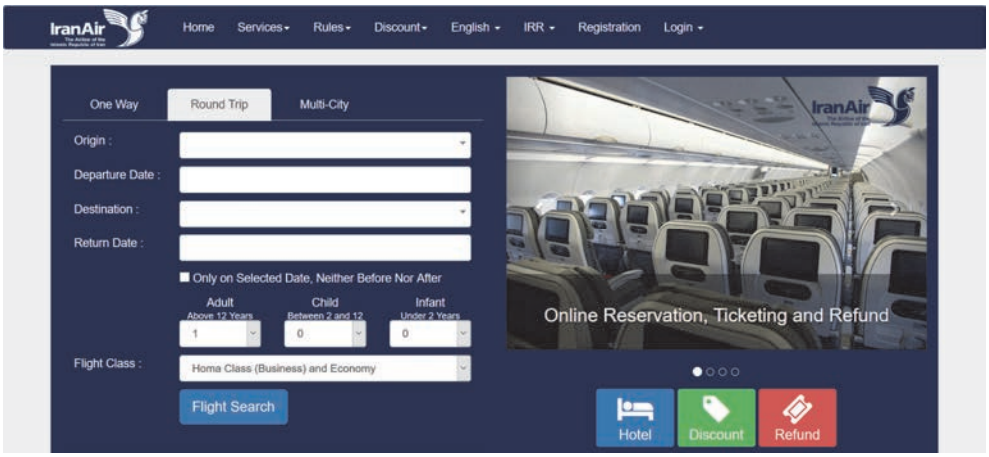
114 Available at www.sadra.ir/default.aspx?PID=HomePage (last consulted on 15 July 2020).



Homepage of SADRA's website, section relating to ongoing projects[115]

G. Iran Air

2.39 Created in 1962 as the Iran National Airlines Corporation, Iran Air, the flag carrier of Iran, is the oldest and largest airline in Iran. All its shares belong to the Iranian Government, from which its legal personality is separate.[116] Iran Air operates 26 domestic routes and 28 international routes, including to Europe, the Middle East and the Indian subcontinent.[117]



Homepage of Iran Air's website[118]

115 Available at www.sadra.ir (last consulted on 15 July 2020).

116 See Iran Air's Articles of Association of 1982, Article 5 (IM, Annex 79).

117 See Iran's Memorial, para. 4.12, and IM, Annex 79.

118 Available at ebooking.iranair.com/Booking (last consulted on 15 July 2020).

SECTION 2.

THE JUDICIAL PROCEEDINGS AGAINST THESE IRANIAN COMPANIES

2.40 The U.S. courts targeted, and are targeting, Iranian companies, in some cases (A) by imposing damages in respect of their alleged material support for acts of terrorism and in most of the cases (B) by enforcing against their assets numerous final judgments condemning Iran to which the companies are not parties.

A. U.S. final judgments against Iranian companies: the *Havlish v. Bin Laden* case and the subsequent actions

2.41 The *Havlish v. Bin laden et. al.* proceeding was the first class-action filed on 19 February 2002 by U.S. victims of the 11 September 2001 terrorist attacks.

2.42 The proceeding served the United States' desire that the plaintiffs receive compensation for the 9/11 attacks, regardless of the actual responsibility for the events. Not only did the *Havlish* court accept a very low – if any – standard of proof and causation, it implemented tailor-made retroactive legislation designed to deprive the defendants of their defences, to increase the damages and ultimately to enable the seizure of their property. Such a defective judicial process could only lead to an absurd result: finding Iran and major Iranian companies responsible for sponsoring the 9/11 attacks – so preposterous an accusation that no one but a few U.S. judges have ever made it.[119]

2.43 The initial complaint against, *inter alia*, Bin Laden, the Taliban, Muhammed Omar, Al Qaeda, Afghanistan, Iraq, but also, inter alia, Iran, Bank Markazi, NIOC, NITC, NPC, NIGC, and Iran Air[120] was based on the Torture Victim Protection Act and on

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[119] Even the current U.S. Executive denies any Iranian responsibility in the 9/11 terrorist attacks. See below para. 6.66.

[120] Plaintiffs had also asserted claims against Ayatollah Khamenei, Mr. Rafsanjani, the Hezbollah, the Iranian Ministry of Information and Security, the Islamic Revolutionary Guard Corps, the Iranian Ministry of Petroleum, the Iranian Ministry of Economic Affairs and Finance, the Iranian Ministry of Commerce, the Iranian Ministry of Defence and Armed Forces Logistics, and also against Usama bin Laden, the Taliban, Muhammad Omar, and the al Qaeda/Islamic Army. Since 2013, this ongoing class-action targets the government of Saudi Arabia.

section 28 U.S. Code § 1605(a)(7) codifying the "terrorism exception" to sovereign immunity before U.S. courts.

2.44 This exception withdraws the immunity from suit of those foreign States, including their agencies and instrumentalities,[121] arbitrarily designated by the U.S. Executive as "State sponsors of terrorism", in cases arising out of certain terrorist acts.[122] The U.S. courts had interpreted this exception, as "merely a jurisdiction conferring provision" and therefore not creating an independent federal cause of action to address state-sponsored terrorism.[123] Thus, under 28 U.S. Code § 1605(a)(7) the plaintiffs had (unsurprisingly) to proceed using pre-existing causes of action available to them, i.e., they had to base their terrorism-related claims against foreign sovereigns on state tort law. This was said to lead, notably in cases involving Iran, to "inconsistent and varied [decisions] when various states' tort laws differed".[124]

2.45 In response to this and to the unavailability of punitive damages under 28 U.S. Code § 1605(a)(7), the U.S. Congress amended the FSIA in section 1083 of the National

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121 28 U.S. Code § 1603(b) defines, for the purposes of the FSIA, an "agency or instrumentality of a foreign state" as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of [title 28 of the U.S. Code], nor created under the laws of any third country".

122 On the 1996 amendments to the FSIA see Iran's Memorial at pp. 16-19, paras. 2.4-2.8. The U.S. Supreme court recently recalled the genesis of this exception: "In 1976, the Congress sought to remedy the problem [that the governing standards for foreign sovereign immunity determinations were neither clear nor uniformly applied] and address foreign sovereign immunity on a more comprehensive basis. The result was the Foreign Sovereign Immunities Act (FSIA). As a baseline rule, the FSIA holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts. See 28 U.S.C. §§1603(a), 1604. But the law also includes a number of exceptions. See, e.g., §§1605, 1607. Of particular relevance today is the terrorism exception Congress added to the law in 1996. That exception permits certain plaintiffs to bring suits against countries who have committed or supported specified acts of terrorism and who are designated by the State Department as state sponsors of terror. Still, as originally enacted, the exception shielded even these countries from the possibility of punitive damages. See Antiterrorism and Effective Death Penalty Act of 1996 (codifying state-sponsored terrorism exception at 28 U.S.C. §1605(a)(7)); §1606 (generally barring punitive damages in suits proceeding under any of §1605's sovereign immunity exceptions)" (*Opati, et al., v. Republic of Sudan, et al.*, U.S. Supreme Court, 18 May 2020, No. 17-1268, p. 3 – IR, Annex 87).

123 *Cicippio-Puelo, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, D.C. Circuit, 16 January 2004, 353 F.3d 1024 (D.C. Cir. 2004), p. 12 (IM, Annex 34).

124 *Valore, et al. v. The Islamic Republic of Iran, et al., Arnold (Estate of James Silvia), et al. v. The Islamic Republic of Iran, et al., Spencer, et al. v. The Islamic Republic of Iran, et al.,* and *Bonk, et al. v. The Islamic Republic of Iran, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06-cv-516, 06-cv-750, and 08-cv-1273, pp. 2-3 (IR, Annex 30).

Defense Authorization Act for Fiscal Year 2008 (the 'NDAA 2008').[125] Section 1083 of NDAA 2008 repealed 28 U.S. Code § 1605(a)(7) and replaced that provision with a new version of the terrorism exception authorising punitive damages under an independent federal cause of action against "states sponsors of terrorism", 28 U.S. Code § 1605A. This, the U.S. Congress directed, may be applied retroactively to a broad range of cases. As the U.S. Supreme Court recently stated:

> "Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using § 1605A(c)'s new federal cause of action. After all, in § 1083(a), Congress created a federal cause of action that expressly allows suits for damages that "may include economic damages, solatium, pain and suffering, and *punitive damages*." (Emphasis added.) This new cause of action was housed in a new provision of the U.S. Code, 28 U.S.C. § 1605A, to which the FSIA's usual prohibition on punitive damages does not apply. See § 1606. Then, in §§ 1803(c)(2) and (c)(3) of the very same statute, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in § 1605A. Both provisions specifically authorized new claims for pre-enactment conduct. Put another way, Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation".[126]

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125 See Iran's Memorial, pp. 24-27, paras. 2.18-2.26. See also *Opati, et al., v. Republic of Sudan, et al.*, U.S. Supreme Court, 18 May 2020, No. 17-1268, pp. 2-3 (IR, Annex 87), and *Valore, et al. v. The Islamic Republic of Iran, et al.*, *Arnold (Estate of James Silvia), et al. v. The Islamic Republic of Iran, et al.*, *Spencer, et al. v. The Islamic Republic of Iran, et al.*, and *Bonk, et al. v. The Islamic Republic of Iran, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06- cv- 516, 06-cv-750, and 08-cv-1273, p. 3 (IR, Annex 30).

126 *Opati, et al., v. Republic of Sudan, et al.*, U.S. Supreme Court, 18 May 2020, No. 17-1268, pp. 8-9 (IR, Annex 87). The intent of the U.S. Congress in enacting section 1083 of NDAA 2008 – guaranteeing that plaintiffs suing Iran in "terrorism judgment" cases would win in any U.S. district court and obtain punitive damages in addition to compensation – had appeared equally clearly to the lower courts, which have applied 28 U.S. Code § 1605A retroactively. See e.g. *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion, 30 September 2009, Case No. 1:00-cv-02329, 659 F.Supp.2d 20 (D.D.C. 2009), p. 3 (IM, Annex 45): "[O]n December 22, 2006, this Court entered Default Judgment in favor of most Plaintiffs […] [T]he Court was not able to award punitive damages. A little over a year later, the President signed the 2008 NDAA, which repealed §1605(a)(7) and replaced that provision with a new version of the terrorism exception, §1605A […]. While this new FSIA enactment is more advantageous in many significant respects, what is most important for the purpose of today's decision is that §1605A abrogates *Cicippio-Puleo* by establishing a federal cause of action against state sponsors of terrorism and provides that punitive damages may be awarded in those actions. See 1605A(c). […] Thus, plaintiffs proceeding under §1605A can forgo the pass-through approach that controlled in the wake of *Cicippio-Puleo* and may assert claims on the basis of the new federal statute alone. Notably, Congress directed that this new terrorism exception, §1605A, may be applied retroactively to a broad range of cases, provided certain conditions are satisfied. See §1083(c) [of NDAA 2008] […]. In March 2008, plaintiffs filed a Motion

2.46 In 2010, the *Havlish* plaintiffs amended their complaint for the third time to avail themselves of the more advantageous 28 U.S. Code § 1605A, the impact of which has been commended by the District Court.[127]

2.47 The legal basis of the action introduced by the third amended complaint diverged considerably from that invoked in the second. For example, although the Torture Victim Protection Act only imposes liability for acts of torture and extrajudicial killing, 28 U.S. Code § 1605A added aircraft sabotage, hostage taking and generally the provision of material support or resources for terrorist acts. As a result, the conditions for imposing the liability on Iran and the Iranian companies were substantially – and retroactively – relaxed.

2.48 Bank Markazi and the other Iranian companies did not appear before the U.S. courts as, *inter alia*, the amended complaints either were not served or otherwise improperly served on them.

2.49 In December 2011, the U.S. District Court for the Southern District of New York found, *in absentia* and without any evidence, Bank Markazi and the other Iranian companies to be acting as agents or instrumentalities of Iran in its alleged provision of material support to Al Qaeda in the execution of the 11 September 2001 terrorist attacks.[128]

2.50 The court did not even follow the so called "but-for" standard for any causal link between the 11 September attacks and the alleged acts of material support attributed

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for Supplementary Relief in which they requested that this Court apply §1605A retroactively to their actions and award additional damages, including 650 million dollars in punitive damages, against Iran. […] On March 13, 2009, this Court determined that plaintiffs' actions satisfied the conditions for retroactive application of §1605A and issued an order indicating that plaintiffs were entitled to proceed before this Court.").

127 Judge Frank Maas writes in his *Report and Recommendation* on the evaluation of damages in these proceedings that "Section 1605A effected a 'sea change' in suits against State sponsors of terrorism. […] Previously, to recover damages against such defendants [i.e. foreign States that had been designed as State sponsors of terrorism], plaintiffs had to demonstrate their entitlement under state or foreign law. […] Now, such claims are subject to a 'uniform federal standard'" (*In Re: Terrorist Attacks on September 11, 2001* (relating to *Havlish v. Bin Laden*), U.S. District Court, Southern District of New York, Report and Recommendation to the Honorable George B. Daniels, 30 July 2012, Case 1:03- cv-09848-GBD-FM, p. 5 (IR, Annex 38).

128 *Havlish, et al. v. Bin Laden, et al.*, U.S. District Court, Southern District of New York, 22 December 2011, No. 03 MD 1570 (S.D.N.Y 2011), pp. 52-53 (IM, Annex 52).

to the Iranian companies. Instead, the court merely adopted the findings of facts and conclusions of law proposed by the plaintiffs, none of which mentioned – let alone demonstrated – any provision of material support to Al Qaeda or support for these attacks by any defendant Iranian company.[129]

2.51 Such so-called "findings of facts" regarding the defendant Iranian companies are limited to the following general and baseless allegations of control by Iran or indirect engagement in general terrorist activity:

a. "The entire apparatus of the Iranian State and government, and many parts of Iran's private sector, including corporations (e.g. National Iranian Oil Company, Iran Air, Iran Shipping Lines); banks (e.g. Central Bank, Bank Sepah), (…) and even charities are at the service of the Supreme Leader, the Islamic Revolutionary Guard Corps, and the Iranian Ministry of Information and Security when it comes to support terrorism";[130]

b. NITC, NIOC, NIGC, NPC, Iran Air and Bank Markazi "are all agencies and instrumentalities of the state of Iran. Each of these corporate defendants has a legal corporate existence outside the government and core functions which are commercial, not governmental, in nature. Each of [them] is, however, tightly connected to the government of Iran, and each is an organ of the government and/or has been owned, directed, and controlled by the Iranian State";[131]

c. As to NITC: it is "controlled by the Islamic Republic of Iran";[132]

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129 The *Levinson* case is another example of such a minimal standard of proof. See *Levinson, et al. v. The Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Memorandum Opinion, 9 March 2020, No. 1:17-cv-00511 (IR, Annex 82), p. 25 ("As a result, a plaintiff that offers proof sufficient to establish a waiver of foreign sovereign immunity under § 1605A(a) has also established entitlement to relief as a matter of federal law if the plaintiff is a citizen of the United States. Fritz, 320 F. Supp. 3d at 86–87; see Hekmati, 278 F. Supp. 3d at 163 ('Essentially, liability under § 1605A(c) will exist whenever the jurisdictional requirements of § 1605A(a)(1) are met.')").

130 *Havlish, et al. v. Bin Laden, et al.*, U.S. District Court, Southern District of New York, 22 December 2011, No. 03 MD 1570 (S.D.N.Y 2011), p. 11 (IM, Annex 52).

131 *Ibid.*, p. 12.

132 *Ibid.*, p. 12. The plaintiffs provided no other finding of fact regarding NITC.

d. As to NIOC: it "is owned, controlled and managed by the Government of Iran" and "a large cash flow of money was funnelled to terrorist organisations through the NIOC";[133]

e. As to NIGC: "Terrorists received monetary commissions from [NIGC] for operating as go-betweens for arrangements involving long-term payments";[134]

f. As to NPC: "Terrorists acted as go-betweens for arrangements with [NPC] involving long-term payment promises – that are never kept – and the terrorists receive monetary commissions for the bogus transactions";[135]

g. As to Iran Air: "Iranian agents who carried out acts of terrorism left the country in which the act was perpetrated on Iran Air flights which were specially held on the ground until the alleged perpetrator(s) could board the flight"; "Iran Air acted as facilitator for the transfer of cash to terrorists on missions abroad";[136]

h. As to Bank Markazi: it "has core functions that are quasi-governmental, but it is a corporation rather than an agency within the government"; "[t]he transfers of huge sums of Iranian money to terrorist organisations such as Hamas and Hizballah, often millions of dollars of cash carried in suitcases, can only be accomplished with the complicity and/or knowledge and acquiescence of [Bank Markazi]. The same *must be true* in the case of banking transactions between Iranian agencies and instrumentalities and terrorist organisations"; it "facilitates the transfer of money to terrorist groups".[137]

2.52 The "evidence" supporting these purported findings of fact is limited to four affidavits or testimonies by people who were not, at the relevant time, involved in any way in

133 *Ibid.*, p. 12.

134 *Ibid.*, p. 13.

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*, pp. 13-14 (emphasis added).

the Iranian government, the defendant Iranian companies, Al Qaeda or the 11 September 2001 attacks:[138]

a. The testimony of Abolghasem Mesbahi, an alleged former Iranian intelligence officer presenting himself as "an Iranian regime 'insider' who knew many of the Islamic regime's top leaders during the 1980s and early 1990s"[139] and who defected to Germany in 1996 [i.e. 5 years before 9/11] under the United Nations refugee status and never went back.[140]

b. The affidavit of Dr. Patrick Clawson, "one of the [U.S.] foremost experts on all matters pertaining to Iran for the last thirty years [who] has done consulting work for the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and the Defense Department, among other governmental agencies".[141]

c. The affidavit of Kenneth Timmerman, "investigative journalist, author and noted Iran expert"[142] who is the president and executive director of the American Foundation for Democracy in Iran, which allegedly supports democratic movements in Iran.[143]

d. The testimony of Abolhassan Banisadr, Iran's first president after the 1979 Revolution, ousted in 1981, who has been living in exile in France since then.[144]

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138 Pursuant to the *Weinstein* precedent, in FSIA default judgment proceedings, the plaintiffs may establish proof by affidavit (*ibid*., p. 5). The judgment's sections referring to Iranian companies (*ibid*., pp. 11-14) do not cite to any other source than these four affidavits and testimonies.

139 *Ibid*., p. 26, para. 147.

140 *Ibid*., p. 27, paras. 158-159.

141 *Ibid*., p. 39, para. 238.

142 *Ibid*., p. 44, para. 272.

143 See the Foundation's website at iran.org/about.htm.

144 *Ibid.*, p. 10, para. 32.

2.53 In fact, the plaintiffs did not provide the court with any evidence of support by Iran or Iranian companies to the perpetrators of the 9/11 attacks, and for good reason: there was no such support. However, the court relying on mere assumptions unrelated to the specific facts underlying the claims and authored by so-called witnesses without any knowledge of those specific facts, determined that the plaintiffs had met the burden of establishing their claims "by evidence satisfactory to the Court"[145] with respect to the defendant Iranian companies. Indeed, the court concluded that:

> "31. Plaintiffs have demonstrated several reasonable connections between the material support provided by defendants and the 9/11 attacks. Hence, plaintiffs have established that the 9/11 were caused by Defendants' provision of material support to al Qaeda" (…)
>
> "33. (…) Defendants … [NITC, NIOC, NIGC, Iran Air, NPC, Bank Markazi], at all relevant times acted as agents or instrumentalities of defendant Iran. Each of these Defendants is subject to liability as agents of Iran under §1606A(c) of the FSIA and as co-conspirators, aiders and abetters under the ATCA"[146]

2.54 The Court thereafter condemned the Iranian defendants to pay the amount of over USD 6 billion, including USD 4.6 billion as punitive damages to 152 plaintiffs, which amounts to an average USD 39.5 million per plaintiff.[147] It is not known on what factual and legal basis this extraordinary and irrational amount of damages was awarded and allocated to the plaintiffs.

2.55 In addition to *Havlish*, Bank Markazi has been sued by three other groups of victims of the 11 September 2001 terrorist attacks in *Hoglan*, *Burnett* and *Ryan* and has been condemned to payment of equally extraordinary and irrational amounts in compensation and punitive damages. In none of these cases did the U.S. courts carry out a review of the factual allegations, evidence, causation and other legal requirements to find Bank Markazi liable for the alleged material support of the

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145 *Ibid*., p. 49. This is the standard required by 28 U.S.C. Sect. 1608(e) for the entry of a default judgment to be appropriate.

146 *Ibid*., pp. 52-53.

147 *In Re Terrorist Attacks of September 11, 2001* (relating to *Havlish v. Bin Laden*), U.S. District Court for the Southern District of New York, Memorandum Decision and Order of 3 October 2012, Case 1:03-cv-09848-GBD-SN (IR, Annex 39). The District Court subsequently ordered the precise allocation of damages to each plaintiff in *In Re Terrorist Attacks of September 11, 2001* (relating to *Havlish v. Bin Lad*en), U.S. District Court, Southern District of New York, Order and Judgment of 12 October 2012, Case 1:03-cv-09848-GBD-SN (IR, Annex 41).

attacks – otherwise they would have had to deny such liability. They simply relied on the unsubstantiated findings made in the *Havlish* and *Ashton* cases.[148] Alongside Bank Markazi, the above Iranian companies were also condemned jointly or severally in the *Hoglan* and *Ryan* cases.[149]

2.56 This judicial absurdity continues: pending before the same U.S. District Court for the Southern District of New York is the *Ray* case against Iran and fifteen Iranian entities including six companies – Bank Markazi, NIOC, NITC, NIGC, NPC, and Iran Air – which are accused, based on the factual and legal findings made in the *Havlish* and *Hoglan* case, of being liable as the agents of Iran "for their role in providing direct and material support to al-Qaeda in carrying out [the 11 September 2001] attacks".[150]

2.57 Also pending, before the U.S. District Court for the District of Columbia, and also as a result of the U.S. measures in this case, are seven proceedings against Bank Markazi, Bank Melli – often with Bank Melli PLC – and NIOC, as sole defendants[151] or as co-

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148 *Thomas Burnett, Sr., et al. v. The Islamic Republic of Iran, et al.* US District Court for the Southern District of New York, Plaintiffs' Motion for Judgment by Default against the Islamic Republic of Iran, The Islamic Revolutionary Guard, and the Central Bank of the Islamic Republic of Iran (the "Sovereign Defendants") and Order of Judgment dated 31 January 2017 granting Plaintiffs Motion (IR, Annex 54).

149 *Hoglan, et al. v. Iran, et al.*, U.S. District Court for the Southern District of New York, Plaintiffs Proposed Findings of Fact and Conclusions of Law in Support of Motion for Entry of Default Judgment, 31 August 2015, and Order of Judgment, 31 August 2015, Case No. 1:11 Civ. 7550 (GBD) (IR, Annex 51); *Ryan, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the Southern District of New York, Order of Partial Final Default Judgments, 6 March 2020, Case No. 1:20- cv- 00266 (IR, Annex 80) (see also *Ashton, et al. v. al Qaeda Islamic Army, et al.*, U.S. District Court for the Southern District of New York, Amended Order of Judgment, 8 March 2016, Case No. 02- cv- 6977 (GBD) – IR, Annex 52).

150 *In Re: Terrorist Attacks on September 11, 2001, Ray, et al. v. Iran, et al.*, U.S. District Court for the Southern District of New York, Complaint (made pursuant to, *inter alia*, the FSIA, 28 U.S.C. §§ 1605A and 1605B), 9 January 2019, Case No. 1:19-cv-00012, introductory paragraph (IR, Annex 65). Plaintiffs are Estates or family members of seventeen persons who died, and one person who was injured, in the attacks. Like in the *Havlish, et al. v. bin Laden*, et al. (1:03-cv-09848) and *Hoglan, et al. v. Islamic Republic of Iran*, et al. (1:11-cv-07550) cases (in which the same fifteen Iranian entities, in addition to Iran itself, were defendants), the plaintiffs claim that the Iranian defendants "instructed, trained, directed, financed and otherwise supported and assisted al-Qaeda, or conspired in the instruction, training, direction, financing, and support of al-Qaeda, in connection with al-Qaeda's terrorist plans [including the September 11, 2001 attacks]" (*ibid*., para. 157). As to the defending companies, the complaint alleges, without referring to any evidence, that they "funnel[] funds to the Iranian government with knowledge that the Iranian government uses those funds to support its own terrorist activities as well as those of Defendant Hezbollah and al-Qaeda" and that in addition Iran Air "knowingly assists Iran's efforts to export terrorism by transporting individual terrorists to destinations for the purpose of committing terrorist acts in foreign countries" (*ibid*., para. 86).

151 *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S.

defendants alongside Iran, the Islamic Revolutionary Guard Corps ('IRGC'), and the Iranian Ministry of Intelligence and Security ('MOIS').[152] Plaintiffs in these cases are estates and families of U.S. nationals and/or members of the U.S. armed forces killed or injured in Iraq between 2003 and 2011 in a thousand of so-called "terrorist attacks" allegedly carried out by various Shia and Sunni groups with Iran's support. The complaints in these six cases, brought pursuant to the FSIA, 28 U.S.C. § 1605A, all build on the same allegations – that are not based on evidence but on the U.S. Government's own determinations – against the Iranian companies:

a. "In order to fund this terror campaign in Iraq, Iran directed [Bank Markazi, Bank Melli, Bank Melli PLC and NIOC] to conspire with an assortment of Western financial institutions willing to substantially assist Iran to evade U.S. and international economic sanctions, conduct illicit trade-finance transactions, and illegally disguise financial payments to and from U.S. dollar-denominated accounts"[153]

b. Bank Markazi, Bank Melli, Bank Melli PLC and NIOC as Iran's agencies "directed millions of U.S. dollars in arms, equipment and materiel to Hezbollah, the IRGC and the IRGC-QF [Qods Force, a subdivision of the latter], which, in turn, trained, armed, supplied and funded Iran's terrorist

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District Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737 (IR, Annex 55); *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126 (IR, Annex 57); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995 (IR, Annex 66).

152 *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18-cv-02248 (IR, Annex 63); *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612 (IR, Annex 62); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915 (IR, Annex 56).

153 *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612, para. 3 (IR, Annex 62). See also *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114, para. 5 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737, para. 5 (IR, Annex 55); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915, para. 3 (IR, Annex 56); *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126, para. 5 (IR, Annex 57); *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18-cv-02248, para. 5 (IR, Annex 63); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995, para. 5 (IR, Annex 66).

agents in Iraq in carrying out their attacks against Plaintiffs and their family members".[154]

c. Bank Markazi "has provided millions of dollars to terrorist organisations" and "is an alter-ego and instrumentality of the Iranian government and its Supreme Leader, and it has routinely used Iranian banks like [Bank Melli and Bank Melli PLC] as conduits for terror financing and weapons proliferation on behalf of the Iranian regime".[155]

d. "[B]etween 2004 and 2011, Bank Melli Iran and Melli Bank PLC in London transferred approximately $100 million USD to the IRGC-QF"; "Bank Melli Iran financed transactions that purposefully evaded U.S. sanctions on behalf of Mahan Air (…) and Iran's Ministry of Defense and Armed Forces Logistics"; and "[i]n mid-2007, Bank Melli Iran's branch in Hamburg (…) transferred funds on behalf of Iran's Defense Industries Organization".[156]

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154 *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612, para. 11 (IR, Annex 62). See also *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114, para. 6 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737, para. 6 (IR, Annex 55); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915, para. 11 (IR, Annex 56) *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126, para. 6 (IR, Annex 57); *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18-cv-02248, para. 6 (IR, Annex 63); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995, para. 6 (IR, Annex 66).

155 *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612, paras. 91 and 93 (IR, Annex 62). See also *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114, paras. 12 and 14 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737, paras. 12 and 14 (IR, Annex 55); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915, paras. 91 and 93 (IR, Annex 56); *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126, paras. 12 and 14 (IR, Annex 57); *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18-cv-02248, paras. 94 and 96 (IR, Annex 63); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995, paras. 13-14 (IR, Annex 66).

156 *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612, paras. 107, 113, and 118 (IR, Annex 62). See also *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114, paras. 26, 32 and 37 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S. District

e. "NIOC used its oil and natural gas revenues to launder money for the IRGC, often using Defendant [Bank Markazi] for this purpose"; "Iranian intelligence gathering [in the Maysan province in Iraq] takes place using National Iranian Oil Company helicopters"; and "NIOC also obtained letters of credit from western banks to provide financing and credit to the IRGC".[157]

2.58 In sum, whoever the author of the alleged terrorist acts they are said to be victim of, however unproven and absurd the allegation of a link to Iran or its companies, U.S. plaintiffs are allowed by the U.S. legal and regulatory measures to pursue Iran and its companies and hold them liable for such terrorist acts.[158]

Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737, paras. 26, 29, and 34 (IR, Annex 55); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915, paras. 107, 113 and 118 (IR, Annex 56); *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126, paras. 21, 24 and 29 (IR, Annex 57); *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18- cv-02248, paras. 110, 116 and 121 (IR, Annex 63); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995, paras. 21, 24 and 29 (IR, Annex 66).

157 *Hartwick, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 7 July 2018, Case No. 1:18-cv-01612, paras. 133, 134, 136 (IR, Annex 62). See also *Hake, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 17 January 2017, Case No. 1:17-cv-00114, paras. 50-51 and 53 (IR, Annex 53); *Brooks, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 20 April 2017, Case No. 1:17-cv-00737, paras. 47, 48, and 50 (IR, Annex 55); *Holladay, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Amended Complaint, 14 September 2017, Case No. 1:17-cv-00915, paras. 133, 134, and 136 (IR, Annex 56); *Field, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, 13 October 2017, Case No. 1:17-cv-02126, paras. 42, 43 and 45 (IR, Annex 57); *Estate of Brook Fishbeck, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 27 September 2018, Case No. 1:18-cv-02248, paras. 136, 137 and 139 (IR, Annex 63); *Wise, et al. v. Bank Markazi, et al.*, U.S. District Court for the District of Columbia, Complaint, 9 April 2019, Case No. 1:19-cv-00995, paras. 42, 43 and 45 (IR, Annex 66).

158 A recent example of this phenomenon is the (pending) *Henkin* case. Plaintiffs – the children of a U.S. national killed in the West Bank in an attack attributed to members of the Hamas organisation – brought a complaint against Iran, the IRGC, the MOIS, Bank Markazi, Bank Melli, Bank Saderat, Iran and Syria. The "factual basis" of their claim that the Defendants are liable for the injuries suffered rests in the U.S. government general allegation that "Iran provides funding to Hamas through its government owned and controlled central bank, Bank Markazi, which uses other Iranian banks, like Bank Melli and Bank Saderat, as conduits" (*Henkin, et al. v. Iran, et al.*, U.S. District Court for the District of Columbia, Complaint, 24 April 2019, Case No. 1:19-cv-01184, para. 107 (IR, Annex 67).

B. Enforcement of U.S. judgments entered against Iran against property belonging to Iranian companies

2.59 Between 1998 and 2019, the U.S. courts issued nearly 140 final judgments against the State of Iran alone over its alleged support of alleged terrorist acts targeting U.S. interests around the world.[159] None of them are based on any evidence of such support, which Iran has not provided.

2.60 Twenty-one of these judgments – all of which resulted from the retroactive application of the FSIA (1996), 28 U.S.C. § 1605(a)(7) and/or its successor FSIA (2008), 28 U.S.C. § 1605A[160] to past terrorist acts[161] and/or to pending proceedings with

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159 See Attachment 1 to this Reply (Attachment 1 to Iran's Memorial, as updated as of 31 December 2019).

160 On these provisions concerning the "terrorism exception" to the foreign sovereign immunity that the U.S. Congress added to the FSIA in 1996 and broadened in 2008, see paras. 2.43-2.45 above and Iran's Memorial at pp. 16-19, paras. 2.4-2.8 and at pp. 23-27, paras. 2.16-2.26.

161 With the exception of the *Greenbaum* and *Bennett* cases, concerning bombings in Jerusalem in 2001 and 2002 respectively, which were decided in 2006 and 2007 respectively under 28 U.S.C. § 1605(a)(7), in force at the time of the relevant conduct (see *Greenbaum, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Fact and Conclusions of Law, 10 August 2006, Case No. 1:02-cv-02148, 451 F. Supp.2d 90 (D.D.C. 2006) (IM, Annex 37) and *Bennett v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, Memorandum Opinion (Liability and Damages), 30 August 2007, Case No. 03-1486, 507 F. Supp. 2d 117 (D.D.C. 2007) – IM, Annex 39), the 19 other cases arose out of the following acts, preceding the enactment of the legal ground for their decision: the bombing of the U.S. Marine barracks in Beirut in 1983 (*Valore, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security, Arnold (Estate of James Silvia), et al. v. The Islamic Republic of Iran, et al., Spencer, et al. v. The Islamic Republic of Iran, et al.*, and *Bonk, et al. v. The Islamic Republic of Iran, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06-cv-516, 06-cv-750, and 08-cv-1273 (IM, Annex 46); *Murphy, et al., v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 24 September 2010, Case No. 06-cv-596 (IR, Annex 31); *Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 30 May 2003, Case No. 1:01-cv-2094 (IR, Annex 18); *Estate of Anthony K. Brown, et al., v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Order Granting Motion to Enter Default Judgment and to Take Judicial Notice (of the findings of facts and conclusions of law in the *Peterson* judgment of 30 May 2003 as fully applicable to the matter), 1 February 2010, Case No. 08-cv-531 (IR, Annex 28); *Davis, et al., v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia (Liability – taking judicial notice of the *Peterson* judgment of 30 May 2003), 1 February 2010, Case No. 07-cv-1302 (IR, Annex 29); *Estate of Steven Bland, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Order (Liability – taking judicial notice of the *Peterson* judgment of 30 May 2003), 6 December 2006, Case No. 1:05-cv-02124 – IR, Annex 19); a kidnapping in Beirut in 1984 (*Levin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Report and Recommendation, 31 December 2007, Case No. 05-2494, 529 F. Supp.2d 1 (D.D.C. 2007) – IM, Annex 41); an assassination in New York in 1990 (*Acosta, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Facts and Conclusions of Law (under the FSIA

respect to such acts[162] – have been implemented against assets belonging not to Iran but to Iranian companies.

(2008), 28 U.S.C. § 1605A), 26 August 2008, Case No. 1:06-cv-00745, 574 F.Supp.2d 15 (D.D.C. 2008) (IM, Annex 43); a bombing in Jerusalem in 1996 (*Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, 6 February 2002, 184 F.Supp.2d 13 (D.D.C 2002)(IM, Annex 30); the bombing of the Khobar Towers in Dharhan, Saudi Arabia in 1996 (*Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion (under the FSIA (2008), 28 U.S.C. § 1605A), 30 September 2009, Case No. 1:00-cv-02329, 659 F.Supp.2d 20 (D.D.C. 2009)(IM, Annex 45); a bombing in Jerusalem in 1997 (*Campuzano, et al. v. The Islamic Republic of Iran, et al.* and *Rubin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 10 September 2003, Cases Nos. 00-2328 and 01-1655, 281 F. Supp. 2d 258 (D.D.C. 2003)(IM, Annex 33); the bombing of the U.S. embassies in Nairobi and Dar-es-Salaam in 1998 (*Khaliq, et al. v. Republic of Sudan, et al.* U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 10-0356 (IR, Annex 46), *Owens, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 01-2244 (IR, Annex 47) and *Mwila, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 08-1377 (IR, Annex 48) – these three judgments were entered under the FSIA (2008), 28 U.S.C. § 1605A); a bombing in Jerusalem in 2001 (*Kirschenbaum, et al., v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Memorandum Opinion (Punitive damages under the FSIA (2008), 28 U.S.C. § 1605A), 19 May 2011, Case No. 08-cv-1814(IR, Annex 33); a bombing in Jerusalem in 2003 (*Beer, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Punitive damages under the FSIA (2008), 28 U.S.C. § 1605A), 19 May 2011, Case No. 08-cv-1807(IM, Annex 49).

162 In some of these cases the plaintiffs, who had originally made their complaint against Iran pursuant to the "terrorism exception" in FSIA (1996), § 1605(a)(7), were permitted to amend such complaint in the course of the proceedings – sometimes after the court's entry of judgment on liability – following the enactment on the NDAA 2008 on 28 January 2008 to take advantage of the FSIA. (2008), § 1610A replacing § 1605(a)(7). See the *Valore*, *Bonk*, *Spencer* and *Arnold* consolidated cases sp. pp. 2- 3(IR, Annex 30), See also the *Murphy* (IR, Annex 31), *Acosta* (IM, Annex 43), *Brown* (IR, Annex 28), *Khaliq*, *Owens* and *Mwila* (IR, Annexes 46, 47, 48) and *Havlish* (IM, Annex 52) cases.

Some of the plaintiffs were even allowed to bring a new complaint to seek punitive damages against Iran even though *they had already obtained a final judgment* under the FSIA (1996), 28 U.S.C. § 1607(a)(7) in the same case. See the *Beer* case (*Beer, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 19 May 2011, Case No. 08-cv-1807 – IM, Annex 49): in a previous action against the same defendants, the *Beer* plaintiffs had successfully pursued claims against Iran and MOIS under the former state-sponsored terrorism exception codified at 28 U.S.C. § 1605(a)(7). The Court held that defendants were liable for the death of Alan Beer in the bombing of a bus in Jerusalem in 2003 and were awarded compensatory damages yet denied punitive damages because they had not properly asserted a cause of action under 28 U.S.C. § 1605A (*Beer, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law (Liability and Damages), 26 August 2008, Case No. 06-473, p. 18 – IR, Annex 24). The *Beer* plaintiffs subsequently filed an amended complaint pursuant to the FSIA, 28 U.S.C. § 1605A to claim punitive damages, which the Court awarded in its 19 May 2011 Judgment. See also the *Kirschenbaum II* case (*Kirschenbaum, et al., v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Opinion and Order (Liability), 15 December 2010, Case No. 08-cv-1814, p. 2 (IR, Annex 32): "Prior to the Court's entry of judgment *Kirschenbaum I* [final judgment issued under the "state-sponsored terrorism" exception to the FSIA, which, at the time of the suit, was codified at 28 U.S.C. § 1605(a)(7): *Kirschenbaum, et al., v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 26 August 2008, Case No. 03-1708 (IR, Annex 25)], Congress passed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), which repealed § 1605(a)(7) and replaced it with a new state-sponsored terrorism exception (…). This new exception, codified at 28 U.S.C. §1605A, 'creat[ed] a federal right

2.61 This section further describes these enforcement proceedings carried out, either collectively or individually, by the 21 groups of judgment creditors thanks to yet again the intervention of retroactive U.S. legislation – Section 201 of TRIA in 2008 and Section 502 of ITRSHRA in 2012 and 2020 – specifically allowing the attachment of the Iranian companies' property in satisfaction of judgments against Iran.

2.62 Iran considers the companies that have been thus deprived of their properties and/or are still under the threat of such deprivation before the U.S. courts in the following order: (i) Bank Melli, (ii) Bank Markazi, (iii) TIC, and (iv) a multitude of Iranian companies whose assets have been globally seized in smaller amounts.

i. Enforcement proceedings against Bank Melli

(a) Susan Weinstein et al. v. Islamic Republic of Iran

2.63 After the enactment in April 1996 of the retroactively applicable FSIA amendments, and thereby the removal of Iran's immunity before U.S. courts,[163] the *Weinstein* plaintiffs sued Iran in 2000 under Section 1605(a)(7) for damages resulting from the death of a U.S. citizen in Jerusalem who was killed in February 1996 in the suicide bombing of a bus for which Hamas claimed responsibility.

2.64 In 2002, in a default judgment issued by the U.S. District Court for the District Court of Columbia, Iran was held liable on the basis that it had allegedly provided "material support" to Hamas and ordered Iran to pay more than USD 192 million to the

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of action against foreign states, for which punitive damages may be awarded' […]. The NDAA also permits plaintiffs to have §1605A retroactively applied in certain circumstances. […]. Plaintiffs here – the same plaintiffs as in *Kirschenbaum I* – seek to invoke the additional remedies provided by this new state-sponsored terrorism exception through the retroactive procedures outlines in the NDAA"). See also the *Rubin* case (*Rubin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Order, 3 June 2008, Case No. 1:01-cv-01655, p. 2, fn. 3 (IR, Annex 23), and the *Heiser* case (*Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion, 30 September 2009, Case No. 1:00-cv-02329, 659 F.Supp.2d 20 (D.D.C. 2009) p. 3. (IM, Annex 45),

163 See above para. 2.2, and Iran's Memorial, pp. 16-19, paras. 2.4-2.8 (on the amendment of FSIA 1976 by the U.S. Antiterrorism and Effective Death Penalty Act of 1996).

plaintiffs, including USD 150 million in punitive damages.[164] Bank Melli was not named as a defendant or judgment debtor in this case, and the default judgment does not contain any allegation concerning Bank Melli.[165]

2.65 In 2007, following the designation by the United States of Bank Melli as a company facilitating "Iran's proliferation activities or its support for terrorism" and the subsequent blocking of all properties of the bank within the United States,[166] the *Weinstein* judgment creditors applied to the District Court for the Eastern District of New York for authorisation to appoint a receiver to sell, in aid of execution of their judgment, Bank Melli's real property located in 135 Puritan Avenue, Forest Hills, New York and to receive the proceeds in partial satisfaction of its judgment.[167]

2.66 This application was based on Section 201(a) of the TRIA (2002) which authorises the attachment of the "blocked assets" not only of an alleged "State sponsor of terrorism", such as Iran (according to the United States), but also of its agencies and instrumentalities.[168] Thus, the plaintiffs claimed, they were entitled to enforce their judgment against the property because the property was a "blocked asset" under the TRIA and Bank Melli was an "agency or instrumentality" of Iran.[169]

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164 *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, 6 February 2002, 184 F.Supp.2d 13 (D.D.C 2002) (IM, Annex 30).

165 The Iranian Ministry of Information and Security alone was accused of having "acted as a conduit for the Islamic Republic of Iran's provision of funds to Hamas", the alleged author of the terrorist attack at issue (*ibid.*, p. 11, para. 30 IM, Annex 30).

166 See U.S. Department of Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism*, 25 October 2007 (IR, Annex 9).

167 *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, Memorandum and Order, 5 June 2009, Case 2:02-mc-00237-LDW (IR, Annex 26).

168 Section 201(a) of the TRIA thus provides that "in every case in which a person has obtained a judgment against a terrorist party [defined to include foreign states designated a "sponsor of terrorism" such as Iran], or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets[ ] of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable" (Section 201(a) of the IM, Annex 13), as amended by Section 502(e)(2) of the ITRSHRA see Iran's Memorial, p. 32, para. 2.38. On Section 201(a) of the TRIA see Iran's Memorial, pp. 19-23, paras. 2.9-2.15 and pp. 71- 72, paras. 4.20-4.24.

169 *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, Memorandum and Order, 5 June 2009, Case 2:02-mc-00237-LDW, pp. 2-3 (IR, Annex 26).

2.67 In 2008, Bank Melli requested the District Court to dismiss this application on several grounds including by reference to Articles III(1), IV(1), IV(2), IV(4) and V(1) of the Treaty of Amity. However, the Court rejected the Bank's defence, including the argument that, since it has a separate juridical status from the Government of Iran, the *Weinstein* judgment cannot be enforced against the Bank's property. With respect to this argument, the Court held that "[t]here is nothing in the language or purpose of Article III(1) of the Treaty of Amity that precludes the veil-piercing authorised by TRIA § 201(a)"[170] and that "[i]n any event, to the extent that TRIA § 201(a) may conflict with Article III(1) of the Treaty of Amity, the TRIA would 'trump' the Treaty of Amity."[171] Accordingly, it granted the plaintiffs' application to appoint a receiver as the property was subject to attachment under the TRIA.[172]

2.68 In 2010, the Court of Appeals for the Second Circuit, while affirming the District Court's decision, acknowledged that "Bank Melli was not itself a defendant in the underlying action".[173] However, referring to Section 201(a) TRIA, it held that this provision "provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor, even if the instrumentality is not itself named in the judgment",[174] and it confirmed the attachment of the property of Bank Melli in partial satisfaction of the liability of the State of Iran.

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170 The District Court made this finding relying on the U.S. Supreme Court case-law: "As the Supreme Court has recognized, 'the primary purpose of the corporation provisions of the [FCN] Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms.' Sumitomo Shoji Am. Inc. v. Avagliano, 457 U.S. 176, 185-86 (1982). Indeed, 'the purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.' Id. at 187-88" (*Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, Memorandum and Order, 5 June 2009, Case 2:02-mc-00237-LDW, pp. 5-6 IR, Annex 26 emphasis omitted).

171 *Ibid.*, p. 6.

172 *Ibid.*, p. 13.

173 *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010), p. 7 (IM, Annex 47).

174 *Ibid.*, p. 12. The Court of Appeals held that Section 201(a) authorised the attachment of Bank Melli's property to satisfy a terrorism-based judgment against Iran, even though the Bank was not itself a party to the underlying tort action that gave rise to that judgment and was not alleged to have played any role in the facts underlying the action. It considered that Congress made clear its intent that assets of any

2.69 In 2012, after Bank Melli's petition for a *writ of certiorari* was denied by the U.S. Supreme Court, the District Court finally ordered the distribution of the sale price of the Bank's property in the amount of USD 1,355,513.06 to the proposed *Heiser* interveners and the *Weinstein* plaintiffs.[175]

(b) Bennett, et al. v. Islamic Republic of Iran

2.70 The *Bennett* proceedings, initiated in December 2011, involved a request for the turnover of assets, in the amount of USD 17.6 million, owed by Visa and Franklin to Bank Melli, to satisfy the judgments obtained by four groups of individuals against Iran in the cases of *Michael Bennett, et al. v. Islamic Republic of Iran, et al*;[176] *Acosta, et al. v. Islamic Republic of Iran, et al*;[177] *Michael Heiser, et al.* v. *Islamic Republic of Iran, et al*;[178] and *Greenbaum, et al. v. Islamic Republic of Iran, et al*.[179] Bank Melli

'instrumentality' of an alleged terrorist State were available to satisfy the 'terrorism judgment' against the State itself. The Court concluded that its reading was confirmed by Section 201's legislative history, which indicates that the provision does not recognise any juridical distinction between an alleged terrorist State and its agencies or instrumentalities (*ibid*., pp. 7-12).

175 *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, 20 December 2012, No. 12 Civ. 3445, (E.D.N.Y. 2012) (IM, Annex 54).

176 *Bennett, v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, Memorandum Opinion (Liability and Damages), 30 August 2007, Case No. 03-1486, 507 F. Supp. 2d 117 (D.D.C. 2007) (IM, Annex 39).

177 *Acosta, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Facts and Conclusions of Law, 26 August 2008, Case No. 1:06-cv-00745, 574 F. Supp. 2d 15 (D.D.C. 2008) (IM, Annex 43).

178 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion, 30 September 2009, Case No. 1:00-cv-02329, 659 F. Supp. 2d 20 (D.D.C. 2009) (IM, Annex 45). The District Court had already entered a final judgment in this case on 22 December 2006 (*Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Memorandum Opinion, 22 December 2006, Case No. 1:00-cv-02329, 466 F. Supp.2d 229 (D.D.C. 2006) (IM, Annex 38). However, in March 2008, following the amendment of the 1996 FSIA by NDAA 2008 to create 28 U.S.C. § 1605A, plaintiffs filed a Motion for Supplementary Relief in which they requested that the District Court apply 28 U.S.C. § 1605A retroactively to their actions and award additional damages, including 650 million dollars in punitive damages, against Iran. On 13 March 2009, the District Court determined that plaintiffs' actions satisfied the conditions for retroactive application of § 1605A and issued an order indicating that plaintiffs were entitled to proceed before the District Court under the terms of the new law. These new proceedings resulted in the 30 September 2009 final judgment.

179 *Greenbaum, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Fact and Conclusions of Law, 10 August 2006, Case No. 1:02-cv-02148, 451 F. Supp.2d 90 (D.D.C. 2006) (IM, Annex 37).

was not a judgment debtor under any of these judgments, which moreover do not contain any allegation concerning the bank.

2.71 These assets consisted of a debt deriving from a contract signed between Visa Inc. and Bank Melli in 1991. Under the contract, Bank Melli agreed to accept Visa cards in Iran through its branches and to reimburse the agents based on their vouchers. Visa Inc. in turn agreed to reimburse Bank Melli for its payments. These assets had been blocked by the U.S. Government following the designation of Bank Melli in October 2007.[180]

2.72 The plaintiffs relied on Section 201(a) of TRIA (2002)[181] as well as Section 1610(g) of the FSIA (codified at 28 U.S.C. § 1610(g)) to seek the attachment of these assets. Section 1610(g), introduced by the NDAA 2008 into the 28 U.S. Code, modified the law concerning attachment in relation to judgments based on Section 1605A. It stated in principle that the property of an agency or instrumentality of a foreign state against which such judgment is entered, including property that is a separate juridical entity, may be subject to attachment in aid of execution, and execution, upon that judgment regardless of certain conditions.[182]

2.73 In August 2012, Bank Melli moved to dismiss the complaint on several grounds, and in particular on the ground of the separate personality of the Bank, distinct from the

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180 See para. 2.65 above.

181 See para. 2.66 above.

182 In relevant part, Section 1610(g) of FSIA (codified at 28 U.S.C. § 1610(g)) provides: "PROPERTY IN CERTAIN ACTIONS.— (1) In General.— Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of— (A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations. (2) United states sovereign immunity inapplicable.— Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act. (…)". On Section 1610(g) of the FSIA see Iran's Memorial, pp. 28-30, paras. 2.30-2.33 and pp. 72-73, paras. 4.25-4.26.

Iranian Government, based on the U.S. Supreme Court's decision in *Bancec*[183] and provisions of the Treaty of Amity (Articles III and IV). Further, Bank Melli pointed to the non-retroactive application of Section 201(a) of TRIA and also the fact that funds "due and owing" could not be regarded as property "of" the Bank, which is a threshold TRIA requirement.[184]

2.74 In November 2012, the District Court discharged Visa and Franklin and held hearings on the Bank's motion. In February 2013, it rejected Bank Melli's motion to dismiss holding *inter alia* that Section 201(a) of TRIA and Section 1610(g) of FSIA were applicable to the case and permitted judgment creditors to execute on blocked assets of an agency or instrumentality of foreign state sponsors of terrorism. According to the court,

a. TRIA validly applies to judgments pre-dating it because "TRIA relates to collectability, not liability",[185] and

b. TRIA overrides the presumption of separateness in *Bancec* and Section 1610(g) of FSIA (2008) squarely abrogates this presumption in the context of terrorism-related judgments.[186]

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183 See *First National City Bank v. Banco Para el Comercio Exterior de Cuba (aka Bancec)*, U.S. Supreme Court, 17 June 1983, 462 U.S. 611 (1983) (IM, Annex 28), paras. 33-34 ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such. We find support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act. During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status"). The Supreme Court thus recognised that juridical persons controlled by a foreign State enjoy a presumption of separateness from it under the FSIA 1976. The lower courts' case law then identified five factors in deciding whether an instrumentality or agency of a foreign state was to benefit indeed from such presumption (the so-called "*Bancec* factors").

184 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the Northern District of California, Order Denying Motion to Dismiss, 28 February 2013, Case 3:11-cv-05807-CRB (IR, Annex 42).

185 *Ibid.*, p. 13.

186 *Ibid.*, pp. 12-13. The Supreme Court interprets section 1610(g) in the same way: there is "no dispute that, at a minimum, § 1610(g) serves to abrogate *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a § 1605A judgment holder seeks to satisfy a judgment held against the foreign state" (*Rubin, et al. v. Islamic Republic of Iran, et al.*, 21 February 2018, Case No. 16-534, p. 8 (IR, Annex 59); see also p. 11: "Prior to the enactment of §1610(g), the plaintiffs would have had to establish that the *Bancec* factors favor holding the agency or instrumentality liable for the foreign state's misconduct. With §1610(g), however, the plaintiffs could attach and execute against the

2.75 Bank Melli appealed from the judgment but the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court in June 2016. It ruled that money owed by Visa and Franklin to Bank Melli is the property of the latter which may be seized by the judgment creditors. As to Bank Melli's reliance on the Treaty of Amity, the Court said that there is no conflict between Section 1610(g) of FSIA and the Treaty provisions. It emphasised that "even if the two provisions were inconsistent, when a treaty and a later-enacted federal statute conflict, the subsequent statute controls to the extent of the conflict."[187]

2.76 Following the dismissal of Bank Melli's petition for a *writ of certiorari* by the U.S. Supreme Court, the "*Bennett* plaintiffs" filed a motion for summary judgment and turnover of the Bank's assets based on TRIA. Bank Melli once again challenged the contention that the assets are property of the Bank as defined by TRIA. In December 2018, the District Court rejected Bank Melli's defence and held that the assets in question, though not yet in possession of the Bank, could be regarded as property of the Bank and qualify as assets subject to execution under TRIA.[188]

2.77 Bank Melli appealed that decision and once again availed itself of the Treaty of Amity and TRIA's ownership precondition for enforcement of the so-called "anti-terrorism judgments". However, the Court of Appeals for the Ninth Circuit affirmed in September 2019 that the property rights of Bank Melli in the funds and concluded that the factual disputes as to ownership of the funds did not call for dismissal of the plaintiffs' motion for summary judgment.[189]

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property of the state-owned entity regardless of the *Bancec* factors, so long as the plaintiffs can establish that the property is otherwise not immune (e.g., pursuant to § 1610(a)(7) because it is used in commercial activity in the United States)").

187 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016), p. 24 (IM, Annex 64).

188 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the Northern District of California, Order Granting Motion for Summary Judgment, Granting Motion for Stay, 19 December 2018, Case 3:11-cv-05807-CRB (IR, Annex 64).

189 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals for the Ninth Circuit, Memorandum, 30 September 2019, No. 3:11-cv-05807-CRB (IR, Annex 72).

2.78 Bank Melli subsequently filed a petition for a *writ of certiorari*, which the U.S. Supreme Court denied on 30 March 2020. On 24 April 2020, the District Court ordered the withdrawal by the plaintiffs' counsel of the amount of the assets, i.e. USD 17.6 million that had been wired to the Court's Registry in May 2012.[190]

(c) Levin, et al. v. Islamic Republic of Iran

2.79 The *Levin* proceedings involved the turnover of blocked assets belonging to Iranian companies, including Bank Melli, to a number of plaintiffs in aid of execution of the judgments issued by U.S. courts in their favour. Bank Melli was not a judgment debtor under any of these judgments, which do not contain any finding of fact concerning the Bank.[191]

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190 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the Northern District of California, Order Granting Motion to Lift Stay and for Withdrawal, 24 April 2020, No. 3:11-cv-05807-CRB (IR, Annex 85).

191 See *Levin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Report and Recommendation, 31 December 2007, Case No. 05-2494, 529 F. Supp. 2d 1 (D.D.C. 2007) (IM, Annex 41); *Greenbaum, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Fact and Conclusions of Law, 10 August 2006, Case No. 1:02-cv-02148, 451 F. Supp.2d 90 (D.D.C. 2006) (IM, Annex 37); *Acosta, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Facts and Conclusions of Law, 26 August 2008, Case No. 1:06-cv-00745, 574 F.Supp.2d 15 (D.D.C. 2008) (IM, Annex 43); *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion, 30 September 2009, Case No. 1:00-cv-02329, 659 F. Supp. 2d 20 (D.D.C. 2009) (IM, Annex 45); *Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 30 May 2003, Case No. 1:01-cv-2094 (IR, Annex 18) and *Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 7 September 2007, Case No. 1:01-cv-2094 (IR, Annex 21); *Campuzano, et al. v. The Islamic Republic of Iran, et al.* and *Rubin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 10 September 2003, Cases Nos. 00-2328 and 01-1655, 281 F. Supp. 2d 258 (D.D.C. 2003) (IM, Annex 33); *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Memorandum and Opinion (Liability and Damages), 6 February 2002, 184 F. Supp. 2d 13 (D.D.C 2002) (IM, Annex 30); *Valore, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, *Arnold (Estate of James Silvia), et al. v. The Islamic Republic of Iran, et al.*, *Spencer, et al. v. The Islamic Republic of Iran, et al.*, and *Bonk, et al. v. The Islamic Republic of Iran, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06-cv-516, 06-cv-750, and 08-cv-1273 (IM, Annex 46) (the *Valore* plaintiffs already held, before the 2008 amendments to FSIA, a final judgment on liability of 27 March 2007 of the same District Court, and subsequently amended their complaint so that it is made pursuant to the newly created 28 U.S.C. § 1605A); *Murphy, et al., v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 24 September 2010, Case No. 06-cv-596 (IR, Annex 31); *Bennett, et al., v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, Memorandum Opinion (Liability and Damages), 30 August 2007, Case No. 03-1486, 507 F. Supp. 2d 117 (D.D.C. 2007) (IM, Annex 39); *Estate of Anthony K. Brown, et al.*,

2.80 On 22 June 2009, the *Levin* plaintiffs, holding a final judgment in the amount of USD 28 million against Iran, MOIS and IRGC,[192] initiated enforcement proceedings against Bank of New York, JP Morgan Chase, Société Générale and Citibank under Section 201 of TRIA and Section 1610(g) of FSIA.[193]

2.81 The turnover of the blocked assets of the Iranian companies held with these four U.S. financial institutions was carried out in three phases pursuant to the decisions made by the U.S. District Court for the Southern District of New York. The first phase concerned some blocked assets consisting in proceeds from wire transfers or deposit accounts belonging to certain Iranian entities. Their turnover was ordered in January and June 2011.[194] In a second phase which started in 2013, the court ordered the

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v. Islamic Republic of Iran and Iranian Ministry of Information and Security, U.S. District Court for the District of Columbia, Order Granting Motion to Enter Default Judgment and to Take Judicial Notice (of the findings of facts and conclusions of law in the *Peterson* judgment of 30 May 2003 mentioned above (IR, Annex 18) as fully applicable to the matter), 1 February 2010, Case No. 08-cv-531 (IR, Annex 28) and *Estate of Anthony K. Brown, et al., v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 3 July 2012, Case No. 08-cv-531 (IR, Annex 37); *Estate of Steven Bland, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Order (Liability – taking judicial notice of the findings of facts and conclusions of law in the *Peterson* judgment of 30 May 2003), 6 December 2006, Case No. 1:05-cv-02124, 831 F. Supp. 2d 150 (D.D.C. 2011) (IR, Annex 19) and *Estate of Steven Bland, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 21 December 2011, Case No. 1:05-cv-02124, 831 F. Supp. 2d 150 (D.D.C. 2011) (IM, Annex 51); *Khaliq, et al. v. Republic of Sudan, et al*; *Owens, et al. v. Republic of Sudan, et al.;* and *Mwila, et al. v. Republic of Sudan, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 30 November 2011, Cases Nos. 10-0356, 01-2244 and 08-1377 (IR, Annex 34); and *Khaliq, et al. v. Republic of Sudan, et al*; U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 10-0356 (IR, Annex 46), *Owens, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 01-2244 (IR, Annex 47) and *Mwila, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 08-1377 (IR, Annex 48).

192 See *Levin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Clerk's Judgment, 6 February 2008, Case No. 05-2494 (IR, Annex 22).

193 *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, Complaint, 22 June 2009, Case No. 09 Civ. 5900 (IR, Annex 27). The defendants had reported to the U.S. Office of Foreign Assets Control that they were in possession of assets owned by Iranian companies and blocked pursuant to various U.S. Executive Orders.

194 *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, 28 January 2011, 2011 WL 337358 (S.D.N.Y. 2011) (IM, Annex 48).

turnover of similar blocked assets, in the amount of more than USD 4 million to the *Levin*, *Greenbaum*, *Acosta*, and *Heiser* judgment creditors.[195]

2.82 Among the assets designated by the court for the third phase was the debt of MasterCard International Incorporated to Bank Melli, held with JP Morgan Chase Bank in two accounts. The amounts of MasterCard's debt as of March 2012 were USD 2,927,258.58 and USD 1,264,233.67.[196]

2.83 On 31 October 2013, the District Court directed the turnover, *inter alia*, of this debt of MasterCard to Bank Melli to the *Levin*, *Greenbaum*, *Acosta*, and *Heiser* judgment creditors.[197]

ii. Enforcement proceedings against Bank Markazi: the Peterson cases

(a) Peterson I

2.84 The proceedings for the enforcement against the assets and interests of Bank Markazi of the final judgment in *Peterson v. Islamic Republic of Iran* began in June 2008 when the U.S. Office of Foreign Assets Control ('OFAC'), pursuant to a protective order issued by the District Court for Southern District of New York,[198] provided the

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195 *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, 10 October 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013) (IM, Annex 59) and *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, Amended Answer of JP Morgan Chase Parties to Amended Counterclaim of *Heiser* Judgment Creditors, with Counterclaims, and Amended and Supplemental Third-Party Complaint against Judgment Creditors of Iran, Plaintiffs Suing Iran and Account and Wire Transfer Parties (Phase 3), 10 October 2012, No. 09 Civ. 5900, p. 51 (IR, Annex 40). See also *Levin, et al. v. Bank of New York Mellon, et al.*, U.S. District Court, Southern District of New York, 1 November 2016, No. 09 Civ. 5900 (S.D.N.Y. 2016) (IM, Annex 71).

196 *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, Amended Answer of JP Morgan Chase Parties to Amended Counterclaim of *Heiser* Judgment Creditors, with Counterclaims, and Amended and Supplemental Third-Party Complaint against Judgment Creditors of Iran, Plaintiffs Suing Iran and Account and Wire Transfer Parties (Phase 3), 10 October 2012, No. 09 Civ. 5900, Exhibit A (IR, Annex 40).

197 *Levin, et al. v. Bank of New York, et al.*, U.S. District Court, Southern District of New York, Judgment and Order Directing Turnover of Funds and Discharge, 31 October 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013) (IM, Annex 60).

198 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the Southern District of New York, Defendant Bank Markazi's Memorandum of Law in Support of its Motion to Dismiss, 15 March 2012, Case No. 10 civ 4518 (BSJ), pp. 4-5 (IR, Annex 35).

judgment creditors with confidential information regarding Bank Markazi's assets invested in the United States financial market. These proceedings involved, in addition to the *Peterson* plaintiffs, 17 other groups of judgment creditors, comprised of more than a thousand individuals, who had also obtained judgments against Iran.[199]

2.85 Bank Markazi was not a defendant in any way in the eighteen cases underlying the *Peterson I* enforcement proceedings. None of the decisions on liability in these cases contains any allegations against Bank Markazi – or any other Iranian company.[200] The

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199 These are the following: *Levin, et al. v. Islamic Republic of Iran, et al*; *Greenbaum, et al. v. Islamic Republic of Iran, et al*; *Acosta, et al. v. Islamic Republic of Iran, et al*; *Michael Heiser, et al.* v. *Islamic Republic of Iran, et al*; *Valore, et al. v. Islamic Republic of Iran, et al*; *Lolita M. Arnold, et al. v. Islamic Republic of Iran, et al*; *Bonk, et al. v. Islamic Republic of Iran, et al*; *Elizabeth Murphy, et al. v. Islamic Republic of Iran, et al*; *Estate of Anthony Brown, et al. v. Islamic Republic of Iran, et al; Estate of Stephen Bland v. Islamic Republic of Iran, et al*; *Khaliq, et al. v. Islamic Republic of Iran, et al*; *Owens, et al. v. Islamic Republic of Iran, et al; Mwila, et al. v. Islamic Republic of Iran, et al*; *Beer, et al. v. Islamic Republic of Iran, et al. Rubin, et al. and others v. Islamic Republic of Iran, et al; Sylvia, et al. v. Islamic Republic of Iran, et al; Kirschenbaum, et al. v. Islamic Republic of Iran, et al.* See *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013) ("*Peterson I*"), p. 1, fn. 1 (IM, Annex 58).

The *Owens*, *Khaliq* and *Mwila* creditors eventually abandoned their claim to Bank Markazi's frozen assets discussed in this section, since none of these plaintiffs had obtained judgments for damages against Iran at the time the District Court ordered the turnover of such assets. See *Peterson, et al. v. Islamic Republic of Iran, Bank Markazi a/k/a Central Bank of Iran, Banca UBAE SpA, Citibank, N.A., and Clearstream Banking, S.A.*, U.S. District Court for the Southern District of New York, 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, 9 July 2013, No. 10-cv-4518-KBF, p. 6 (IR, Annex 43).

200 *Levin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Report and Recommendation, 31 December 2007, Case No. 05-2494, 529 F. Supp. 2d 1 (D.D.C. 2007) (IM, Annex 41); *Greenbaum, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Fact and Conclusions of Law, 10 August 2006, Case No. 1:02-cv-02148, 451 F. Supp.2d 90 (D.D.C. 2006) (IM, Annex 37); *Acosta, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Findings of Facts and Conclusions of Law, 26 August 2008, Case No. 1:06-cv-00745, 574 F. Supp. 2d 15 (D.D.C. 2008) (IM, Annex 43); *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.* (consolidated with *Estate of Campbell, et al. v. Islamic Republic of Iran, et al.*), U.S. District Court, District of Columbia, Memorandum Opinion, 30 September 2009, Case No. 1:00- cv-02329, 659 F.Supp.2d 20 (D.D.C. 2009) (IM, Annex 45); *Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 30 May 2003, Case No. 1:01-cv-2094 (IR, Annex 18) and *Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 7 September 2007, Case No. 1:01-cv-2094 (IR, Annex 21); *Campuzano, et al. v. The Islamic Republic of Iran, et al.* and *Rubin, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 10 September 2003, Cases Nos. 00-2328 and 01-1655, 281 F. Supp. 2d 258 (D.D.C. 2003) (IM, Annex 33); *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Memorandum and Opinion (Liability and Damages), 6 February 2002, 184 F.Supp.2d 13 (D.D.C 2002) (IM, Annex 30); *Valore, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security, Arnold (Estate of James Silvia), et al. v. The Islamic Republic of Iran, et al., Spencer, et al. v. The Islamic Republic of Iran, et al.*, and *Bonk, et al. v. The*

findings of fact are limited to the various groups accused of having committed the attacks at issue and to Iran, Iranian ministries, the IRGC, and Iranian officials allegedly providing financial and material support to the said groups.

2.86 Bank Markazi's assets in issue, as disclosed by OFAC, consisted of the Bank's investments in the United States, namely ownership interest in security entitlements in U.S. dollars held with Clearstream account at Citibank in New York which were eventually turned over by U.S. courts to *Peterson*'s judgment creditors.

Islamic Republic of Iran, et al. (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06-cv-516, 06-cv-750, and 08- cv- 1273 (IM, Annex 46) (the *Valore* plaintiffs already held, before the 2008 amendments to FSIA, a final judgment on liability of 27 March 2007 of the same District Court, and subsequently amended their complaint so that it is made pursuant to the newly created 28 U.S.C. § 1605A); *Murphy, et al., v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 24 September 2010, Case No. 06-cv-596 (IR, Annex 31); *Bennett, v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, Memorandum Opinion (Liability and Damages), 30 August 2007, Case No. 03-1486, 507 F. Supp. 2d 117 (D.D.C. 2007) (IM, Annex 39); *Estate of Anthony K. Brown, et al., v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, United States District Court for the District of Columbia, Order Granting Motion to Enter Default Judgment and to Take Judicial Notice (of the findings of facts and conclusions of law in the *Peterson* judgment of 30 May 2003 mentioned above (IR, Annex 18) as fully applicable to the matter), 1 February 2010, Case No. 08-cv-531 (IR, Annex 28) and *Estate of Anthony K. Brown, et al., v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, United States District Court for the District of Columbia, Memorandum Opinion (Damages), 3 July 2012, Case No. 08-cv-531 (IR, Annex 37); *Estate of Steven Bland, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Order (Liability – taking judicial notice of the findings of facts and conclusions of law in the *Peterson* judgment of 30 May 2003), 6 December 2006, Case No. 1:05-cv-02124 (IR, Annex 19) and *Estate of Steven Bland, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 21 December 2011, Case No. 1:05-cv-02124, 831 F.Supp.2d 150 (D.D.C. 2011) (IM, Annex 51); *Khaliq, et al. v. Republic of Sudan, et al*; *Owens, et al. v. Republic of Sudan, et al.; and Mwila, et al. v. Republic of Sudan, et al.* (consolidated), U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 30 November 2011, Cases Nos. 10-0356, 01-2244 and 08-1377 (IR, Annex 34); and *Khaliq, et al. v. Republic of Sudan, et al*; U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 10-0356 (IR, Annex 46), *Owens, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 01-2244 (IR, Annex 47) and *Mwila, et al. v. Republic of Sudan, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 28 March 2014, Case No. 08-1377 (IR, Annex 48); *Kirschenbaum, et al., v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Opinion and Order (Liability), 15 December 2010, Case No. 08-cv-1814 (IR, Annex 32) and *Kirschenbaum, et al., v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Memorandum Opinion (Punitive Damages), 19 May 2011, Case No. 08-cv-1814 (IR, Annex 33); *Beer, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Findings of Fact and Conclusions of Law (Liability and Damages), 26 August 2008, Case No. 06-473, p. 18 (IR, Annex 24) and *Beer, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 19 May 2011, Case No. 08-cv-1807 (IM, Annex 49).

2.87 The securities had been purchased by Bank Markazi during the years 2002 to 2007 at the nominal value of USD 1,753,000,000.[201] These were 22 entitlements in dematerialised bonds issued by various foreign governments and intergovernmental organisations such as the World Bank.

2.88 The purchase of the security entitlements constituted a specific kind of ownership interest for Bank Markazi, known within the U.S. legal system as a "security entitlement", the particular nature of which is the consequence of the modern holding system of securities. The entitlements in this system were dematerialised within the chain of different tiers. This means that, although the securities may themselves be represented by certain global notes being registered with a central depository, the entitlements stemming from them are not represented by a physical certificate, but rather take an electronic form as book-entries on the intermediaries' records.

2.89 The securities purchased by Bank Markazi "had been issued in physical form and were registered with either Federal Reserve Bank of New York ('FRBNY') or Depository Trust Company of New York ('DTC'), also located in New York. Accordingly, prior to their maturity, the FRBNY and the DTC were the custodians of [Bank Markazi's bonds]."[202] The Federal Reserve Bank of New York is the fiscal and paying agent for U.S. dollar denominated securities in the United States as held through the book entry system operated by such bank.

2.90 Bank Markazi purchased the security entitlements using the services of Clearstream Banking S.A. ('Clearstream' or 'CBL'), a Luxembourg clearing house: "Clearstream Luxembourg is an international service provider for the financial industry offering securities settlements and custody-safekeeping services […] Clearstream serves as an intermediary between financial institutions worldwide to ensure that transactions from one bank to another are efficiently and successfully completed."[203] In order to pay for the entitlements, Bank Markazi had to transfer the agreed price in U.S. dollars, into

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201 See para. 3.25 below.

202 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 5 (IM, Annex 58).

203 *Ibid.*

Clearstream's bank account at Citibank NY ('Citibank') so that Clearstream could effectively purchase the securities.

2.91 Clearstream had agreed in 1994 to act as the custodian of Bank Markazi's security entitlements. Under its General Terms and Conditions (the 'Contract'), Clearstream agreed to provide services relating to the clearance, settlement, custody and administration of securities.[204] It opened, pursuant to Article 4 of the Contract, in its books an account in Luxembourg in the name of Bank Markazi for the conduct of the Bank's business.

2.92 To maintain security entitlements for its customers in securities whose physical notes were "immobilized" with depositories in the United States, Clearstream had deposited the entitlements at its omnibus account with Citibank, i.e. had "sub-custodized" these entitlements with Citibank.[205]

2.93 Under Article 20 of the Contract, Clearstream, through Citibank, as its agent, had to collect every six months the interest accrued on bonds from the said U.S. depositories, after it had been collected from the issuers, and transfer the interest to Bank Markazi's account in its books in Luxembourg or another account at the Bank's instruction. Similarly, when the bonds themselves matured or were sold by the Bank, the related

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204 Clearstream Banking S.A., *General Terms and Conditions*, 2008 (IR, Annex 109).

205 A custodian, or custodian bank, is a financial institution responsible for safekeeping and administering financial assets or securities on behalf of their owners and for providing related post-trade services. It is common practice in the financial industry for the legal owner of securities to hold them through a registration chain – designed to facilitate the registration of traded securities – involving one or more custodian. The custodians are registered as the holders of the securities that they hold in a fiduciary arrangement for the ultimate beneficial owner of the securities. A sub-custodian (or local custodian bank, or agent bank) is a financial institution that provides custody services, with respect to securities traded in a particular jurisdiction, on behalf of another custodian who may not have an operation in that jurisdiction. In the instant case, Clearstream, maintaining a mere representative office in the United States, had to use Citibank – a U.S. institution among the largest custodian banks in the world alongside Bank of New York Mellon, JP Morgan or BNP Paribas Securities Services – as a sub-custodian for the securities ultimately held by Bank Markazi.

An omnibus account is used to maintain appropriate custody of securities. It hosts funds belonging to more than one investor ("*omni*" is for "many", "*bus*" is for "business"). They are intended to facilitate the operations of professional securities intermediaries such as Clearstream, as it allows them to execute trades in securities on behalf of the participating investors.

proceeds received by Clearstream from the buyer into its account with Citibank had to be transferred to Bank Markazi's account in Clearstream's books.[206]

2.94 In 2007, as a result of OFAC's threat to impose sanctions, Clearstream decided to close all accounts that it maintained for Bank Markazi and other Iranian customers, regardless of whether such accounts involved securities held in custody in the United States.

2.95 In 2008, Bank Markazi consequently agreed to transfer the security entitlements from its custody account with Clearstream to the account of an Italian bank, called Unione delle Banche Arabe ed Europee ('UBAE'), which had been opened with Clearstream. This transfer was marked "free transfer".[207] UBAE in turn credited the Bank's custody account held with UBAE with the transferred bonds. This transfer only added a new tier of intermediary in the relationship between the parties involved: Bank Markazi continued to maintain its entitlement and remained the ultimate beneficial owner of the bonds.[208]

2.96 As of 2008, after the OFAC disclosed these securities, the following series of legal, regulatory and judicial measures were taken by the United States against them:

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206 See *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), pp. 9-10 (IM, Annex 58).

207 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 7 (IM, Annex 58).

208 In the course of proceedings before the District Court, UBAE expressly admitted that it had no "legally cognizable interest in the restrained bonds" (IM Annex 58, p. 47). Pursuant to the U.S. Uniform Commercial Code which is the law governing the securities generated in the U.S. market, both a "security" and a "security entitlement", i.e. "any property that is held by a securities intermediary for another person", are considered as financial assets of the entitlement holder (UCC, Section 8-102(a)(9)(i) and (iii)). In fact, "all interests in [a] financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders [and] are not property of the securities intermediary" (UCC, Section 8-503(a)). In the case of a security entitlement, a person acquires it if a security intermediary "indicates by book entry that a financial asset has been credited to the person's securities account" (UCC, Section 8-501(b)(1)). The security intermediary, in such a situation, undertakes to treat the holder of the account "as entitled to exercise the rights that comprise the financial asset." (UCC, Section 8-501(a)).

a. In June 2008, the District Court issued, pursuant to plaintiffs' request, orders to restrain Bank Markazi's security bonds which were sub-custodized by Clearstream with Citibank in New York.[209]

b. In February 2012, the assets of Government of Iran, Bank Markazi and all other Iranian institutions were "blocked" (i.e., frozen) pursuant to E.O. 13599. According to Sections 1(a) and (b) of this Executive Order:

> "(a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.
>
> (b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in."[210]

The aim of this Executive Order was to ensure the concrete implementation of Section 201(a) of the TRIA notably by the *Peterson I* plaintiffs: it legally provides the "blocked assets" – those of Iran as well as those of its financial agencies and instrumentalities, including Bank Markazi – that these plaintiffs needed to be authorised, pursuant to Section 201(a), to attach Bank Markazi's property.[211]

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209 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 5 (IM, Annex 58).

Bank Markazi's commercial activity in the United States was further barred three months later. Effective 10 November 2008, the Iranian Transactions Regulations were amended to revoke authorisation for so-called "U-turn" transfers, i.e. dollar transactions involving the transfer of funds through U.S. financial institutions between two foreign – non-Iranian – banks for the direct or indirect benefit of non-designated Iranian banks, other persons in Iran or the Government of Iran. As a result of this amendment, U.S. financial institutions such as depository institutions, registered brokers or dealers in securities, are no longer permitted to process U-turn transfers involving any Iranian banks including Bank Markazi – except transfers involving certain specified underlying transactions. See OFAC, *Final Rule amending the Iranian Transactions Regulations*, 4 November 2008, U.S. Federal Register Vol. 73, No. 218 of 10 November 2008 (IR, Annex 10).

210 Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22).

211 Section 201(a) of TRIA authorises post-judgment execution against the property of the agencies or instrumentalities of the judgment debtor – provided it is designated as "State sponsor of terrorism –

c. In August 2012, Congress passed Section 502 of ITRSHRA (codified at 22 U.S.C. § 8772) in order specifically to authorise the turnover of Bank Markazi's financial assets to the particular plaintiffs in specific litigation in the U.S. courts in satisfaction of the judgments in their favour.[212] This Act addressed the specific property which was the subject of the then ongoing enforcement proceedings in *Peterson I*, namely the property of Bank Markazi. Section 502(a)(1) reads:

> "(…) notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and pre-empting any inconsistent provision of State law, a financial asset that is–
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad, shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act."

The "property described in subsection (b)" referred to in subsection (B) was described as follows:

> "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated

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only if such property consists in "blocked assets" within the meaning of the U.S. sanctions law. See para. 2.66 above.

On E.O. 13599 see Iran's Memorial, pp. 31-32, paras. 2.35-2.37, and p. 74, para. 4.29.

212 22 U.S. Code, Section 8772 as adopted by Section 502 of the U.S. Iran Threat Reduction and Syria Human Rights Act of 2012 Pub. L. 112-158, 126 Stat. 1214 (IM, Annex 16). Section 502 was in fact drafted by attorneys of plaintiffs, carefully tailored for *Peterson I* proceedings, and thereafter enacted by the U.S. Congress. See Julie Triedman, "Can American Lawyers Make Iran Pay for 1983 Bombing?", *The American Lawyer*, 30 September 2013 (IR, Annex 116).

> June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order."[213]

As highlighted by the U.S. Supreme Court in *Peterson*, the Congress intended to create 22 U.S.C. § 8772 as the mean to "place beyond dispute the availability of some of the E.O. 13599-blocked assets for the satisfaction of judgments rendered in terrorism cases".[214] In other – more blunt – words, those used by Chief Justice Roberts and Justice Sotomayor in the same case:

> "Section 8772 does precisely that, changing the law—for these proceedings [*Peterson I*] alone—simply to guarantee that respondents win. The law serves no other purpose—a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute "'sweeps away … any … federal or state law impediments that might otherwise exist'" to bar respondents from obtaining Bank Markazi's assets. … In the District Court, Bank Markazi had invoked sovereign immunity under the [FSIA 1976]. … Section 8772(a)(1) eliminates that immunity".[215]

d. On 28 February 2013, the District Court granted plaintiffs' motion for partial summary judgment for turnover of the cash proceeds of the securities held in the Clearstream account at Citibank under both Section 201(a) of the TRIA and Section 8772 of the U.S. Code.[216]

e. On 9 July 2013, the District Court ordered (i) the creation of a Qualified Settlement Fund (or 'QSF trust') to be administered by a trustee for the benefit of the *Peterson* plaintiffs and (ii) the payment of "all funds directed for turnover pursuant to the Partial Judgment of 28 February 2013 and any Order of this court directing the entry of a final and appealable order and judgment

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213 IM, Annex 16.

214 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), at p. 5 (IM, Annex 66).

215 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court (Joint Dissenting Opinion Roberts & Sotomayor), 20 April 2016, 578 U.S. 1 (2016), at p. 34 (IM, Annex 66). On Section 8772 (Section 502 of ITRSHRA) generally see Iran's Memorial, pp. 32-35, paras. 2.38-2.43 and pp. 73-74, paras. 4.27-4.28.

216 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013) (IM, Annex 58). Although summoned as defendant, Iran chose not to appear in these proceedings because pursuant to international law it shall, as a foreign State, be immune from suit in U.S. courts.

consistent with the Partial Judgment" – i.e. the deposit by Citibank of the abovementioned cash proceeds into the QSF trust.[217]

f. On the same day, the District Court awarded judgment for turnover of the blocked assets and ordered (i) OFAC to issue a license to the trustee of the QSF to transfer these assets to the Registry of the Court and (ii) Citibank to deposit these assets, minus any Citibank's reasonable fees, plus all accrued interest thereon to date, "which as of June 4, 2013 constituted $1,895,600,513.03", in an account opened in the name of the QSF.[218]

g. In July 2014, the District Court's turnover partial judgment of 28 February 2013 was affirmed by the Court of Appeals for the Second Circuit. The Court rejected Bank Markazi's arguments including the conflict of Section 8772 with the Treaty of Amity.[219]

h. In April 2016, the U.S. Supreme Court dismissed Bank Markazi's *writ of certiorari* and affirmed the judgment of the Court of Appeals for the Second Circuit – subject to a powerful dissent by Chief Justice Roberts and Justice Sotomayor.[220]

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217 *Peterson, et al. v. Islamic Republic of Iran, Bank Markazi a/k/a Central Bank of Iran, Banca UBAE SpA, Citibank, N.A., and Clearstream Banking, S.A.*, U.S. District Court for the Southern District of New York, Order Approving Qualified Settlement Fund, 9 July 2013, No. 10-cv-4518-KBF, p. 2 (IR, Annex 44).

218 *Peterson, et al. v. Islamic Republic of Iran, Bank Markazi a/k/a Central Bank of Iran, Banca UBAE SpA, Citibank, N.A., and Clearstream Banking, S.A.*., U.S. District Court for the Southern District of New York, 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, 9 July 2013, No. 10-cv-4518-KBF, p. 8 (IR, Annex 43). The District Court held that if this Partial Final Judgment became definitive, the plaintiffs should apply to the Court for an order authorising the distribution of the funds in the account opened in the name of the QSF, otherwise the blocked assets would have to be transferred to the Registry of the Court upon application for, and receipt of, the License from OFAC (see *ibid*., p. 9, paras. 5 and 7).

219 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014) (IM, Annex 62).

220 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), joint dissenting opinion of Chief Justice Roberts and Justice Sotomayor (IM, Annex 66).

i. Finally, in June 2016, the District Court ordered the distribution to the plaintiffs of about USD 1.895 billion – *i.e.* the nominal value of the securities, which had matured since 2008 – plus interest, as property belonging to Bank Markazi.[221]

(b) Peterson II

2.97 In addition to these securities, Peterson and other judgment creditors of Iran have been seeking, in a separate enforcement proceeding initiated on 30 December 2013,[222] to execute their default judgments totalling billions of dollars against Iran, against USD 1.68 billion in XS security bond[223] proceeds owned by Bank Markazi.[224]

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221 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 6 June 2016, No. 10 Civ. 4518 (S.D.N.Y. 2016) (IM, Annex 68).

222 See *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. District Court for the Southern District of New York, Amended Complaint, 25 April 2014, No. 13-cv-9195-KBF (IR, Annex 49). The judgment creditors who initiated this additional enforcement action are listed in Exhibit A to this complaint. They form the following groups: the *Peterson* creditors (*Peterson, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 7 September 2007, Case No. 1:01-cv-2094 (IR, Annex 21); the *Valore*, *Arnold*, *Spencer* and *Bonk* creditors (see the opinion accompanying the final judgments in these four consolidated cases: *Valore, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010), Cases No. 03-cv-1959, 06-cv-516, 06-cv-750, and 08-cv-1273 – IM, Annex 46), the *Bland* creditors (see *Bland, et al. v. The Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 21 December 2011, 831 F. Supp. 2d 150 (D.D.C. 2011) – IM, Annex 51), the *Brown* creditors (*Estate of Anthony K. Brown, et al., v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, United States District Court for the District of Columbia, Memorandum Opinion (Damages), 3 July 2012, Case No. 08-cv-531 (IR, Annex 37) and the *Davis* creditors (*Davis, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 30 March 2012, Case No. 07-cv-1302 (IR, Annex 36). None of the judgments held by these creditors makes any reference to Bank Markazi as being involved in any of their purported findings of fact.

223 Securities are coded with unique identification numbers. The most popular global securities identifier code – and used with respect to the securities at issue in the instant case – is the International Securities Numbering Identification Number ('ISIN'). An ISIN consists in twelve alphanumeric characters including (i) two letters coding the issuing country, i.e. the country in which the issuing company is headquartered (e.g. "US" for the United States), (ii) nine alphanumeric characters – the specific security identifying number, i.e. a serial number assigned by the local country's numbering agency (e.g. the CUSIP Service Bureau in the United States) –, and (iii) one final numerical check digit. By contrast with this traditional system involving local depositories, the international securities cleared through an international central depository like Clearstream or Euroclear have in their ISIN an "XS" used in place of any two-letter country code. See www.isin.org/isin.

224 Thereafter, three other enforcement proceedings have been initiated by groups of judgment creditors of Iran against these same bond proceeds. The *Havlish* and *Levin* actions have been stayed since their inception in light of the ongoing appellate proceedings in *Peterson II*, while the *Heiser* action has been stayed since 10 March 2020 pending decision on the said appeal. See *Estate of Michael Heiser, et al.*

2.98 The plaintiffs had been seeking, *inter alia*, an order requiring Clearstream and other financial institutions to turn over these bond proceeds pursuant to New York law. On 20 February 2015, the District Court dismissed the turnover claims on jurisdictional grounds, having found that the assets at issue are not in the United States.[225]

2.99 As the court explained, the bond proceeds are recorded as book entries made in Clearstream's Luxembourg offices and reflected as a positive account balance showing a right to payment owed by Clearstream to Bank Markazi through UBAE; when Clearstream receives proceeds on behalf of Bank Markazi in New York in correspondent accounts at U.S. bank JP Morgan, it in turn credits Bank Markazi's account in Luxembourg with an equivalent positive amount attributable to the bonds.[226] The District Court concluded that Bank Markazi's interest in book entries held by Clearstream in Luxembourg was not subject to turnover because the provisions of the FSIA "do not allow for attachment of property outside of the United States".[227]

2.100 On 21 November 2017, the U.S. Court of Appeals for the Second Circuit ruled that the bond proceeds held in Luxembourg by Clearstream for the benefit of Bank

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v. Clearstream Banking, S.A., U.S. District Court for the Southern District of New York, Granted Motion for Stay of Case, 10 March 2020, No. 19-cv-11114 (IR, Annex 83).

See in addition *Hoglan, et al., v. The Islamic Republic of Iran, et al.*, United States District Court for the Southern District of New York, Restraining Notice to Clearstream Banking S.A., 26 March 2018, Case Nos. 1:11-cv-07550 and 1:03-md-01570, in execution of the judgment (annexed to the restraining notice as Exhibit B) entered pursuant to 28 U.S.C. § 1605A on 26 February 2018 against Iran and various Iranian companies including Bank Markazi in the total amount of USD 3,395,354,978.01 in compensatory damages, including interests (IR, Annex 61). On 7 April 2020, the U.S. District Court for the Southern District of New York authorised the Hoglan Plaintiffs to enforce this final judgment "by any lawful means, including attachment of, and execution against, the specific assets against the property held at Clearstream Banking, S.A. that belongs to any of the Judgment Debtor Defendants [Iran, Ayatollah Khamenei, A. Rafsandjani, MOIS, IRGC, Iran's Ministry of Petroleum, Iran's Ministry of Economic Affairs and Finance, Iran's Ministry of Commerce, Iran's Ministry of Defence and Armed Forces Logistics, Bank Markazi, NPC, NIOC, NITC, NIGC, Iran Air, and Hezbollah], including, more particularly, the Central Bank of Iran, *a.k.a*. Bank Markazi, as described and authorised by 22 U.S.C. §8772 (2019)" (*In re Terrorist Attacks On September 11, 2001*, relating to *Hoglan, et al. v. Iran, et al.*, Order Under 28 U.S.C. § 1610(c) authorising Enforcement of Judgment, 7 April 2020, Case No. 03 MDL 1570 – IR, Annex 84). On 22 U.S.C. §8772 (2019), see paras. 2.103-2.107 below.

225 *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. District Court for the Southern District of New York, Opinion and Order, 20 February 2015, No. 13-cv-9195-KBF (IR, Annex 50) ("*Peterson II*").

226 *Ibid.*, p. 6.

227 *Ibid.*, p. 10.

Markazi are not entitled to immunity under the 1976 FSIA. The Second Circuit therefore vacated the District Court's decision with respect to the turnover claims and remanded for the District Court to (i) consider whether it has personal jurisdiction over Clearstream and, if the affirmative, (ii) determine whether any provision of U.S. law prevents it from recalling the assets.[228]

2.101 The Court of Appeals agreed with the District Court that the assets that the plaintiffs were seeking – the bond proceeds – are not held by Clearstream as cash in New York City but are represented by a right of payment in the possession of Clearstream located in Luxembourg.[229] But it did not agree that the FSIA does not allow for attachment of property outside of the United States. According to the Court of Appeals, "the FSIA does not by its terms provide execution immunity to a foreign sovereign's extraterritorial assets".[230] It held that New York law controls the authority of a New York District Court to enforce a judgment by attaching property. The relevant part of this law – article 52 of the New York Civil Practice Law and Rules – was construed as containing no express territorial limitation barring the entry of a turnover order requiring a garnishee to transfer property into New York from another state or country. The Court of Appeals concluded that "a court sitting in New York with personal jurisdiction over a non-sovereign third party [has the authority] to recall to New York extraterritorial assets owned by a foreign sovereign".[231] In other words, the Court extended the scope of the "state-sponsored terrorism exception" to sovereign immunity provided by the FSIA to include property located outside the United States.

2.102 Clearstream, UBAE and Bank Markazi filed petitions for *certiorari* with the U.S. Supreme Court seeking review of this decision. On 26 February 2018, Bank Markazi

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228 *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank,* U.S. Court of Appeals for the Second Circuit, Opinion and Order, 21 November 2017, Case 15-0690 (IR, Annex 58).

229 *Ibid.*, p. 43 and p. 50. The court stressed that "the nature and location of the asset here – a right to payment located in Luxembourg – distinguishes this case from Peterson I, where it was 'undisputed' that Clearstream held a segregated pool of '$1,75 billion in cash proceeds of the bonds … in an account at Citigroup in New York' […] Here, by contrast, there never was a traceable or segregated pool of Markazi-owned bond proceeds held as cash in Clearstream's correspondent account at JPMorgan in New York City" (*ibid*., pp. 49-50; internal references omitted).

230 *Ibid*., p. 57.

231 *Ibid*., p. 61.

– as Clearstream also did – moved to stay issuance of the mandate to the District Court in *Peterson II* pending the resolution of these petitions, on the basis that "whether or not the district court ultimately distributes the assets to plaintiffs, a mere order directing Clearstream to transfer the assets to the United States would itself be a significant restraint on the use of the property and thus an infringement of Bank Markazi's sovereign immunity".[232] The Second Circuit granted the stay of the mandate.

2.103 On 20 December 2019, the U.S. President signed into law the National Defense Authorization Act for Fiscal Year 2020 ('NDAA 2020'). Section 1226 of that law headed "Expansion of availability of financial assets of Iran to victims of terrorism", amends Section 502 of ITRSHRA (codified at 22 U.S.C. § 8772). As amended, 22 U.S.C. § 8772 now provides that: "*notwithstanding any other provision of law, including any provision of law relating to sovereign immunity*, and pre-empting any inconsistent provision of State law", a specified "financial asset" that meets certain criteria "shall be subject to execution or attachment in aid of execution, or to *an order directing that the asset be brought to the State in which the court is located and subsequently to execution or attachment in aid of execution,* (…) *without regard to concerns relating to international comity*", in order to satisfy a terrorism-related judgment for compensatory damages against Iran.[233]

2.104 In sum, the new 22 U.S.C. § 8772 purported to make Bank Markazi's loss in the proceedings certain as it retroactively extends the U.S. courts' jurisdiction over the assets located outside the United States, whereas under the former law (the FSIA) such assets were immune from execution. It comes as a confirmation of the above-mentioned decision of the U.S. Court of Appeals for the Second Circuit of 21 November 2017 which construed the FSIA as not prohibiting attachment of (Bank Markazi's) property outside of the United States.[234]

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232 *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. Court of Appeals for the Second Circuit, Bank Markazi's Motion to Stay the Mandate, 26 February 2018, Case 15-0690, p. 6 (IR, Annex 60).

233 22 U.S.C. 8772(a)(1) as amended by Section 1226 of NDAA 2020 (IR, Annex 7 – emphasis added).

234 See para. 2.101 above.

2.105 Identically to the pre-amendment version of Section 502 ITRSHRA applied in *Peterson I,*[235] the three criteria that a "financial asset" must meet to come within the ambit of 22 U.S.C. § 8772 are the following: they must be "held by or for a foreign securities intermediary doing business in the United States", be either an asset "blocked" under U.S. sanctions law "or an asset that would be blocked if the asset were located in the United States", and be "equal in value to a financial asset of Iran […] that such foreign securities intermediary or a related intermediary holds abroad".[236]

2.106 The amended statute specifically provides that such "financial assets" include those that are:

> "identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 13 Civ. 9195 (LAP)"[237] (i.e. the bond proceeds at issue in *Peterson II*).

2.107 In fact, by enacting Section 1226 of NDAA 2020 while the *Peterson II* case was pending, the U.S. Congress acted in the exact same way as it did with respect to Bank Markazi's securities that the *Peterson I* plaintiffs sought to seize:[238] it intervened in a case pending before a U.S. court in order to decide that case by depriving the Iranian company concerned of the defence on which it was relying – immunity from execution under U.S. law.[239] The Congress further changed a law already designed to guarantee that the (*Peterson I*) plaintiffs win against Bank Markazi, to specifically ensure that the *Peterson II* plaintiffs obtain the turnover of the Bank's XS bond proceeds that the U.S. Court of Appeals for the Second Circuit's reasoning had allowed in 2017.[240]

2.108 On 13 January 2020, the U.S. Supreme Court granted Clearstream, UBAE and Bank Markazi's petitions for certiorari, vacated the Second Circuit's judgment, and

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235 See para. 2.96c) above.

236 22 U.S.C. 8772(a)(1)(A)-(C) (IR, Annex 7).

237 22 U.S.C. 8772(b)(2) (IR, Annex 7).

238 See para. 2.96(c) above.

239 See Iran's Memorial, pp. 33-35, paras. 2.41-2.45.

240 See paras. 2.95-2.96 above.

remanded the case to the Second Circuit for further consideration in light of Section 1226 of NDAA 2020, which contains, as explained above, provisions concerning the *Peterson II* assets.[241] The case is pending before the District Court, to which the Second Circuit directed, on remand, to address the issues before it, notably those pertaining to the NDAA 2020.[242]

iii. Enforcement proceedings against TIC: the Heiser case

2.109 TIC's asset affected by U.S. measures is the sum of USD 613,587.38 which corresponds to the amount that Sprint Communications Company LP owed TIC pursuant to their "bilateral telecommunications carrier relationship" that resulted in a periodic settlement and offset process to determine the net payer and payee.

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241 *Clearstream Banking, Banca UBAE, Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, Summary Disposition Granting Petition for Certiorari, 13 January 2020, Cases 17-1529, 17-1530, 17-1534 (IR, Annex 74). The rationale for this decision seems to be that the application of Section 8772 to Bank Markazi's bond proceeds, and the issue such application raises, i.e. whether the bond proceeds would enjoy execution immunity while located abroad (in Luxembourg), can only be addressed by the lower courts. Bank Markazi maintains that Section 1226 of the NDAA 2020 is unconstitutional because, notably, it violates the Bank's due process rights: it purports to abrogate the immunity of the *Peterson II* assets from seizure and thus to deprive Bank Markazi of property in which it has a beneficial interest without a neutral decision-maker.

242 *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. Court of Appeals for the Second Circuit, Opinion, 22 June 2020, Case 15-0690 p. 6 ("We now reinstate only our judgment that the district court prematurely dismissed the amended complaint for lack of subject-matter jurisdiction and remand for the district court to reconsider that question. We do not, at this time, reinstate our analysis as to whether the common law and *Koehler* provide the district court with jurisdiction over the extraterritorial asset. Based on the enactment of the NDAA [2020], and the language employed by the Supreme Court in vacating and remanding this matter to this Court, however, we respectfully direct the district court, on remand, to address the issues before it pertaining to the NDAA [2020], personal jurisdiction, and, consistent with this opinion, any other matters necessary to the resolution of the case")(IR, Annex 88).

Meanwhile, on 30 January 2020, the *Bland, Brown, Valore* (as consolidated) and *Davis* creditors served restraining notices with Clearstream. See *Estate of Brown, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, United States District Court for the Southern District of New York, Restraining Notice to Garnishee, 30 January 2020, Case No. 1:13-MC-113 (IR, Annex 75); *Valore, et al. v. The Islamic Republic of Iran, et al. and Iranian Ministry of Information and Security*, U.S. District Court for the Southern District of New York, Restraining Notice to Garnishee, 30 January 2020, Case No. 1:11-MC-217 (IR, Annex 76); *Davis, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the Southern District of New York, Restraining Notice to Garnishee, 30 January 2020, Case No. 1:13-MC-00046 (IR, Annex 77); *Estate of Stephen B. Bland, et al. v. Islamic Republic of Iranian Ministry of Information and Security*, U.S. District Court for the Southern District of New York, Restraining Notice to Garnishee, 30 January 2020, Case No. 1:12-MC-373 (IR, Annex 78).

2.110 This asset was seized in 2013 in satisfaction of the amended default judgment obtained by the *Heiser* plaintiffs in 2009 ordering the Islamic Republic of Iran, the MOIS and the IRGC to pay USD 290 million in compensatory damages and USD 300 million in punitive damages.[243]

2.111 Neither the initial default judgment on liability and damages nor the amended one on damages contains any reference to TIC. The plaintiffs' baseless allegations regarding persons involved in the terrorist attacks on the Khobar Towers were limited to Iran, MOIS, IRGC, and the Hezbollah in Saudi Arabia.[244]

2.112 In 2010, the *Heiser* plaintiffs had filed with the District Court a motion to garnish any debts that might be owed by various telecommunications companies, including Sprint, to Iran. They invoked Section 1610(g) FSIA to garnish funds held by Sprint and owed to TIC.[245] In a Memorandum Opinion issued in August 2011, the District Court held that TIC is an instrumentality of Iran and thus the judgment creditors could execute their judgment against TIC's funds held by Sprint under Section 1610(g) FSIA.[246]

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243 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Damages), 30 September 2009, Case No. 00-2329, 659 F. Supp. 2d 20 (IM, Annex 45). Initially, in 2006, the District Court had held the defendants jointly and severally liable for USD 250 million in compensatory damages (*Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 22 December 2006, Case No. 00-2329, 466 F. Supp. 2d 229 (D.D.C. 2006) – IM, Annex 38). However, following the 2008 FSIA amendments which, *inter alia*, replaced § 1605(a)(7) with a new "state-sponsored terrorism exception" codified at § 1605A, and permitted recovery of punitive damages, the court entered this amended judgment of 2009, ordering an additional USD 36 million in compensatory damages and USD 300 million in punitive damages. On these *Heiser* judgments see Iran's Memorial, pp. 37-38, para. 2.51. On the 2008 FSIA amendments see Iran's Memorial, pp. 23-30, paras. 2.16-2.33.

244 *Ibid.*,

245 Under Section 1610(g), introduced in 2008, the property "of a foreign state" or "of an agency or instrumentality of a foreign state" is subject to execution, even where that property "is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity". See Iran's Memorial, pp. 28-30, paras. 2.30-2.33 and pp. 72-73, paras. 4.25-4.26.

246 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, Memorandum Opinion, 10 August 2011, 807 F. Supp. 2d 9 (D.D.C. 2011) (IM, Annex 50). As to Section 1610(g) FSIA, the court explained that "prior attempts to execute against assets held by foreign instrumentalities had to be made under § 1610(b), which requires—in addition to proof of an instrumentality relationship—that 'the judgment relates to a claim *for which the agency or instrumentality is not immune* by virtue' of the FSIA liability exceptions […]" (p. 13). However, the court added, "Section 1610(g) unwinds these limitations […] by excluding any requirement that the foreign instrumentality be subject to the underlying claim and thus not otherwise immune from liability […] and by expressly declaring that property held by an instrumentality is subject to execution

iv. Enforcement proceedings against other Iranian companies: the Heiser cases

2.113 On 8 March 2011, the *Heiser* judgment creditors filed a petition with the U.S. District Court for the Southern District of New York against the New York branch of Bank of Baroda for the enforcement of the final judgment rendered against Iran. According to the *Heiser* plaintiffs, the Bank of Baroda was holding certain funds or interest in funds of Iranian companies following electronic fund transfers.

2.114 On 19 February 2013, the District Court granted the plaintiffs' motions for summary judgment and turnover, pursuant to Section 1610(g) FSIA and Section 201(a) TRIA, with respect for the following funds retained by Bank of Baroda:

a. Bank Saderat: USD 2,180;

b. EDBI: USD 12,467.68, USD 13,000 and USD 13,020;

c. Behran Oil and Bank Saderat: USD 11,600;

d. Bank Melli: USD 19,000 and USD 49,000; and

e. a remaining USD 9,561.31 which constituted interests of Iranian entities.[247]

2.115 In another effort to satisfy the *Heiser* final judgment, on 29 January 2013, the U.S. District Court for the Southern District of New York ordered the New York branch of Bank of Tokyo Mitsubishi to turn over to the *Heiser* judgment creditors the properties – electronic funds – belonging to Iranian State-owned companies, as follows:

a. Bank Sepah International PLC: USD 92,058.08;

b. Iranohind Shipping Company: USD 4,740;

'regardless of the level of economic control over the property by the government of the foreign state.'" (p. 14).

247 *The Estate of Michael Heiser, et al. v. Bank of Baroda, New York Branch.*, U.S. District Court, Southern District of New York, 19 February 2013, No. 11 Civ. 1602 (S.D.N.Y. 2013) (IM, Annex 57). The District Court thereafter ordered the turnover to the plaintiffs of the residual Iranian companies' assets held by Bank of Baroda in the amount of USD 9,561.31 plus any accrued interest (*The Estate of Michael Heiser, et al. v. Bank of Baroda, New York Branch*, U.S. District Court, Southern District of New York, Judgment and Order Allocating Remaining Blocked Assets, 19 August 2013, No. 11 Civ. 1602 – IR, Annex 45).

c. IRISL: USD 62,216.80;

d. IRISL Benelux NV: USD 100,365.63;

e. EDBI: USD 98,127.36;

f. Bank Melli: USD 2,181.88.[248]

2.116 As the said companies had been enlisted as Special Designated Nationals by the OFAC, these assets had been "blocked" and maintained in interest-bearing accounts held by the Bank of Tokyo Mitsubishi for the Iranian companies. Their turnover was ordered based on Section 1610(g) of FSIA and Section 201(a) of TRIA.

2.117 Similarly, on 9 June 2016, the District Court of Columbia ordered, pursuant to the same provisions, the turnover of the following properties of Iranian companies – funds held with Bank of America and Wells Fargo – to *Heiser* judgment creditors:

a. Iranian Marine and Industrial Company: USD 37,543.59;

b. Sediran Drilling Company (now known as NIOC): USD 11,744.80;

c. Iran Air and Bank Melli PLC: USD 9,743.53.[249]

2.118 As mentioned above,[250] none of these various companies – in fact, no Iranian company at all – was involved in the underlying *Heiser* case. The *Heiser* judgment on liability does not contain a single reference to them.[251]

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248 *Estate of Michael Heiser, et al. v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, U.S. District Court, Southern District of New York, 13 February 2013, No. 11 Civ. 1601 (S.D.N.Y. 2013) (IM, Annex 56).

249 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, 9 June 2016, No. 00 Civ. 02329 (D.D.C. 2016) (IM, Annex 69). The District Court followed the same reasoning that in the abovementioned *Estate of Michael Heiser, et al. v. Bank of Tokyo Mitsubishi UFJ, New York Branch* proceedings. It held that the funds constituted "blocked assets" under the TRIA, belonging to Iranian companies deemed agencies or instrumentalities of Iran within the meaning of the TRIA and the FSIA, and were therefore subject to execution in accordance with the requirements of Section 1610(g) FSIA and Section 201(a) TRIA.

250 See above, para. 2.111.

251 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 22 December 2006, Case No. 00-2329, 466 F. Supp. 2d 229 (D.D.C. 2006) (IM, Annex 38).

2.119 In conclusion, the U.S. measures at issue were designed for, and used by, judgment creditors of Iran alone to inevitably obtain massive compensation from Iranian companies – as such, juridically separate from the State of Iran – that none of these enforced judgments found liable in respect of any act. As the U.S. District Court for the Northern District of California put it in the *Bennett* enforcement proceedings against Bank Melli:

> "This case is not about holding Bank Melli liable for Iran's actions, it is simply about collecting money from Iran, wherever that money can be found."[252]

2.120 The United States continues to apply this approach, and increasingly so: the amounts of damages sought from Iranian companies alien to the judgments held are accumulating, and the money is indeed collected everywhere as Iranian companies are facing enforcement proceedings against their assets located in the United States as well as in other countries.[253]

SECTION 3.

THE PENDING JUDICIAL PROCEEDINGS AGAINST THE STATE OF IRAN

2.121 The U.S. legislative and regulatory measures at issue are still having an impact, and increasingly so, on the State of Iran as defendant in proceedings continuously initiated by U.S. claimants with respect to terrorist acts to which Iran is not connected in any way. As of 31 December 2019, there were, in addition to those enumerated above, nearly a hundred cases pending against Iran alone, without any Iranian company being a defendant, before the U.S. courts.[254]

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252 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the Northern District of California, Order Denying Motion to Dismiss, 28 February 2013, Case 3:11-cv-05807-CRB p. 12 (IR, Annex 42)

253 See Attachment 3 to this Reply, "Actions filed in other Jurisdictions for Recognition & Enforcement for U.S. judgments against Assets of Iran & Iranian State Entities as of May 2020".

254 Attachment 4 to this Reply, "Claims Pending before U.S. Courts against Iran & Iranian State Entities as of 31 December 2019". This in addition to the dozens of judgments already entered against Iran pursuant to the "state-sponsored terrorism exception" in either the FSIA, as amended, 28 U.S.C. § 1605(a)(7) or 28 U.S.C. § 1605A. See Attachment 1 to this Reply (Attachment 1 to Iran's Memorial, as updated as of 31 December 2019).

2.122 This phenomenon of judicial accumulation against the State of Iran is not about to stop – on the contrary, it seems to be accelerating. Some of the pending cases were filed as early as 2011[255] but a third of them were brought before the U.S. courts during last year only.[256]

2.123 Most of these recently initiated actions are based on very ancient facts for which the U.S. courts have already purportedly decided, many years ago and without any evidence, that Iran is liable as alleged provider of material support to the authors of terrorist attacks. For instance, the *Arias* plaintiffs, who present themselves as victims of the 11 September 2001 attacks - for which the U.S. District Court for the Southern District of New York purportedly found Iran and Iranian companies responsible in 2012-[257] filed their complaint in 2019;[258] likewise, alleged victims of the Khobar Towers bombing, which occurred in 1996, recently brought claims against Iran[259] on the basis that U.S. courts decided 14 years ago that Iran was supposedly

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255 See *Baxter, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability), 27 September 2019, Case No. 11-2133 (IR, Annex 71), concerning ten terrorist attacks committed by members of the Hamas organisation, allegedly supported by Iran, between December 2001 and September 2004. Originally the complaint named Syria and the Syrian Air Force Intelligence as co-defendants. The longest pending proceedings against Iran is from 2003. It is the multi-district litigation captioned *In re Terrorist Attacks on September 11, 2001* (U.S. District Court for the Southern District of New York, Case No. 03 MDL 1570). It also involves certain Iranian companies (among over two hundred of defendants accused of having directly or indirectly provided material support to Osama bin Laden and the al Qaeda members who carried out the 11 September 2001 terrorist attacks: the Taliban, al-Qaeda, Saudi Arabia, Sudan, Iraq, several Saudi princes, and various banks and charities registered in the abovementioned States, and various religious groups. See *Ashton, et al. v. al Qaeda Islamic Army, et al.*, U.S. District Court for the Southern District of New York, Sixth Amended Complaint, 30 September 2005, Case No. 02-cv-6977 pp. 98-101(IR, Annex 20)

256 Attachment 4 to this Reply, "Claims Pending before U.S. Courts against Iran & Iranian State Entities as of 31 December 2019".

257 *Havlish, et al. v. Bin Laden, et al.*, U.S. District Court, Southern District of New York, 22 December 2011, No. 03 MD 1570 (S.D.N.Y 2011) (IM, Annex 52). Generally, on the *Havlish* case, see paras. 2.41-2.55.

258 See *Arias, et al. v. The Islamic Republic of Iran*, U.S. District Court for the Southern District of New York, Order of Judgment as to Liability, 9 September 2019, Case No. 1:19-cv-00041 (IR, Annex 70).

259 See e.g. *Christie, et al. v. Islamic Republic of Iran, the Islamic Revolutionary Guard Corps, and Iranian Ministry of Intelligence & Security*, Second Amended Complaint, 28 May 2019, Case No. 1:19-cv-01289 (IR, Annex 69), and *Blank, et al., v. The Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Complaint, Case No. 1:19-cv-036545, 6 December 2019 (IR, Annex 73).

responsible.[260] Using Section 1605A of the (2012) FSIA, plaintiffs are guaranteed to cash-in on Iran – and expeditiously so – since the sole determination that the U.S. courts have to make concerns the relation between the unproven case they bring and cases already (wrongly) decided.[261]

2.124 The list of pending cases against Iran, in Attachment 4 to this Reply, clearly shows the dramatic extent of the impact of certain U.S. measures at issue – 28 U.S.C. § 1605(a)(7) then 28 U.S.C. § 1605A – which, by eliminating Iran's immunity from suit for terrorism-related claims, make these claims admissible and, due to a very relaxed standard of proof, ultimately successful.

2.125 These cases were brought by U.S. victims of dozens of terrorist acts that took place in the last 40 years, most of them pre-dating the abovementioned measures – resulting from amendments to the FSIA in 1996 and 2008 –, all over the world: in the United

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260 *Estate of Heiser, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court for the District of Columbia, Memorandum Opinion (Liability and Damages), 22 December 2006, Case No. 00-2329, 466 F. Supp. 2d 229 (D.D.C. 2006) (IM, Annex 38).

Such actions should be inadmissible under Section 1605A of the FSIA as 28 U.S.C. § 1605A(b) imposes the following time limitation: "An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) … not later than the latter of– (1) 10 years after April 24, 1996; or (2) 10 years after the date on which the cause of action arose". However, untimeliness of an action pursuant to this section has, in fact, no consequence. The U.S. Courts of Appeals indeed held that the district courts lack authority and discretion to raise on their own initiative a forfeited statute of limitation defense – such as timeliness of the action – in an FSIA terrorism exception case where the defendant sovereign fails to appear. See *Maalouf, et al. v. Islamic Republic of Iran and Iranian Ministry of Information and Security*, U.S. Court of Appeals for the District of Columbia Circuit, Opinion, 10 May 2019, Cases No. 18-7052 and 18-7053, p. 34(IR, Annex 86)

261 See e.g. *Arias, et al. v. The Islamic Republic of Iran*, U.S. District Court for the Southern District of New York, Order of Judgment as to Liability, 9 September 2019, Case No. 1:19-cv-00041 (IR, Annex 70) (the complaint, concerning the 11 September 2001 attacks, was filed on 3 January 2019); *Aceto, et al. v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Memorandum Opinion, 7 February 2020, Case No. 1:19-cv-00464 (IR, Annex 79) (the complaint, concerning the 1996 Khobar Towers bombing in Saudi Arabia, was filed on 25 February 2019).

States itself,[262] but also in all the Middle East,[263] in East Africa,[264] in Afghanistan,[265] and in Europe.[266] The plaintiffs claim, without providing any evidence, that Iran is liable for the damages resulting from these acts on the basis of the alleged provision of support to the various bodies and individuals who have been held responsible for these acts.

2.126 In other words, according to the U.S. plaintiffs, Iran is somehow behind virtually all terrorist acts that have affected American interests since the 1980s, whoever the perpetrator: any group of Afghan insurgents, any group of Iraqi insurgents, Shia organisations such as Hezbollah, Sunni organisations such as Hamas or Palestine Islamic Jihad, the Houthi movement in Yemen, etc.

2.127 The global amount of damages currently sought by these plaintiffs is estimated at USD 25 billion in compensatory damages and USD 26 billion in punitive damages.[267] Under the U.S. legal regime, and following the judicial pattern described in this Chapter, it is foreseeable that the U.S. courts will (i) hold Iran responsible and award these damages *in absentia*, and (ii) allow the creditors of such default judgments to execute against assets, wherever they are located, belonging to the major Iranian companies, including banks, on which Iran's trade and economy rely.

2.128 The U.S. legislative and executive measures, by opening jurisdictional venues to baselessly sue Iran, allowing for the award of massive amounts of damages, and guaranteeing that they would win and indeed collect such damages, deliberately

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262 See e.g. the *Arias* case (IR, Annex 70) (11 September 2001 attacks).

263 See in Attachment 4 e.g. the *Bova* case (Lebanon – bombing of the U.S. Marine Barracks in Beirut in 1983); the *Baxter* case (IR, Annex 71) (Israel – ten attacks between 2001 and 2004); the *Aceto* case (IR, Annex 79), the *Christie* and *Bland* cases (Saudi Arabia – bombing of the Khobar Towers in 1996), the *Burks* case (Iraq – multitude of attacks between 2005 and 2016), the *Hamen* case (Yemen – kidnapping in Sana'a in 2015).

264 See in Attachment 4 the consolidated cases *Sheikh*, *Kinyua* and *Chogo* (Kenya and Tanzania – bombings of the U.S. embassies in Nairobi and Dar-Es-Salaam in 1998).

265 See in Attachment 4, *e.g*, the *Strange* case (shooting down of a U.S. helicopter by Afghan insurgents on 6 August 2011).

266 See in Attachment 4 the *McCarty* case (Greece – Hijacking of TWA Flight 847 after departing from Athens on 14 June 1985).

267 See Attachment 4 to this Reply, "Claims Pending before U.S. Courts against Iran & Iranian State Entities as of 31 December 2019".

created this dramatic situation. The United States presents this legal scheme it elaborated since the 1996 FSIA as "ensuring that victims of terrorism are not unduly burdened in their efforts to seek justice".[268] This presentation is misleading, as demonstrated in this Chapter. Instead of justice, the U.S. measures serve the pillage of a State's major economic operators, in plain breach of international law.

[268] U.S. Counter-Memorial, p. 42, para. 6.2.

PART I.

THE UNITED STATES BREACHED IRAN'S TREATY RIGHTS

CHAPTER III.
BANK MARKAZI WAS CARRYING OUT, AT THE RELEVANT TIME, ACTIVITIES CHARACTERISING IT AS A "COMPANY" WITHIN THE MEANING OF THE TREATY OF AMITY

3.1 In its Memorial, Iran has claimed that the United States has violated the Treaty of Amity in adopting a conduct in breach of its obligation vis-a-vis Iranian "companies", as this term is defined for the purposes of the Treaty of Amity. Iran maintained that Bank Markazi, which is the central bank of Iran, is a "company" within the meaning of the Treaty.[269] Iran also explained that many other entities qualify as "companies" under the Treaty, namely Bank Melli,[270] EDBI,[271] Bank Saderat Iran,[272] TIC,[273] NIOC,[274] Iranohind Shipping Company,[275] Iran Marine Industrial Company,[276] Behran Oil Company, and Sediran.[277]

3.2 In its Preliminary Objections, the United States objected that the Court lacked jurisdiction with respect to Iran's claim concerning the treatment reserved by the United States to Bank Markazi because, according to the Respondant, Bank Markazi

269 Iran's Memorial, para. 4.7.

270 *Ibid.*, para. 4.8.

271 *Ibid.*, para. 4.9.

272 *Ibid.*, para. 4.10.

273 *Ibid.*, para. 4.11.

274 *Ibid.*, para. 4.12.

275 *Ibid.*, para. 4.13.

276 *Ibid.*, para. 4.14.

277 *Ibid.*, para. 4.15.

is not a "company" as this term is defined for the purposes of the Treaty.[278] By contrast, the United States did not deny that the other Iranian entities listed above are "companies" under the Treaty of Amity.

3.3 The Court rendered its Judgment on the preliminary objections raised by the United States on 13 February 2019. It interpreted the term "company" under the Treaty of Amity as encompassing entities having their own legal personality and engaging in activities of commercial nature (or, more broadly, business activities).[279] The Court held that a "legal person […] should 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."[280]

3.4 However, the Court held that the objection based on Bank Markazi's status as a "company" under the Treaty does not possess a preliminary character, in the circumstances of the case.[281] It took the view that:

> "it does not have before it all the facts 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. Since those elements are largely of a factual nature and are, moreover, closely linked to the merits of the case, the Court considers that it will be able to rule on the third objection only after the Parties have presented their arguments in the following stage of the proceedings, should it find the Application to be admissible."[282]

3.5 In its Counter-Memorial, the United States correctly states that, in substance, it follows from the Court's findings in its Judgment on U.S. preliminary objections that the enquiry is now focused on whether the activities carried out by Bank Markazi related to the U.S. measures at issue in this case are of a commercial nature. However,

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278 U.S. Preliminary Objections, pp. 95-104, paras 9.1-9.20.

279 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 37, para. 87, and p. 38, para. 92.

280 *Ibid.*, pp. 38-39, para. 92.

281 *Ibid.*, p. 45, para. 126, points (3) and (5).

282 *Ibid*., p. 40, para. 97 (emphasis added).

the United States erroneously contends that this is not the case,[283] basing its assertions on a misconstruction of the Court's Judgment (Section 1), as well as on a failure to assess the relevant facts correctly (Section 2).

SECTION 1.
THE RULING OF THE COURT IN THE JUDGMENT ON THE PRELIMINARY OBJECTIONS

3.6 As recalled above, the Court took the view in its Judgment on the U.S. preliminary objections that it was not in a position to decide whether or not Bank Markazi's activities at issue in the current case permitted it to qualify it as a "company" under the Treaty of Amity, because the Court did not have before it the facts required for doing so. Yet, the Court did interpret the term "companies", holding that what characterises a "company" under the Treaty is the nature of its activities. By contrast, the Court rejected the *function* – or purpose – underlying an activity as irrelevant to assessing whether an entity that carries out this activity is a "company" under the Treaty. Clearly, if function – or purpose – had been the test, there would have been no need for the Court to join the question to the merits.

3.7 Curiously, in its Counter-Memorial, the United States insists that as a matter of principle the "sovereign functions" or "purpose" of the activities carried out by Bank Markazi as a central bank should disqualify them as characterising Bank Markazi as a "company" under the Treaty.[284] The United States contends that Bank Markazi has "stated that it acted in a sovereign – not commercial – capacity in all relevant aspects",[285] and that "Bank Markazi has consistently claimed that its activities at issue in this case consist of the management of its foreign currency reserves".[286] The United States seems to postulate that the *purpose* of investments carried out by central banks, when such investments are implemented to manage the foreign currency reserves,

283 U.S. Counter-Memorial, Chapter 9.

284 U.S. Counter-Memorial, p. 66, para. 9.9, repeating U.S. Preliminary Objections, p. 99, para. 9.8, and p. 100, para. 9.11.

285 U.S. Counter-Memorial, p. 68, para. 9.13, repeating U.S. Preliminary Objections, p. 98, para. 9.7.

286 U.S. Counter-Memorial, p. 70, para. 9.15, repeating U.S. Preliminary Objections, pp. 98-99, para. 9.7.

automatically qualifies their related activities as having a "sovereign nature".[287] The U.S. thesis is that "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".[288] The United States also insists that, in the context of domestic litigations, Bank Markazi argued that it was performing sovereign functions.[289]

3.8 Iran is of the view that, in repeating at the merits phase the very same arguments as those developed by the United States in Chapter 9 of its Preliminary Objections, the Counter-Memorial does not help the Court to fulfill its task. The Court has heard, and has not been convinced by, the U.S. argument according to which when an entity is entitled to perform sovereign functions, or to pursue a sovereign purpose, all its activities are necessarily to be characterised as sovereign. Iran cannot see why the Court would be more convinced now. Indeed, as suggested above, if the United States were right that this is the correct approach, the Court would not have needed to join the issue to the merits.

3.9 What the Court has acknowledged is that the *functions* of an entity, that is, the objective it pursues, is one thing, but the *nature* of its different activities is another thing. As held by the Court, but ignored by the United States, "there is nothing to preclude, *a priori*, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities".[290]

3.10 In other words, if sovereign activities are, of course, "linked to the sovereign functions of the State",[291] in the sense that, in principle, an entity entitled to exercise sovereign functions can carry out sovereign activities, that does not mean that all the activities

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287 U.S. Counter-Memorial, p. 71, para. 9.17.

288 *Ibid.*,

289 U.S. Counter-Memorial, pp. 71-72, para. 9.18, repeating U.S. Preliminary Objections, pp. 98-99, para. 9.7. See also U.S. Counter-Memorial, footnote 251, repeating U.S. Preliminary Objections, p. 87, para. 8.18 (re Bank Markazi's argument under Article XI, paragraph 4 of the Treaty of Amity); see also para. 9.14, footnotes 246-247.

290 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 38, para. 92.

291 *Ibid.*, p. 38, para. 91.

carried out by such entity are necessarily sovereign activities. Sovereign activities encompass sovereign "acts", or acts "of sovereignty", or, as said by the Court, acts of "public authority".[292] As held also by the European Court of Justice "an exercise of public powers […] entails the exercise of powers falling outside the scope of ordinary legal rules applicable to relationships between private individuals".[293] By contrast, activities that do not involve the exercise of State power are not "sovereign" activities.

3.11 This finding had already been illustrated by an I.C.S.I.D. Tribunal in the *CSOB* case. It was argued in this case that Ceskoslovenska Obchodni Banka, A.S. (CSOB), a bank organised under Czech law, was discharging governmental functions and that the dispute of which the Tribunal was seized arose out of functions performed in that capacity.[294] The Tribunal held that:

> "It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. *While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature*."[295]

3.12 That the United States could be missing this basic point made by the Court in its Judgment on preliminary objections is all the more surprising given that in the U.S. legal system it is common ground, although in a different context, namely the law of State immunities, to consider that it is the "nature test", not the "purpose test" which

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292 *Ibid.*, p. 38, para. 90. For an example of an act of public authority, it has been held that "taxation per se is of course a lawful sovereign activity"; see *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013.

293 General Court of the European Union, Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13, Judgment of 11 June 2015, para. 51.

294 *Ceskoslovenska* Obchodni *Banka, a.s. v. The Slovak Republic*, I.C.S.I.D. Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 19. See also *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction, 28 September 2010, para. 147.

295 *Ceskoslovenska* Obchodni *Banka, a.s. v. The Slovak Republic*, I.C.S.I.D. Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 20 (emphasis added).

is to be used to determine the commercial character of an activity.[296] For example, the legislative history of the 1976 FSIA indicates that it was intended to direct courts to consider the nature of an activity rather than its purpose,[297] and it is thus clear that "[t]he fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical."[298] The U.S. case-law, and in particular, the U.S. Supreme Court's judgments, is consistent with this view.[299] For example, in *Republic of Argentina v. Weltover* (1992), the Supreme Court had to determine whether issuance of bonds by Argentina, as part of its debt-refinancing program, was a commercial activity. In its analysis,[300] the Court emphasised the differentiation of "'purpose' (i.e. the reason why the foreign state engages in the activity) from 'nature' (i.e. the outward form of the conduct that the foreign state performs or agrees to perform)."[301] Arguing that "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose'",[302] the Court established the "private person test", and held that "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce'".[303] It ultimately applied the private person test to the facts of

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296 It can also be noted that during the hearings in the *Oil Platforms* case, the United States appeared fully aware of the distinction to be made between the functions and the activities. Counsel for the United States argued, in order to demonstrate the lack of *ratione materiae* jurisdiction of the Court, that "whatever their normal function, the oil platforms involved in the present case were being used, as you have heard, from Commander Neubauer, for guiding armed attacks on shipping in the Gulf - hardly a commercial activity." *Oil Platforms (Islamic Republic of Iran v. United States of America),Verbatim Record,* CR96/12, (Lowenfell) p. 55.

297 D.A. Brittenham, "Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach", *Columbia Law Review*, Vol. 83, No. 6, 1983, pp. 1440, 1443.

298 House Report, Rep. No. 1487, 94th Cong., 2d Session 7 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News at 6615 (IR, Annex 4).

299 See, e.g., *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

300 *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), at p. 613. See also, for example, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB(AF)/11/2, Order of the US District Court for the District of Delaware, 9 August 2018, para. 131.

301 *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), at p. 618.

302 *Ibid.*, at p. 615.

303 *Ibid*. (emphasis in the original).

the case and found that, through issuing the bonds, Argentina engaged in commercial activity.[304] Since this jurisprudence a new rule has been introduced as § 1603 of the U.S. Code, providing, among other definitions, that:

> "(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[305]

3.13 In these proceedings it is of course neither the U.S. Code nor the U.S. case-law related to State immunity which is to be applied, but the criteria determined by the Court to characterise a "company", as this term is defined for the purposes of the Treaty of Amity. Thus, consistent with the Court's Judgment on the U.S. preliminary objections, the only relevant question concerns the nature of the "activities" at issue and is whether they are "of a commercial nature (or, more broadly, business activities)".[306]

SECTION 2.
THE COMMERCIAL NATURE OF BANK MARKAZI'S ACTIVITIES THAT CAME UNDER THE AMBIT OF THE IMPUGNED US MEASURES

3.14 This section (A) recalls that according to its statutes, Bank Markazi *can* perform commercial activities, then (B) turns to show what were the activities actually carried out by Bank Markazi and relevant in the context of the present case, and finally (C) demonstrates that these activities are commercial in nature "or, more broadly, business activities".[307]

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304 *Ibid.*, at p. 618.

305 28 U.S. Code § 1603.

306 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 37, para. 87, and p. 38, para. 92. It is noted that the question whether Bank Markazi must be considered a "company" and whether its activities at issue here are of commercial nature *under the Treaty* are unrelated to the jurisdictional and enforcement immunity that Bank Markazi enjoys under international law.

307 *Ibid.*, p. 38, para. 92.

A. The commercial and business activities which Bank Markazi can perform according to its statutes

3.15 As explained in Chapter II, above, it is beyond debate that Bank Markazi "enjoys legal personality and shall be governed by the laws and regulations pertaining to joint-stock companies in matters not provided for by [Iran's Monetary and Banking] Act."[308]

3.16 In so far as Bank Markazi's activities are concerned, Iran's Monetary and Banking Act of 1972, which contains the statutes of Bank Markazi, is of particular relevance since, as acknowledged by the Court, the Act "contains various provisions defining the types of activities in which Bank Markazi is entitled to engage".[309]

3.17 Under Iran's Monetary and Banking Act of 1972, Bank Markazi is vested with certain sovereign functions and authority. Article 11 provides that it has "the regulatory authority of the monetary and credit system of the country", and that it shall fulfill a series of "functions": issuance of notes and coins (art. 11(a)), supervision of banks and credit institutions (art. 11(b)), adoption of certain regulation (art. 11(c)), exercise of control over certain activities (art. 11(d) and(e)). Article 14 also grants authority to Bank Markzazi to implement the country's monetary policy. Under this Article, Bank Markazi is mandated to supervise the banking and financial sector. For example, it determines the "official rediscount rate" (art. 14(1)), and the ratios of banks' liquid assets to their total assets or to their different types of liabilities (art. 14(2) and(3)).

3.18 In addition to these sovereign functions, regulatory and supervisory powers, Bank Markazi is also designated by Article 12 as "the Banker to the Government". Under this provision, Bank Markazi is required to perform some banking activities that are identical to those performed by any commercial bank, but for one category of client only, namely governmental entities. Indeed, Article 12(a) provides that Bank Markazi shall be:

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308 Iran's Monetary and Banking Act of 1972, Article 10 (c) (IM, Annex 73).

309 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 39, para. 95. It is noted that the Court acknowledged that Bank Markazi is entitled to perform various "types of activities", and not to a single type of activity.

"keeping account and handling banking transactions for the Government".

Note 2 to this Article confirms the commercial nature of this activity since it clarifies that the law may provide that other banks – i.e. commercial banks – are authorised to perform the same activity for certain governmental entities:

> "Ministries, companies, and entities which, under special laws, are authorised to conduct their banking transactions through other banks, shall not be subject to the provision of Section (a) and the first part of Note (1) of this Article."[310]

3.19 As explained in Chapter II, above, Bank Markazi is also vested with other financial and banking activities that are typically commercial/business in nature, identical to those performed by any other private company doing business in a free and competitive market. In particular, under Article 13(7) of the Monetary and Banking Act of 1972, Bank Markazi is empowered to engage in:

> "Opening and holding current accounts with foreign banks, and/or holding accounts for domestic and foreign banks with itself, and carrying out all other authorised banking operations[311], and obtaining credits inside the country and abroad on its own account or on behalf of domestic banks."[312]

3.20 Under Article 25(a)(1) of the Monetary and Banking Act of 1972, as amended, Bank Markazi must also pay income tax to the Government in accordance with the regulations applicable to the governmental companies.[313] The obligation to pay tax is another indication of the fact that the Bank also engages in for-profit activities, and earns taxable profits.

3.21 The profits come from foreign currency transactions, selling such currency to "commercial banks in the Iranian foreign exchange interbank market as part of Bank

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310 According to the first part of note (1) to the Article: "Ministries, municipalities, government companies, and entities referred to in Section (a) of this Article shall deposit their funds exclusively with, and conduct their banking transactions through CBI".

311 Article 2(7) of the Iranian Commercial Code describes "any kind of banking and exchanges operation" as "commercial transactions."

312 Iran's Monetary and Banking Act of 1972, Article 13(7)(IM Annex 73);the English translation is not totally accurate, and this is why here "themselves", as it appears in the public English version of Iran's Monetary and Banking Act, has been corrected as "itself".

313 *Ibid*., Article 23(a)(1).

Markazi's daily operations to satisfy foreign currency needs of the market".[314] The source of foreign currency is mainly Iran's oil export revenues which are credited to Bank Markazi's account. The Bank becomes the sole beneficial owner of such funds after it has credited Iranian Government Treasury accounts maintained in its books with its equivalent in the rial value.[315]

3.22 Another important source of the Bank's income is its investments in different currencies and instruments such as fixed-term bank deposits and fixed income debt instruments including bonds and securities issued by foreign governments or accredited international financial institutions.[316]

B. The activities carried out by Bank Markazi relevant to the present case

3.23 It is the acquisition, ownership and management of property rights with respect to its investment in the security entitlements and their proceeds, mentioned in Chapter II, above, which constitute the relevant activities of Bank Markazi related to the U.S. measures at issue. The exercise of these activities has been precluded by the U.S. measures recalled in Chapter II, above.

3.24 Bank Markazi, as part of its activities, has regularly invested its assets in the securities and bonds denominated in different currencies issued by top-rated sovereign entities. Bank Markazi purchased bonds to diversify its investment in different instruments rather than limiting itself to primarily short-term money market instruments.[317]

3.25 The relevant investing activities in the context of the present case are related to 22 security entitlements in U.S. dollars purchased by Bank Markazi during the years

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314 Affidavit of Ali Asghar Massoumi as Head of Foreign Exchange Negotiable Securities Section at Bank Markazi, 17 October 2010, filed on 31 August 2017 in U.S. District Court for the Southern District of New York, *Peterson, et al. v. Islamic Republic of Iran*, Case No. 10 Civ. 4518 (BSJ), para. 10 (Annex A02 of the *Peterson*'s Proceeding Documents filed with the I.C.J. by the United States on 19 September 2017).

315 *Ibid.*, para 10.

316 *Ibid.*, para 11.

317 *Ibid.*, para 13.

2002 to 2007.These security entitlements were entitlements in dematerialised bonds issued by a number of foreign governments and intergovernmental organisations such as the World Bank. The nominal value of these bonds was USD 1,753,000,000. Pursuant to the U.S. Uniform Commercial Code ('UCC') which is the law governing the securities generated in the U.S. market, the entitlement holder with respect to these 22 security entitlements mentioned above was Bank Markazi.[318]

List of Bank Markazi's US Securities Subject of Peterson 1

No.	ISIN	COUPON	ISSUE DATE	MATURITY DATE	CURRENCY	NOMINAL AMOUNT	VALUE BOUGHT	SOLAR DATE	PRICE BOUGHT	NAME OF DEPOSITORY
1	US54905UCG76	4.1250	12-Aug-20	12-Aug-09	USD	$100 000 000	12-Aug-02	24/05/1381	99.9100	Federal Reserve Bank of NY
2	US298785CW43	3.0000	8-Apr-03	16-Jun-08	USD	$130 000 000	8-Apr-03	19/01/1382	99.3813	Depository Trust Co., NY
3	US465410BH09	2.5000	3-Jul-03	15-Jul-08	USD	$100 000 000	3-Jul-03	12/04/1382	99.5210	Depository Trust Co., NY
4	US465410BH09	2.5000	3-Jul-03	15-Jul-08	USD	$100 000 000	16-Mar-04	26/12/1382	99.8572	Depository Trust Co., NY
5	US65562QAC96	2.8750	25-Mar-04	15-Jun-09	USD	$100 000 000	25-Mar-04	06/01/1383	95.8530	Depository Trust Co., NY
6	US45950KAM27	3.7500	28-Apr-04	30-Jun-09	USD	$100 000 000	25-Mar-04	06/01/1383	99.9410	Federal Reserve Bank of NY
7	US4595056QS92	4.1250	24-Jun-04	24-Jun-09	USD	$100 000 000	24-Jun-04	04/04/1383	99.6870	Federal Reserve Bank of NY
8	US65562QAD79	3.8750	24-Feb-05	15-Jun-10	USD	$30 000 000	24-Feb-05	06/12/1383	99.9950	Depository Trust Co., NY
9	US65562QAD79	3.8750	24-Feb-05	15-Jun-10	USD	$30 000 000	24-Feb-05	06/12/1383	99.9950	Depository Trust Co., NY
10	US45950KAN00	4.0000	6-May-05	15-Jun-10	USD	$25 000 000	6-May-05	16/02/1384	99.4560	Federal Reserve Bank of NY
11	US465410BP25	4.0000	9-May-05	16-Jun-08	USD	$195 000 000	22-Jun-05	01/04/1384	99.8300	Depository Trust Co., NY
12	US500769BG84	3.8750	30-Jun-05	30-Jun-09	USD	$40 000 000	30-Jun-05	09/04/1384	99.8970	Depository Trust Co., NY
13	US298785DP82	4.1250	8-Sep-05	15-Sep-10	USD	$100 000 000	8-Sep-05	17/06/1384	99.8640	Depository Trust Co., NY
14	US676167AR05	4.2500	6-Oct-05	6-Oct-10	USD	$50 000 000	6-Oct-05	14/07/1384	99.6570	Depository Trust Co., NY
15	US48245RAX26	4.6250	16-Nov-05	17-Nov-08	USD	$100 000 000	16-Nov-05	25/08/1384	99.6570	Depository Trust Co., NY
16	US5000769BL79	4.6250	20-Jan-06	20-Nov-11	USD	$100 000 000	28-Dec-06	07/10/1385	99.3800	Depository Trust Co., NY
17	US45950KAN00	4.0000	6-May-05	15-Jun-10	USD	$75 000 000	28-Dec-06	07/10/1385	97.6300	Federal Reserve Bank of NY
18	US045167BL65	4.1250	26-Jul-05	15-Sep-10	USD	$45 000 000	28-Dec-06	07/10/1385	97.8400	Federal Reserve Bank of NY
19	US298785EC60	5.0000	6-Feb-07	8-Feb-10	USD	$50 000 000	12-Feb-07	23/12/1385	100.0000	Depository Trust Co., NY
20	US298785EE27	4.6250	21-Mar-07	21-Mar-12	USD	$93 000 000	21-Mar-07	01/01/1386	99.7040	Depository Trust Co., NY
21	US45950KAQ31	4.7500	25-Apr-07	25-Apr-12	USD	$70 000 000	25-Apr-07	05/02/1386	99.6400	Federal Reserve Bank of NY
22	US500769CF92	5.0000	31-May-07	1-Jun-10	USD	$20 000 000	4-Jun-07	14/03/1386	99.9010	Depository Trust Co., NY
			TOTAL (USD)			$1 753 000 000				

3.26 The maturing date of these bonds varied in time. All payment of interests and principal for the bonds have occurred in New York. In 2012, after the last bond matured, the cash associated with the bonds was placed on an interest-bearing account maintained at Citibank in New York.

C. The commercial/business nature of the activities carried out by Bank Markazi in respect of security entitlements

3.27 There can be no doubt that the exercise of ownership rights and rights derived from ownership of security entitlements and of their proceeds is a business (or commercial) activity. Like all commercial activities related to security entitlements or other sort of investments held in the United States, they are governed by the UCC, which purpose is "(1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practice".[319]

318 See para. 2.95 and footnote 208 above.

319 UCC, Section 1-103.

3.28 This is a classic activity of commercial banks and other private financial institutions. The U.S. Court of Appeals for the Second Circuit noticed that point in stating: "[l]ike many large financial institutions, Markazi invests in foreign sovereign bonds".[320] Indeed, investing in security entitlements, including sovereign bonds, is a widespread practice in modern business. As explained in a recent OECD report, government securities "serve as a saving instrument for individuals and institutional investors, an investment instrument for central banks, a risk management instrument for companies, a collateral to secure to financial transactions, and a benchmark for pricing of other debt instruments. For example, pension funds and insurance companies invest in long-term government bonds to meet their future liabilities. Central banks use government bonds for quantitative monetary policy purposes along with reserve management."[321] There is therefore no surprise that "Clearstream has business relations with 2500 financial institutions from all over the world".[322]

3.29 Bank Markazi was plainly involved in these business (or commercial) activities. The governing contract with Clearstream establishes a business relationship between Bank Markazi and Clearstream as its agent for "transacting business", in the form of "a series of financial transactions over an extended period of time with regard to these New York based bonds".[323] Bank Markazi was "the only owner" of these assets,[324] and "[t]he only entity with any financial interest in the funds in the account",[325] located at Citibank in New York.[326]

3.30 Just like any other company, Bank Markazi paid tax on the profits generated by its foreign deposits in the United States. The balance sheets of Bank Markazi for the

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320 *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. Court of Appeals for the Second Circuit, Opinion and Order, 21 November 2017, Case 15-0690, p. 8 (IR, Annex 58).

321 OECD, "Chapter 2. Understanding investor demand for government securities", *OECD Sovereign Borrowing Outlook 2019*, Ed. OECD, 23 April 2019, para. 2.2 (IR, Annex 114).

322 *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 6 (IM, Annex 58).

323 *Ibid*., p. 39.

324 *Ibid*., p. 47.

325 *Ibid*., p. 49.

326 *Ibid*., p. 50.

period, extending between 2002 and 2009 indicates the profits generated by them and that Bank Markazi paid substantial income tax on this profit.

3.31 For 2002, the Bank's balance sheet indicates that foreign bonds generated a revenue of 410 billion rials. It contributed to the net profit of the Bank, which paid more than 6 billion rials in income tax. The following extract of the balance sheet for 2002 illustrates these points.[327]

REVENUE RECEIVED FROM DEPOSITS AND INVESTMENT ABROAD

(million rials)

	Year end	
	1379	1380
Foreign exchange term deposits	509,149.9	459,969.6
Foreign exchange sight deposits & special & clearing accounts	63,640.7	78,426.6
Foreign bonds	116,533.3	410,386.4
Gold depositing	20,878.6	21,643.6
Algerian Decree	0	52,848.9
SDR	24,714.9	17,704.2
Profit of OSF account	(99,365.9)	(452,782.1)
Total	**635,551.5**	**588,197.2**

PROFIT APPROPRIATION

(rials)

Income tax	6,182,777,629
Transfer to legal reserve	1,586,167,079
Transfer to contingency reserve	793,083,540
Share of the government from the net profit	7,220,000,000
0.5% allocated to low-income groups for provision of housing	79,308,354
Balance of net profit carried forward	679,511
Total	**15,862,016,113**

3.32 For 2003, the profits generated by the foreign bonds increased significantly, from 410 to 2,599 billion rials. The income tax paid also increased from 6 to 239 billion rials.[328]

REVENUE RECEIVED FROM DEPOSITS AND INVESTMENT ABROAD

(million rials)

	Year end	
	1380	1381
Foreign exchange term deposits	459,969.6	1,389,939.7
Foreign exchange sight deposits & special & clearing accounts	78,426.6	168,222.8
Foreign bonds	410,386.4	2,599,351.8
Gold depositing	21,643.6	440.0
Algerian Decree	52,848.9	116,271.5
SDR	17,704.2	60,965.3
Profit of OSF account	-452,782.1	-2,246,833.8
Total	**588,197.2**	**2,088,357.3**

PROFIT APPROPRIATION

(rials)

Income tax	239,396,007,965
Transfer to legal reserve	82,112,112,127
Transfer to contingency reserve	400,000,000,000
Share of the government in the net profit	95,508,000,000
0.5% allocated to low-income groups for provision of housing	4,105,605,606
Balance of net profit carried forward	75,081
Total	**821,121,800,779**

327 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2002, pp. 89 and 91 (IR, Annex 101).

328 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2003, pp. 97 and 99 (IR, Annex 102).

3.33 For 2004, the revenue generated from foreign bonds was more than 3,373 billion rials, and the income tax increased to 305 billion rials.[329]

REVENUE RECEIVED FROM DEPOSITS AND INVESTMENT ABROAD

(million rials)

	Year end	
	1381	1382
Foreign exchange term deposits	1,389,939.7	1,329,802.6
Foreign exchange sight deposits & special & clearing accounts	168,222.8	68,037.2
Foreign bonds	2,599,351.8	3,373,634.7
Gold depositing	440.0	0
Algerian Decree	116,271.5	12,168.0
SDR	60,965.3	51,562.9
Profit of OSF account	-2,246,833.8	-2,041,437.5
Total	**2,088,357.3**	**2,793,767.9**

PROFIT APPROPRIATION (rials)

Income tax	305,709,457,510
Transfer to legal reserve	118,222,118,834
Transfer to contingency reserve	397,712,000,000
Share of the government in the net profit	354,666,000,000
0.5% allocated to low-income groups for provision of housing	5,911,105,942
Balance of net profit carried forward	581,138
Total	**1,182,221,263,424**

3.34 For 2005, 2006, and 2007, and 2008, the revenue generated from foreign bonds was 4,074,[330] 4,709,[331] 5,360,[332] and 5,766[333] billion rials respectively, and the income tax was 455,[334] 1,368,[335] 2,869[336] and 4,956 billion rials respectively.[337]

3.35 As of March 2009 the revenue generated from foreign bonds decreased significantly to 3,124 billion rials.[338] Income tax paid was 6,511 billion rials.[339] From this year, the bonds detained in the United States and their proceeds were restrained, and ceased generating any profit for the Bank.

329 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2004, pp. 93 and 95 (IR, Annex 103).

330 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2005, p. 97 (IR, Annex 104).

331 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2006, p. 125 (IR, Annex 105).

332 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2007, p. 122 (IR, Annex 106).

333 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2008, p. 137 (IR, Annex 107).

334 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2005, p. 99 (IR, Annex 104).

335 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2006, p. 127 (IR, Annex 105).

336 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2007, p. 123 (IR, Annex 106).

337 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2008, p. 138 (IR, Annex 107).

338 Balance Sheet and Profit and Loss Account of Bank Markazi, 20 March 2009, p. 154 (IR, Annex 108).

339 *Ibid.*, p. 155.

3.36 This figures plainly confirm that Bank Markazi's activities subjected to the U.S. impugned measures were of a purely business/commercial nature, carried out in the same manner than and under the same regime as any commercial bank

SECTION 3.
CONCLUSION OF CHAPTER III.

3.37 As demonstrated in this Chapter, the question of whether Bank Markazi is a "company" for the purposes of the Treaty of Amity depends on the commercial (or more generally business) nature – not the purpose – of the activities with respect to which Bank Markazi has been subjected to the United States measures described in Chapter II, above.

3.38 These activities consist in the acquisition, ownership and management of property rights with respect to investment in security entitlements and their proceeds in the United States. The U.S. measures intentionally precluded Bank Markazi from exercising these activities, by depriving it of all its property rights in those security entitlements. The U.S. measures enumerated in Chapter II, above have had the effect of depriving Bank Markazi of its right to exercise its property rights over its financial assets – including its right to use them, for example as guarantee, to earn profit from them, to transfer them, to sell them, to enforce them, as well as of its capacity to effectively defend its rights. These rights have been denied, and the financial assets, of a value of almost 2 billion dollars, have been turned over to third parties, in breach of the Treaty of Amity, as demonstrated by Iran in its Memorial, and further developed in this Reply.

3.39 These activities plainly qualify as commercial activities, or more broadly as business activities. They are classic commercial/business activities generating profit and loss that commercial banks and other private institutions perform on a daily basis and on which they pay income tax.

3.40 Bank Markazi thus plainly qualifies as a company, as this term is defined by the Treaty of Amity. It was performing, at the relevant time, activities of the nature of those

which permit characterisation as a "company" within the meaning of the Treaty of Amity, capable of being affected by the measures complained of by Iran by reference to Articles III, IV and V of the Treaty. As a matter of fact, as will be developed below, Bank Markazi's activities of a commercial/business nature have been severely affected by numerous United States' breaches of Article III, IV and V of the Treaty.

CHAPTER IV.
THE UNITED STATES HAS VIOLATED ARTICLE III(1) OF THE TREATY OF AMITY

4.1 Iran claims that the United States has violated its obligation set out in Article III(1) through depriving Iranian companies of their juridical status as established under the applicable laws and regulations of Iran, because it has conflated their juridical status with that of another legal person, namely the Iranian State.[340] Among other Iranian companies, the United States has abrogated Bank Markazi's rights as a separate juridical entity.[341]

4.2 In its Counter-Memorial, the United States contends that Article III(1) has a "narrow purpose",[342] and is "limited to recognizing the legal personality of the companies of the other Party, and nothing more".[343] The United States bases its interpretation on what would be, according to the Respondent:

a. a "straightforward reading of the text" – though the United States in fact bases its interpretation on anything but the text;[344]

b. alleged "*travaux préparatoires*" – although the United States has not asserted, let alone demonstrated, that recourse to "supplementary means of interpretation" is permitted or required as a matter of international law;[345]

c. U.S. internal analysis in the context of the negotiation of the U.S.-Netherlands FCN, or during negotiations with Belgium – which can hardly find a place in

340 Iran's Memorial, pp. 70-77, paras. 4.18-4.36.

341 *Ibid*., p. 77, para. 4.35.

342 U.S. Counter-Memorial, p. 97, para. 13.8.

343 *Ibid*., p. 98, para. 13.9.

344 *Ibid.*, p. 97, para. 13.7.

345 *Ibid.*, pp. 97-98, para. 13.8.

the application of any sound method of treaty interpretation to the Treaty of Amity.[346]

4.3 Further, the United States contends that it has not violated Article III(1) of the Treaty of Amity, as it interprets it, since it has not denied Iranian companies their "legal personality".[347] The United States recalls that the contested U.S. measures "make available for attachment certain property of States designated as sponsors of terrorism, including the property of their agencies and instrumentalities", suggesting that the mere fact that these measures concern "States designated as sponsors of terrorism", on the one hand, and "their agencies and instrumentalities", on the other hand, proves that the legal personality of the latter is recognised.[348] It also suggests that the legal personality of these companies has been duly recognised because they have been subject to judicial proceedings in the United States.[349] Alternatively, the United States asserts that even if the interpretation proposed by Iran were correct, the Respondent would not have violated Article III(1) in conflating the juridical status of companies with that of Iran because it was, in this case, appropriate to "pierce the corporate veil or otherwise disregard the distinction between a corporation and its shareholders in the interest of justice".[350]

4.4 In making these arguments, the United States fails to interpret Article III(1) correctly (Section 1). Iran maintains that the United States has failed to respect its Treaty obligation as provided for in this Article (Section 3) vis-à-vis Iranian companies which all have a separate juridical status (Section 2).

346 *Ibid.*, p. 98, para. 13.10.

347 *Ibid.*, p. 101, para. 13.20.

348 *Ibid.*

349 *Ibid.*, pp. 101-102, para. 13.20.

350 U.S. Counter-Memorial, p. 102, para. 13.21.

SECTION 1.

INTERPRETATION OF ARTICLE III(1) OF THE TREATY OF AMITY

4.5 Article III(1) of the Treaty provides, in its first sentence:

> "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."

4.6 The United States fails to interpret the text of this provision properly, on four basic points:

a. First, it conflates "juridical status" – the terms used in the Treaty – and "legal personality"[351] – terms not used in the Treaty, although the two concepts are to be distinguished.

i. The "juridical status" of an entity or of a person is its legal status as determined by the laws and regulations applicable to this entity or person. The "juridical status" of a company entails its basic specificities. The International court of Justice in *Barcelona Traction* observed that corporate entities are "endowed with a specific status" made of "rules governing [their] creation and operation".[352] It is this "specific status", defining the specificities of each company, to which the Parties refer in Article III(1) of the Treaty with the terms "juridical status". With respect to persons other than legal entities, their "juridical status" usually entails specific rules applicable to these persons. For example, the Convention relating to the status of refugees adopted on 28 July 1951 contains a Chapter II titled "Juridical status", which provides for rules applicable to refugees, relating to their "Personal status" (art. 12), "Movable and immovable property" (art. 13), "Artistic rights and industrial property" (art. 14), "Right of association" (art. 15), and "Access to courts" (art. 16). "Juridical status" is also used to designate the specific group

351 See, *e.g.*, U.S. Counter-Memorial, p. 98, para. 13.9 and p. 101, para. 13.18.

352 *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 34, para. 39.

of rules applicable to certain features devoid of legal personality. For example, one can discuss "the juridical status of waters",[353] or "the juridical status of the EEZ".[354]

ii. By contrast, "legal personality" merely refers to the existence of a person or of an entity as a "legal being". Of course, these terms are reserved to "persons", unlike the terms "juridical status" which, as illustrated above, are not reserved to characterising "persons" only. The "legal personality" of an entity derives from what the law says about this entity, or, in other words, from its juridical status. But the juridical status of an entity that is recognised as a legal being under its domestic law is broader than the mere establishment of the legal personality of this entity, since it also provides for the essential legal rights and duties attached to this legal person.

iii. The context confirms that recognition of a "juridical status", as these terms appear in Article III(1) of the Treaty, cannot be reduced to recognition of a "legal personality", which, of itself, does not encompass any right to engage in substantive activities. Indeed, if it were the case, the Parties would have had no reason, in the same paragraph of the same article, to precise that: "[i]t 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 organised."[355]

iv. This immediate context further confirms that the terms "juridical status" in Article III(1) refer to company's basic rights, and not merely to their "legal existence". The sentence quoted in the preceding paragraph introduces a qualification to the extent of the rights that would derive from an unqualified recognition of the "juridical status" of the other Party's companies. With this precision, the Parties agree that even if the

353 R. Jennings, A. Watts (Eds.), *Oppenheim's International Law: Volume 1 Peace* (9th Edition), p. 647.

354 D. P. O'Connell, *The International Law of the Sea: Volume I*, 1st Edition (16 December 1982), p. 579.

355 Article III(1), last sentence, of the Treaty of Amity (IM, Annex 1).

laws of the other Party grant to its companies, as part of their juridical status, rights to engage in activities "for which they have been organised", the recognition of their juridical status under the Treaty would not concern this aspect of their juridical status. *A contrario*, it concerns all other aspects.

v. The last sentence of Article III(1) sheds further light on the notion of "juridical status". It provides that the term "companies" under the Treaty, i.e., the legal entities the juridical status of which the Parties must "recognize", means "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit". These are all categories of legal persons that U.S. and Iranian domestic laws distinguish as to their juridical status. In this context, the "juridical status" of companies obviously refers to the basic legal features defining the different categories of companies, and not only to their existence as "legal beings". For example, the recognition of the juridical status of a partnership entails recognition of this partnership as a specific category of legal entity. Likewise, the recognition of the juridical status of a corporation encompasses recognition of a legal person with the specificities that the law attaches to a corporate entity.

vi. This understanding of the notion of "juridical status" is confirmed by the *travaux préparatoires*. In discussing the meaning of Article III(1), the U.S. Embassy's Aide Mémoire dated 20 November 1954[356] argues that in so far as it relates to corporation, the provision provides "for their recognition *as corporate entities*".[357]

b. Second, the United States errs in reading Article III(1) as providing, in substance, that Iranian companies shall have "a" juridical status, or a mere

356 Aide Mémoire of the U.S. Embassy in Tehran, dated 20 November 1954(IR, Annex 1)

357 IM, Annex 3 (emphasis added).

"existence",[358] recognised by the laws of the United States. Article III(1) provides that Iranian companies shall have "their" juridical status recognised, which means the juridical status they possess according to the laws and regulations under which they have been constituted, not "a" juridical status, limited to an unqualified "legal existence".

c. Third, the United States fails to acknowledge that the terms "their juridical status" refer to the juridical status of Iranian companies as established "under the applicable laws and regulations" of Iran. By recognising the juridical status of Iranian companies as established under Iranian laws and regulations, the United States commits to give legal effect to Iranian laws on its territory governing the establishment of Iranian companies – and, conversely, Iran commits to give legal effect on its territory to U.S. laws governing the establishment of U.S. companies. This is a common feature in private international law as well as in public international law. In this regard, the Court observed in *Barcelona Traction* "that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction."[359]

d. Fourth, the United States fails to mention that under Article III(1), the juridical status of Iranian companies must be "recognized within the territories of" the United States. The obligation to recognise, in this context, refers to an obligation to be given legal effect in the United States. Thus, it establishes a Treaty obligation for the United States to give legal effect in the United States to the Iranian companies' juridical status as established by Iranian laws and regulations.

4.7 In sum, according to its ordinary meaning, read in context, Article III(1) of the Treaty of Amity provides that Iranian companies shall have *their* juridical status, *i.e. the juridical status they possess under Iranian laws and regulations*, recognised within

358 U.S. Counter-Memorial, p. 98, para. 13.10.

359 *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 33, para. 38. See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 675, para. 104.

the U.S. territory, i.e. given legal effect within this territory. Consequently, the precise scope of the obligation to recognise an Iranian company's juridical status depends on the content of this juridical status as established by the laws and regulations under which this company has been constituted.

4.8 It follows that if, as is the case, according to these laws and regulations, this juridical status provides for separateness of the legal entity, then the obligation to recognise this juridical status plainly encompasses the obligation to recognise this separateness. This is confirmed by the definition of companies provided for by Article III(1) of the Treaty, which reads: "'companies' means corporations, partnerships, companies, and other associations, whether or not with limited liability and whether or not for pecuniary profit." As is apparent, this text expressly mentions specific legal entities the juridical status of which does, in both the U.S. and the Iranian domestic systems, inherently encompass independence and separateness, namely "corporations".

4.9 Recognising the juridical status of a corporation without recognising that it is a juridical entity separate from its shareholders would make no sense. Indeed, as observed by the Court in *Barcelona Traction*, "[t]hese entities have rights and obligations peculiar to themselves."[360] By contrast with associations, they "enjoy independent corporate personality".[361] Indeed, ["t]he concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of its shareholders, each with a distinct set of rights. The separation of property rights as between company and shareholders is an important manifestation of this distinction."[362] This separation is part of the "basic characteristic of the corporate structure"[363], or, in the words of the U.S. administration, one of the "basic principles of corporal law and international principles".[364]

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360 *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 33, para. 39.

361 *Ibid.*, para. 40.

362 *Ibid.*, para. 41.

363 *Ibid.*

364 U.S. House of Representatives, Report on the Justice for Victims of Terrorism Act, 13 July 2000, H. R. Rep. No. 106-733, at p. 12 (IM, Annex 12).

4.10 Thus, the obligation to recognise the juridical status of companies constituted as corporations necessarily encompasses the obligation to recognise – i.e. give legal effect to the legal rule – that they enjoy independent corporate personality as separate legal entities, as established under the relevant domestic laws and regulations. By contrast, if a partnership has no separate legal personality, the obligation to recognise the juridical status of this company organised as a partnership implies recognition that it does not have separate legal personality.

SECTION 2.
VIOLATION OF ARTICLE III(1) OF THE TREATY OF AMITY

4.11 The Iranian laws and regulations under which the Iranian companies referred to in the present proceedings are established grant them a juridical status the basic characteristic of which is that they are corporate entities separate from their shareholders including the Iranian State.

4.12 In this regard, the Court can take note that, whereas the United States wrongly contests that the obligation to recognise the juridical status of Iranian companies encompasses the obligation to recognise their separate juridical status, it does not dispute that the Iranian companies relevant to this case have been legally constituted in Iran as separate and independent juridical entities. This is indeed beyond dispute. For example, Bank Markazi has been constituted in the Iranian domestic order as a separate juridical entity. Article 28, paragraph 1, of the Monetary and Banking Act of 1960, as amended, expressly provides that "an independent institution to be called the Bank Markazi Iran shall be established".[365] Likewise, the Export Development Bank of Iran was constituted in 1979 and, as indicated in Article 1 of its statutes: "the bank is an independent legal entity, with financial independence, and Iranian

[365] Under Article 28 (1) of the Act as approved on 27 May 1960, "in order to stabilize the value of currency and to regulate the volume of credit, an independent institution to be called the Bank Markazi Iran shall be established which shall have the monopoly of coin note issue"; available at: www.cbi.ir/page/5298.aspx.

nationality".[366] The same can be said of all other Iranian companies concerned in the present case, as explained above in Chapter II.[367]

4.13 The Treaty obligation to recognise the juridical status of Iranian companies as separate legal entities entails that there can be no confusion between their liability, on the one hand, and the liability of their shareholders for their own acts, on the other hand. Thus, an Iranian separate entity cannot be held liable for execution of a judgment against its shareholders, including when the shareholder is the State of Iran, and its own property cannot be subject to attachment in execution of a judgment passed against its shareholders, including when Iran is concerned. As held by the Court "[c]onferring independent corporate personality on a company implies granting it rights over its own property".[368]

4.14 Yet, the United States has abrogated the separate juridical status of the Iranian companies relevant to the present case through successive legislative and executive acts, as explained by Iran in its Memorial.[369] These are Section 201(a) of the TRIA of 2002, Section 1610(g) of Title 28 of the U.S. Code introduced by NDAA of 2008, Section 8772 of Title 22 of the U.S. Code introduced by the ITRSHRA, and Section 7(b) of E.O. 13599. On the basis of these laws and executive acts, U.S. courts ordered the seizure and turning over of the assets of Iranian companies in aid of execution of judgments issued against Iran.[370]

4.15 The United States does not dispute that it has disregarded the distinction between Iranian companies, as independent legal entities, and the State of Iran.[371] Rather, it

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366 IM, Annex 75.

367 Article 583 of the Iranian Commercial Code provides that "All trading companies mentioned in this Act have juridical personality" (code available on the website of the Iranian Ministry of Industry, Mine and Trade at https://en.mimt.gov.ir). Further, where the separate juridical status of an entity is not expressly mentioned in a company's articles of association or its constituting document, this inherent legal peculiarity follows from the entity's purpose, functions, its mode of administration, its limited capital and liability.

368 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 605, para. 61.

369 Iran's Memorial, pp. 70-74, paras. 4.19- 4.29.

370 *Ibid.*, p. 74-77, paras. 4.30-4.36; U.S. Counter-Memorial, p. 50, para. 6.18.

371 U.S. Counter-Memorial, p. 102, para. 13.21; p. 124, para. 14.45.

argues that its acts are not breaches of its treaty obligations under Article III(1) of the Treaty of Amity.

4.16 The first argument of the United States is that it has no Treaty obligation to respect the separate juridical status of Iranian companies; its only obligation, according to the Respondent, is to recognise nominally that the Iranian companies have a "legal personality" – that they have an "existence" in law. According to the United States: "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."[372]

4.17 But as has been demonstrated above,[373] Article III(1) provides for the U.S. obligation to give legal effect within its territories to the juridical status of Iranian companies, which, properly interpreted, includes the obligation to respect a key feature of their juridical status in Iranian laws and regulations, namely their legal separateness from the State of Iran.

4.18 The United States then argues that even if it were correct that its Treaty obligation is to respect the juridical separateness of Iranian companies, this obligation would not have been violated by the U.S. measures challenged by Iran in the present case. While the United States acknowledges "the general principle that a distinction between a corporation and its shareholders should be observed", it argues that there are exceptions, mentioning 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",[374] and claims that "[t]he 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."[375]

4.19 This defence fails for at least two reasons.

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372 *Ibid.*, p. 100, para. 13.17.

373 See paras. 4.6(c)-(d) and 4.7 above.

374 *Ibid.*, p. 102, para. 13.21.

375 *Ibid.*

4.20 First, the United States founds this thesis on a single U.S. authority, namely a decision of its Supreme Court, the so-called *Bancec* decision (*First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633-34 (1983)).[376] This decision is relevant, according to the Counter-Memorial, because the U.S. Supreme Court found an exception to the separateness of corporate juridical status, allegedly deriving from "internationally recognized equitable principles", in the objective "to avoid the injustice that would result from permitting a foreign state to reap the benefits of [domestic] courts while avoiding the obligations of international law."[377]

4.21 The U.S. argument is disingenuous since it is not in implementing the *Bancec* exception that the United States has abrogated the separate juridical status of Iranian companies, but in disapplying the *Bancec* exception.

4.22 As explained in Iran's Memorial, the Court of Appeals of the Ninth Circuit carefully assessed in the 2002 *Flatow* judgment whether the *Bancec* exception to the separateness of corporate entities could apply to an Iranian public bank. The Court articulated and applied the so-called five "*Bancec* factors" that trigger the exception. On this basis, it considered that the Iranian public bank could not be conflated with Iran and concluded that since the bank could not be held liable for Iran's debt, its assets were not subject to attachment in execution of a judgment passed against Iran.[378]

4.23 Thus, contrary to what the United States contends, the *Bancec* exception is of no avail to its case. In fact, it was precisely to override the five "*Bancec* factors", and to create an exception specially tailored to apply unconditionally to certain Iranian companies, that the Congress enacted the NDAA 2008.

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376 *Ibid*., p. 102, para. 337. In fact, the United States also refers in general to an article of doctrine, namely Cheng-Han Tan, et al., "Piercing the Corporate Veil: Historical, Theoretical, & Comparative Perspectives", 16 *Berkeley Business Law Journal* 140, 140-41 (2019) (U.S. CM, Annex 140). But this article discusses a practice which has no relation at all with the one of the United States with respect to Iranian companies.

377 U.S. Counter-Memorial, p. 102, para. 13.21, fn. 337.

378 *Flatow v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, 23 October 2002, 308 F.3d 1065 (9th Cir. 2002) (IM, Annex 31).

4.24 Senator Specter, who submitted in 2005 the bill which was introduced in NDAA 2008, made it clear that the bill was specifically passed against Iran and Iranian companies:

> "This legislation clarifies a private right of action, in Federal courts, for U.S. citizens against state sponsors of terrorism and will ultimately make it easier for victims of such acts to collect court-ordered damages against state-sponsors of terrorism. The specific provisions of the legislation have been drafted to harmonize existing statutory law with the recent decision by the District of Columbia circuit in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, D.C. Cir. 2004, which held that 'neither 28 U.S.C. §1605(a)(7) nor the Flatow Amendment to the Foreign Sovereign Immunities Act ... , nor the two considered in tandem, creates a private right of action against a foreign government.' 353 F.3d 1024, 1032-33 (D.C. Cir. 2004). This bill will permit the families of the brave servicemen who died at the Marine Corps Barracks in Beirut, Lebanon. to collect court-ordered damages against state-sponsors of terrorism such as Iran. […]
>
> The second section of the bill eliminating many of the barriers which have prevented U.S. citizens from collecting on court ordered damages against state sponsors of terrorism. The bill does this by changing the legal standard of the Bancec doctrine from day to day managerial control to those under the beneficial ownership of the state. The Supreme Court enunciated the so called Bancec doctrine in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27, 1983. In this case. the U.S. Supreme Court created a presumption against a party that seeks to satisfy an outstanding judgment against a foreign government by seizing the foreign government's assets. This section of the bill will ease the burden on the families of victims of terrorism by permitting them to attach the hidden assets of terrorist states held within the United States."[379]

4.25 Indeed, the NDAA 2008 explicitly abrogated the separate juridical status of Iranian companies "regardless of" each of the five "*Bancec* factors". Under this law, the property of Iranian companies can be attached in aid of execution, or execution, upon a judgment against Iran, "regardless of : (A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as

[379] U.S. Congressional Record – Senate, Vol. 151, Pt 9, 16 June 2005, p. 12869 (IR, Annex 5).

a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations."[380]

4.26 The invocation by the U.S. Counter-Memorial of the *Bancec* exception is therefore wholly misplaced: the separate juridical status of Iranian companies has not been abrogated by U.S. courts in application of *Bancec*; to the exact contrary, it has been abrogated in disapplication of *Bancec.*

4.27 Secondly, since it is the Treaty of Amity which is the relevant applicable law in the current case, what the United States must demonstrate in order to make good its position is that, while establishing the obligation for the United States to give effect to the separate juridical status of Iranian companies, the same Treaty authorises exceptions to this obligation. The United States does not even try, at para. 13.21 of its Counter-Memorial, to make such demonstration, limiting itself to vague and unconvincing assertions of allegedly "well-established" exceptions in common law and civil law.[381]

4.28 Thirdly, there is not a single basis justifying the existence of an alleged "well established" exception permitting the abrogation of the separate juridical status of a company in order to treat its assets as if they were assets of another person. What has been acknowledged by the Court regarding the States' practice, is that "'lifting the corporate veil' or 'disregarding the legal entity'"[382] has been considered justified and equitable when "forms of corporations and their legal personality"[383] have "not been employed for the sole purposes they were originally intended to serve", [384] or when "the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it".[385] It is in these situations only that the independent existence

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380 28 U.S. Code, Section 1610(g)(1) as adopted by Section 1083(b)(3)(D) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15); Iran's Memorial, pp. 28-29, para. 2.30.

381 U.S. Counter-Memorial, p. 102, para. 13.21.

382 *Barcelona Traction, Light And Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 39, para. 56.

383 *Ibid.*

384 *Ibid.*

385 *Ibid.*

of the legal entity has been sometimes disregarded in order "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 Court further explained that this practice has been employed "from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of – among others – the shareholders, but only in exceptional circumstances."[386] At no point did the Court admit the existence, let alone suggest, anything close to the U.S. newly asserted thesis, which is that it is "well-established" that the wrongful acts of a shareholder or of an owner of a company can justify enforcing judgments against its companies established as independent corporate entities.

SECTION 3.
CONCLUSION OF CHAPTER IV

4.29 As demonstrated in this Chapter:

- Article III(1) of the Treaty of Amity provides for the obligation of the United States to recognise the juridical status of Iranian companies as provided for in Iranian laws and regulations;

- This Treaty provision entails the obligation for the United States to respect the independent corporate personality conferred to Iranian companies by Iranian laws and regulations; the Treaty provides for no exception to this obligation; and

- The United States plainly violated its Treaty obligation under Article III(1) by conflating Iranian companies and the government of Iran, including in seizing and turning over their assets in execution of judgments entered against Iran.

386 *Ibid.*

CHAPTER V.
THE BREACHES OF ARTICLE III(2) OF THE TREATY OF AMITY: IRAN'S ENTITLEMENT TO FREEDOM OF ACCESS TO THE U.S. COURTS FOR ITS COMPANIES

5.1 The United States' defence to all of Iran's claims under Article III(2) is to adopt the extreme position that the obligation to afford Iranian nationals and companies "freedom of access to the courts of justice […] both in defence and pursuit of their rights, to the end that prompt and impartial justice be done" means nothing more than that Iranian nationals and companies should not be prevented from entering U.S. courtrooms and making submissions. It is said that this follows from the Court's Judgment on Preliminary Objections.[387]

5.2 According to the United States, as long as this essentially physical access is granted, the provision contains nothing to stop it from imposing targeted measures (legislative or executive) which bar (including with retrospective effect) any reliance by Iranian nationals or companies on defences/arguments which would otherwise have been available to those nationals and companies even if those defences/arguments have in fact already been relied upon in the given proceeding. The United States' core argument is that such conduct cannot be prohibited by the freedom of access provision because this creates no new substantive or procedural right.

5.3 The United States fails to engage with Iran's position. Properly interpreted, Article III(2) confers a broad and unqualified obligation to afford a meaningful freedom of access to courts (i.e., freedom which is not merely illusory).[388] This follows from an application of the rules of treaty interpretation and is consistent with the interpretation of access to court provisions by other international courts and tribunals.

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387 U.S. Counter-Memorial, pp. 103-104, paras. 13.25-13.26.

388 In the context of the "freedom of commerce" under Article X(1) of the Treaty, the Court has recognised that the provision is not to be interpreted and applied "such [that this] freedom is to be rendered illusory": see *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 819, para. 50, quoted at *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 201, para. 83. See also at p. 203, para. 89.

5.4 Once the U.S. interpretation is disposed of, it becomes clear that it has no defence to Iran's claims under Article III(2). Indeed, it is notable that the United States prefers to mischaracterise Iran's case rather than engage with the submissions actually advanced in Iran's Memorial.

SECTION 1.

THE PROTECTIONS AFFORDED BY ARTICLE III(2)

5.5 Article III (2) of the Treaty of Amity provides:

> "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."

5.6 The Parties appear to agree that Article III(2) affords a protection that is cast in mandatory and absolute terms, i.e. an unqualified entitlement to freedom of access, as well as protection formulated on a national treatment and a most favoured nation basis.[389] However, they disagree on the question of the meaning of "freedom of access".

5.7 Iran's position is that, as follows from the broad and unqualified language used, the "freedom of access" required under Article III(2) is meaningful. The Parties did not attempt to predict and specify all of the many and varied situations in which measures will obstruct freedom of access to court. It is therefore unsurprising and immaterial that Article III(2) does not expressly specify the entitlements of Iranian companies and nationals which are at issue in the present case, namely: (a) the entitlement of Iranian companies to respect for their separate juridical status as distinct from the State of Iran, and (b) the entitlement of Iranian nationals and companies not be subjected to

389 Iran's Memorial, p. 78, para. 5.3; U.S. Counter-Memorial, pp. 103-104, para. 13.26.

the targeted removal of legal defences which would otherwise be available under U.S. law.[390]

5.8 Further, the requirement to accord freedom of access "both in defence and pursuit of their [i.e. companies'] rights" is equally broad, and the word "rights" is subject to no limitation by reference to the source or nature of the rights. Thus, the "rights" at issue would include those conferred or recognised by domestic law (including U.S. law) as well as those conferred under the Treaty of Amity. This includes (but is not limited to) the right to respect for separate juridical status under both U.S. law and under Article III(1) of the Treaty of Amity.

5.9 In proceedings before the U.S. courts both Bank Markazi and Bank Melli specifically invoked the requirement to respect their separate juridical status under Article III(1) of the Treaty of Amity.[391] The U.S. courts rejected these arguments on the basis that, even if Article III(1) could be relied on, the U.S. measures would "trump" this provision.[392]

5.10 The additional words "to the end that prompt and impartial justice be done" must, of course, be given meaning and effect. Indeed, they were specifically negotiated.[393] Wilson (a U.S. commentator with experience of negotiating U.S. FCN treaties) confirms that: "The Iranian treaty differs from the others in providing for access on a

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390 Cf. U.S. Counter-Memorial, p. 104, para. 13.27 stating that these entitlements do not "appear in the text of Article III(2)".

391 See paras. 2.67 above and 9.30 below.

392 With respect to Bank Markazi see: *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), pp. 51- 52 (IM, Annex 58); *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014), pp. 6-7 (IM, Annex 62). With respect to Bank Melli see *Weinstein, et al., v. The Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, Memorandum and Order, 5 June 2009, Case 2:02-mc-00237-LDW, p. 5 (IR, Annex 26); *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010) pp. 20-21 (IM, Annex 47) ; *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. District Court for the Northern District of California, Order Denying Motion to Dismiss, 28 February 2013, Case 3:11-cv-05807-CRB, p. pp. 4-5 (IR, Annex 42); *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016), pp. 23-24 (IM, Annex 64).

393 R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 239, note 130. The United States accepts that such material is relevant for the purpose of interpretation of the provisions of the Treaty of Amity: see U.S. Counter-Memorial, p. 95, para. 12.7.

non-contingent basis",[394] and the inclusion of the words "to the end that proper and impartial justice be done" is unique among the FCN treaties concluded up to 1959.[395] Thus, the language and scope of Article III(2) is substantially broader in certain respects than that of equivalent freedom of access provisions found in other U.S. commercial treaties. Since the last sentence of Article III(2) specifically and "in any event" protects against discrimination against Iranian nationals and companies (by comparison with U.S. and third country nationals and companies), these additional words are to be understood as providing for greater protection. Thus, unlike certain traditional freedom of access provisions, Article III(2) requires more than merely non-discriminatory treatment.

5.11 The U.S. interpretation of Article III(2) disregards the fact that the right to freedom of access of court is expressly stated to be "to the end that […] impartial justice be done". If access were limited to physical access and participation, as the United States contends, this would be insufficient to secure the objective of "impartial justice". Impartiality requires much more, and it is necessary at this phase of the case for the Court to assess whether the effect of any restrictions on access to court – including with respect to legislative or executive interference in the judicial process – was to prevent impartial justice from being done.

5.12 The United States wrongly contends that "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".[396] Iran's interpretation reflects the ordinary meaning of the treaty language in its context and in light of its object and purpose. By contrast, the U.S. interpretation should be rejected as unduly restrictive

394 R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 239, note 130. See further p. 230 ("National treatment was, for the great majority of the access clauses during this period [i.e., prior to 1923], the agreed basis") and p. 239 ("Each of the seventeen treaties signed up to mid-1959 provides for access on a national-treatment basis").

395 R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 239, note 130. As the United States accepts, in addition to the object and purpose, "the Court has also taken into account its [the Treaty's] context and history, including in connection with similar FCN treaties concluded by the United States during the same time period": U.S. Counter-Memorial, p. 95, para. 12.7 citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, at p. 814, para. 29 (referring to clauses in FCN treaties concluded between the United States and China, Ethiopia and Oman).

396 U.S. Counter-Memorial, p. 96, para. 13.2.

and emptying Article III(1) of any concrete meaning. Relying on highly formalistic and technical arguments, the United States seeks to redraw the scope of Article III(2) in a way that would lead to absurd consequences, including in the present case (see para. 5.171.5 below).

5.13 The United States' primary position rests on an assertion that the Court "rejected Iran's interpretation" in its Judgment on Preliminary Objections and "left no basis for its Article III(2) claims".[397] This is incorrect. At the jurisdiction stage, the Court interpreted Article III(2) specifically for the purposes of ruling on the second objection to jurisdiction which asked the Court to dismiss "as outside the Court's jurisdiction all claims […] that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities".[398] Thus, the Court stated that it would examine the provision "in order to ascertain whether it permits the question of sovereign immunities to be considered as falling within the scope *ratione materiae* of the Treaty of Amity".[399] With respect to Article III(2), the specific question the Court asked itself was whether "the breach of international law on immunities would […] be capable of having some impact on compliance with the right guaranteed by Article III, paragraph 2"[400] The Court answered this question in the negative.[401]

5.14 Having found that Iran's immunity-related claims did not fall within the scope of Article III(2) – because the question of freedom of access is "clearly distinct" from the question of any obligation to uphold immunities under customary international

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397 U.S. Counter-Memorial, p. 96, para. 13.2.

398 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 25, para. 48, emphasis added. See also the *dispositif*, para. 126(2) upholding the second preliminary objection to jurisdiction.

399 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 26, para. 52.

400 *Ibid.*, p. 32, para. 70.

401 It was in this specific and limited context that the Court reasoned that: "The provision at issue 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. […]" (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 32, para. 70).

law[402] – the Court was not required to and did not interpret the provision conclusively with reference to Iran's other claims. In particular, the Court did not find that the targeted imposition of a condition or restriction, such as measures specifically removing defences which were previously available under domestic law, would not breach the obligation to grant free access.

5.15 The United States also contends that the "text [of Article III(2)] protects only 'access to the courts'".[403] However, as the Court has highlighted: "The rights […] are guaranteed 'to the end that prompt and impartial justice be done'".[404] The United States disregards these additional words, which are an integral part of the protection and key to understanding what is meant by "freedom of access".

5.16 The United States seeks to justify its unduly narrow interpretation of Article III(2) by arguing that "the provision does not guarantee any substantive or procedural rights", and by claiming with respect to the *Peterson* case that "what ultimately transpired as a result of these court proceedings is irrelevant".[405] This misses the point. The United States accepts, as it must, that freedom of access encapsulates procedural rights.[406] No separate question arises as to whether Iranian nationals or companies are (or should be) entitled to other substantive or procedural rights under U.S. law which have no bearing on freedom of access to courts. Nor, contrary to the United States' contention, is Iran's claim reducible to a contention that it disagrees with the result reached by the U.S. courts in certain proceedings.

5.17 In essence, the United States' position is that, under Article III(2), the Parties have agreed to a bare guarantee that the nationals and companies of the other Party must be

402 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 32, para. 70.

403 U.S. Counter-Memorial, p. 104, para. 13.26.

404 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 32, para. 70. Cf. U.S. Counter-Memorial, p. 103, para. 13.25 omitting this sentence.

405 U.S. Counter-Memorial, pp. 105-106, paras. 13.32-13.33.

406 See *ibid*., pp. 115-116, para. 14.28-14.29.

allowed physically to enter its courts and participate in proceedings.[407] On this reading, there is nothing to stop a Party from adopting executive or legislative measures (including retroactive measures) targeting the companies of the other Party and depriving them of the ability to raise legal defences which would otherwise have been available to them under domestic law, and which continue to be available to its own nationals and companies and those of third countries. In other words, according to the United States, a Party remains free to change its domestic law specifically to guarantee that the nationals and companies of the other Party lose proceedings before its courts, such that the supposed freedom of access is an entirely empty protection.[408] The United States' interpretation must be rejected: it would not only impermissibly limit the requirement of freedom of access, which is expressed in absolute and unqualified terms, but render this protection illusory.

5.18 Iran agrees with the United States that the jurisprudence of the European Court of Human Rights ('ECtHR') under Article 6 of the ECHR is an appropriate reference point. The ECtHR has long held that the right of access to court is an inherent aspect of the safeguards enshrined in the right to a fair trial in Article 6(1) ECHR.[409]

5.19 In *National & Provincial Building Society et al. v. United Kingdom* (a case concerning retrospective legislation which the United States relies on with respect to its interpretation of the provisions of the Treaty of Amity[410]), the ECtHR emphasised that it "will subject to close scrutiny the reasons adduced by the respondent State for justifying any intervention which may have occurred in pending litigation as a result

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407 U.S. Counter-Memorial, p. 103, para. 13.25: "In other words, Article III(2) simply grants a company the right of access to courts to protect whatever rights the company claims to have. It does not do anything more". See also *ibid.*, p. 104, para. 13.29.

408 U.S. Counter-Memorial, p. 106, para. 13.33.

409 See e.g. *Zubac v. Croatia*, Grand Chamber Judgment, 5 April 2018, para. 76 referring to *Golder v. United Kingdom*, 21 February 1975, Series A. no. 18, paras. 28-36. Likewise, the right to equality before courts and tribunals and to a fair trial under Article 14 of the ICCPR "encompasses the right of access to the courts": see HRC General Comment No. 32, para. 9. Further, a situation in which the executive is able to control or direct the judiciary "is incompatible with the notion of an independent tribunal": HRC General Comment No. 32, para. 19.

410 Iran notes that the United States also adopts the position that "the Treaty should be assumed to respect the customary international law principles of judicial independence and deference": see U.S. Counter-Memorial, pp. 115-116, paras. 14.27-14.28.

of the retrospective effects of [legislation]".[411] The Court elaborated this concern as follows:

> "the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection".[412]

5.20 On the facts of the case, the ECtHR concluded that there was no breach of the right of "access to court" under Article 6 ECHR because the United Kingdom's enactment of the legislation (in that case, tax legislation designed to remedy a technical defect in earlier legislation) was justified by "compelling public interest motives".

5.21 Notably, the United States has not drawn the above passages to the Court's attention.

5.22 Nor has it mentioned that the statement of principle in the *National & Provincial Building Society* case reaffirmed the ECtHR's earlier judgment in *Stran Greek Refineries*.[413] It is useful to focus also on that earlier case because there are important parallels between what Greece was then arguing and the position that the United States now adopts.

5.23 The *Stran Greek Refineries* case concerned legislation removing rights arising under a contract concluded with the former military regime and the invalidation of an arbitration award in the applicants' favour while litigation concerning the validity of the arbitration agreement was pending before the Greek courts. The Court of Cassation upheld the constitutionality of the legislation and, in implementation of that legislation, the Greek courts held that the arbitration award was void.

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411 See *National & Provincial Building Society, et al. v. United Kingdom* (117/1996/736/933-935), Judgment (Oct. 23, 1997), para. 107 **(**U.S. CM, Annex 188**)**. The Judgment is reported at (1988) 25 EHRR 127.

412 See *National & Provincial Building Society, et al. v. United Kingdom*, para. 112.

413 *National & Provincial Building Society, et al. v. United Kingdom*, para. 112 citing *Stran Greek Refineries and Stratis Andreadis v. Greece* (1995) 19 EHRR 293, para. 49.

5.24 In response to Greece's argument that the legislation was justified in the public interest of eradicating measures taken by the military regime, the ECtHR did not "question the Government's intention to act in response to the Greek people's concern that democratic legality be re-established". However, it found that the relevant legislation "was in reality aimed at the applicant company – although the latter was not mentioned by name" and "the legislature's intervention […] took place at a time when judicial proceedings in which the State was a party were pending".[414] In other words, this was a case of targeted legislation.

5.25 Similar to the position of the United States in the present case, Greece argued that the legislation entailed no breach of Article 6 ECHR because "the applicants had had the opportunity to put their arguments before the First Division of the Court of Cassation, which had heard the case on its merits".[415] The ECtHR was "not persuaded by this reasoning" because:

> "the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of [the legislation] […] effectively excluded any meaningful examination of the case by the First Division of the Court of Cassation. Once the constitutionality of those paragraphs had been upheld by the Court of Cassation in plenary session, the First Division's decision became inevitable.
>
> In conclusion, the State infringed the applicants' rights under Article 6, para. (1) by intervening in a manner which was decisive to ensure that the – imminent – outcome of proceedings in which it was a party was favourable to it".[416]

414 *Stran Greek Refineries and Stratis Andreadis v. Greece*, paras. 46-47.

415 *Ibid.*, para. 48.

416 *Ibid.*, paras. 49-50. In subsequent cases, the ECtHR has concluded that there will be a violation of Article 6 where the State intervenes in the judicial process in a manner which affects the outcome of proceedings by determining the substance of pending proceedings and making it pointless for a party to carry on with the litigation, unless there are "compelling grounds of the general interest": see e.g. *Zielinski, Pradal, Gonzalez and Others v. France*, Grand Chamber Judgment, (2003) EHRR 60, para. 57; *Agoudimos v. Greece* (2003) 36 EHRR 60, paras. 30-35; *Papageorgiou v. Greece* (97/1996/716/913), 22 October 1997; *Azienda v. Italy*, 48357/07, 24 June 2014, paras 76, 86-89. It is sufficient that the decision of the domestic court is based even subsidiarily on the intervening act of the State: see e.g. *Anagnostopoulos v. Greece*, 39374/98, 7 November 2000, paras 20-21. This is so irrespective of whether the State is a party to those proceedings: *Ducret v. France*, 40191/02, 12 June 2007, paras. 33-37.

5.26 It is also instructive that international courts and tribunals tasked with interpreting *narrower* freedom of access clauses than that in Article III(2) of the Treaty, which clauses are essentially concerned with discrimination, have rejected the narrow reading of "freedom of access" which the U.S. insists upon.

5.27 In *Van Bokkelen's* case of 1888, the sole arbitrator found that there was an "irresistible inference" that the obligation to accord access under Article VI of the Treaty of 1864 between the United States and Haiti[417] "included all the steps and processes of the judicial tribunals of either of the contracting parties".[418] The arbitrator therefore rejected Haiti's attempt (much like the attempt of the United States in the present case) to "seek to constrain and confine the treaty protection of 'free access to the tribunals of justice' to very narrow limits" and found for the United States.[419] This reasoning has even greater force in the present case since the Court is not concerned with a freedom of access clause that is qualified by reference to national treatment or even most-favoured-nation treatment.

5.28 Similarly, in the *Ambatielos* case, the Commission of Arbitration held that the obligation to accord "free access to the courts" on a national treatment basis in Article XV of the 1886 Treaty of Commerce and Navigation between Greece and Great Britain was not to be interpreted narrowly. Greece argued that the protection was not limited to allowing a foreign national to go to court and plead his case but that it included the obligation to make it possible to avail himself of all the documents necessary for the defence of his rights. The Commission explained:

> "when 'free access to the Courts' is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy

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417 Art VI of the Treaty of 1864 states, so far as pertinent: "The citizens of the contracting parties shall have free access to the tribunals of justice, in all cases to which they may be a party, on the same terms which are granted by the laws and usage of the country to native citizens, furnishing security in the cases required, for which purpose they may employ in the defense of their interests".

418 J. B. Moore, *History and digest of the international arbitrations to which the United States has been a party*, Washington, Gov't Print Off., Vol. II at p. 1825 (IR, Annex 112). See also R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 237.

419 Contrary to its position in the present case, the U.S. resisted that very narrow interpretation and argued that the unavailability for Mr Van Bokkelen (who had been imprisoned for debt) of the right of judicial assignment (i.e., a debtor's release from detention on the condition of the surrender of all his property for the benefit of creditors), which was afforded to Haitian nationals under Haitian law, amounted to a breach of free access (*Claim of Charles Adrian Van Bokkelen v. The Government of Hayti*, Brief of Argument in Support of the Claim, 8 August 1888, p. 13 – IR, Annex 15).

> full freedom […] 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." [420]

5.29 The Commission found that there would be a breach of free access if *inter alia* "conditions, restrictions or taxes beyond those imposed on British subjects were imposed on him [Mr Ambatielos]; or that he was in some other way denied access to the English courts".[421]

SECTION 2.

VIOLATION OF IRAN'S ENTITLEMENT TO FREEDOM OF ACCESS TO THE U.S. COURTS FOR ITS COMPANIES UNDER ARTICLE III(2)

5.30 In its Memorial, Iran showed that the U.S. measures violate its entitlement of freedom of access to the U.S. courts for its companies, "in defence and pursuit of their rights", under Article III(2) through:

a. The abrogation of the rights of Iranian companies to recognition of their separate juridical status, effected through Section 1610(g) FSIA, Section 201 of the TRIA, E.O. 13599, and Section 502 of the ITRSHRA, and the implementation of those legislative and executive acts by the U.S. courts.[422]

b. Establishing, by legislation, the liability of Iranian companies for judgments rendered against the Iranian State by U.S. courts in proceedings to which those companies were not parties and in respect of facts in which they were not even

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420 *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, 6 March 1956, R.I.A.A. Vol. XII, pp. 83-153, para. 111.

421 See *The Ambatielos Claim*, paras. 111-112. While the provision then at issue expressly referred to conditions or restrictions on free access, it follows from the Commission's reasoning that, even absent such explanatory language, an obligation to accord free access (i.e. "full freedom") entails that no conditions or restrictions shall be imposed.

422 Iran's Memorial, p. 83, para. 5.14.

alleged, in the (purported) findings of facts in those proceedings, to have been involved.[423]

c. The enactment and implementation (through the processes of the U.S. courts) of legislation having retroactive effect that ultimately enabled the seizure of the property of these companies (i.e., Section 1605A and 1610(g) FSIA and Section 502 of the ITRSHRA), including the retroactive change in the law depriving Bank Markazi of defences upon which it had previously been entitled to rely and had relied in the *Peterson* case.[424]

5.31 It is unnecessary for Iran to repeat its case in any greater detail. The U.S. response to each of these alleged breaches amounts to nothing more than a restatement of its unduly restrictive and formalistic interpretation of the unqualified right of "freedom of access" under Article III(2).[425] Thus, the United States repeats its misconceived argument that Article III(2) "cannot be interpreted as providing other substantive or procedural rights",[426] Iranian companies "regularly appeared as named defendants, were represented by experienced counsel, and made detailed legal submissions", [427] and "[w]hether or not the companies prevailed in these court proceedings is irrelevant".[428] Iran has already responded to the U.S. interpretation (see paras. 5.5- 5.29 above).

5.32 The United States complains that Iran "cites to no support for the proposition that Article III(2) encompasses an obligation with regard to 'separate' juridical status".[429] It is, however, the ordinary meaning of the unqualified word "rights" in Article III(2) that it encompasses Treaty rights, including the right to respect for separate judicial status under Article III(1) (see para. 5.8 above). The United States

423 *Ibid.*, p. 84, para. 5.15.

424 Iran's Memorial, p. 85, para. 5.16.

425 U.S. Counter-Memorial, pp. 104-107, paras. 13.29-13.34.

426 *Ibid.*, p. 105, para. 13.31.

427 *Ibid.*, p. 104, para. 13.29.

428 *Ibid.*

429 *Ibid.*, p. 105, para. 13.31.

does not engage with this point (beyond repeating its interpretation of Article III(1)), and instead suggests that Iran is somehow seeking to "create […] [a] new obligation or right".[430]

5.33 In any event, contrary to the U.S. assertion, however, it is not necessary for Iran to show that the Treaty right of freedom of access to U.S. courts necessarily entails or requires a freestanding right of Iranian companies to have their separate juridical status (or any other defence).[431] Nor is Iran required to show that the provision prohibits a "default judgment […] by itself".[432]

5.34 Rather, the provision prohibits the abrogation of such rights and defences which have been conferred as a matter of U.S. law (and/or by the Treaty of Amity). It is no answer for the United States to say that the relevant rights and defences have been abrogated by the U.S. measures in accordance with U.S. law, or to point to the content of U.S. law only after the adverse change and to suggest that the Iranian company must accept the situation in which it has been placed.

5.35 The United States seeks to place particular weight on the *Peterson* case in particular, stating that:

> "It strains credulity for Iran to argue that Section 502 [of the ITRSHRA] 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".[433]

5.36 The United States is wrong to suggest that Iran's claim concerns "disappointment with the outcome of [the] court proceedings".[434] This is not a point Iran made in its Memorial, and the United States has not engaged with Iran's actual submission that:

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430 Cf. *ibid.*

431 U.S. Counter-Memorial, p. 105, para. 13.31.

432 *Ibid.*, p. 106, para. 13.32. Iran has not claimed that the imposition of default liability judgments against Iran for alleged wrongful acts was in breach of Article III(2).

433 U.S. Counter-Memorial, p. 106, para. 13.33.

434 *Ibid.*

> "a right of access to courts must comprise a right to a fair trial before competent and impartial judges whose ability to reach a decision according to law is not constrained by retrospective and targeted legislation, and yet such right has been defeated".[435]

5.37 The United States also ignores the obvious and undeniable point recorded by Chief Justice Roberts and Justice Sotomayor in their joint dissenting opinion in the U.S. Supreme Court that the purpose and effect of the U.S. measures was:

> "changing the law … simply to guarantee that [the *Peterson* plaintiffs] win. The law serves no other purpose – a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute 'sweeps away … any … federal or state law impediments that might otherwise exist' to bar [the *Peterson* plaintiffs] from obtaining Bank Markazi's assets."[436]

5.38 The same point applies with respect to the other U.S. court proceedings because, in each instance, the right to respect for separate juridical status which was previously protected in U.S. law under the *Bancec* presumption has been denied to the Iranian companies through legislative and executive acts, including measures targeted specifically at Bank Markazi.

5.39 The United States states that "Iran seems to imply that a defence can only be 'properly' or 'meaningfully' made if it proves successful".[437] This is incorrect. Rather, the requirement to accord freedom of access to Iranian companies under Article III(2) means that the United States is prohibited from interfering with such access, including by abrogating defences which would otherwise have been available to those companies, and which remain available to companies (including State-owned/State-controlled companies) of other nationalities. A defence can only be made properly or meaningfully – and access to the court can thus only be meaningful – if it is open to the court to accept that defence if the conditions for its application are made out. This is precisely what the U.S. measures sought to prevent.

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435 Iran's Memorial, p. 85, para. 5.16.

436 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), joint dissenting opinion of Roberts CJ and Sotomayor J, at pp. 7-8 (IM, Annex 66).

437 U.S. Counter-Memorial, p. 105, para. 13.31.

5.40 The United States also claims, with respect to the obligation to accord freedom of access on the basis of most-favoured nation treatment, that "Iran has not identified any way in which Iranian companies had 'less favourable' access to the courts than comparably-situated companies of third States".[438] This is misconceived since, unlike other treaties to which the United States is a party, the protection under Article III(2) is not limited to the companies of third States "in like circumstances".[439] It is concerned with more favourable treatment extended to "nationals or companies of […] any third country" without any qualification. In any event, the United States has put forward no suggestion that the central bank (or, indeed, any bank) of any other State – even that of another country which has been unilaterally designated by the United States as a so-called "State sponsor of terror" – has been subjected to the same treatment as Bank Markazi in being made subject to targeted measures which ensure that the property of that bank is to be enforced and executed against in order to satisfy liability judgments rendered by the U.S. courts against the bank's national State. Likewise, it has not pointed to any such measures having been implemented as they have been in the *Peterson* case. Again, there is no basis for seeking to characterise Iran as attempting to "invent a right to a particular outcome or defence".[440]

438 *Ibid.*, p. 107, para. 13.34.

439 Cf. *e.g.*, Article 1103 of the NAFTA.

440 U.S. Counter-Memorial, p. 107, para. 13.34.

CHAPTER VI

THE BREACHES OF ARTICLE IV(1) OF THE TREATY OF AMITY

SECTION 1.

THE PROTECTIONS WITH RESPECT TO FAIR AND EQUITABLE TREATMENT, UNREASONABLE OR DISCRIMINATORY MEASURES, AND EFFECTIVE MEANS OF ENFORCEMENT

6.1 Article IV(1) states:

> "Each High Contracting Party shall at all times afford 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".[441]

6.2 The repetition of the word "shall", combined with the use of the semi colon and the conjunction "and", shows that Article IV(1) imposes three separate obligations. It is perplexing that this has been put in issue by the United States.

6.3 The United States puts forward the most restrictive – and unconvincing – interpretation of Article IV(1). It contends that each of the three separately expressed elements – the fair and equitable treatment provision, the prohibition on unreasonable or discriminatory measures that would impair legally acquired rights, and the requirement to afford effective means of enforcement for lawful contractual rights – is limited by reference to a single protection against a denial of justice under the international minimum standard as it stood in 1955.[442] It goes so far as to contend that – despite the plainly mandatory nature of the language used – "shall" – the second and third elements do not establish independent obligations and serve only to "inform how this obligation [the obligation not to deny justice] is to be interpreted and applied".[443]

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441 Emphasis added.

442 See U.S. Counter-Memorial, p. 118, para. 14.32. On the question of timing see *ibid*., p. 107, para. 14.3.

443 U.S. Counter-Memorial, p. 110, para. 14.12.

A. Article IV(1) establishes three discrete obligations

6.4 The United States' interpretation is contrary to the ordinary meaning of the text of Article IV(1) in its context and in light of its object and purpose, and amounts to an attempt to rewrite this provision. The apparent aim is to raise the threshold for Iran's claims under Article IV(1), and to seek to introduce a generalised requirement for the exhaustion of local remedies, which is not present in the Treaty.[444] At a very obvious level:

a. If the Parties had agreed to the narrow scope which the United States now insists upon, they would not have used language establishing three separate obligations in Article IV(1), not one of which – pursuant to its ordinary meaning – is confined to (or even uses the language of) denial of justice. They would instead have used a quite different formulation including, if the second and third elements of Article IV(1) were indeed to be merely subsidiary, by using connective words after the fair and equitable treatment standard such as "including" or "in particular".

b. As noted in Iran's Memorial, any interpretation that would require that the different elements of Article IV(1) are merely duplicative would cut across the principle of effectiveness.[445] The United States has not engaged with this obvious point. Indeed, it is to be noted that certain earlier treaties concluded by the United States, such as that at issue in the *ELSI* case, contained a prohibition against arbitrary or discriminatory measures but no fair and equitable treatment provision.[446] On the United States' current position, the introduction of the fair and equitable provision served no purpose. That is not a tenable position.

6.5 The context confirms Iran's interpretation as to the existence of three free-standing obligations in Article IV(1). Thus, other provisions of the Treaty contain more than

444 See U.S. Counter-Memorial, p. 118, para. 14.31.

445 Iran's Memorial, p. 88, para. 5.24(a).

446 See Article 1, Supplementary Agreement dated 26 September 1951 to the United States – Italy Treaty of Friendship, Commerce and Navigation 1948, quoted at *Elettronica Sicula S.p.A (ELSI), Judgment, I.C.J. Reports 1989*, pp. 71-72, para. 120.

one independent obligation, as indeed the United States accepts. This is the case for example for Article IV(2) which contains a requirement to afford the most constant protection and security and a separate prohibition against takings.

6.6 Supplementary means of interpretation may be resorted to in order to confirm that, properly interpreted, Article IV(1) confers separate standards of protection, as follows from the materials cited at paragraph 6.19 below.

6.7 The United States is therefore incorrect in claiming that it intended for Article IV(1) to contain only a single obligation. Further, as explained in greater detail in sub- section B below, it is likewise incorrect that the obligation of fair and equitable treatment under Article IV(1) is limited to denial of justice under the international minimum standard.

6.8 Before turning to the detail, Iran notes the United States' assertion that, in the Judgment on Preliminary Objections, the Court "recognized that the relevant provisions of Article IV are circumscribed by the customary international law rules governing the minimum standard of treatment, contrary to the interpretation put forward by Iran".[447] This is plainly incorrect. The United States has elected to misread the Court's reasoning 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".[448] There is nothing here to suggest that the Court had in mind minimum standards existing in customary international law, as opposed to minimum protections as established by the Treaty. To the contrary, the Court was expressly focusing on Treaty protections and thereby rejecting Iran's argument on immunity protections that exist as a matter of customary international law. Moreover, the Court referred to "certain rights" as well as "minimum protections", such that even if the latter had been limited to minimum protections under customary international law,

447 U.S. Counter-Memorial, p. 108, para. 14.7.

448 *Ibid.*, referring to *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 28, para. 58.

there is nothing to suggest that Article IV (including the fair and equitable treatment provision in Article IV(1)) does not establish discrete Treaty rights.[449] It plainly does.

B. Fair and equitable treatment

6.9 As Iran demonstrated in its Memorial, properly interpreted and applied, the U.S. measures are in breach of various elements of the obligation to accord fair and equitable treatment under Article IV(1) of the Treaty of Amity: the U.S. measures are arbitrary, grossly unfair, unjust and idiosyncratic;[450] discriminatory;[451] constitute a lack of due process leading to an outcome which offends judicial propriety, including through a denial of justice;[452] and defeat the legitimate expectations of Iranian companies.[453]

6.10 The United States has elected not to engage with many of Iran's arguments regarding the ordinary meaning to be given to the fair and equitable treatment provision in its context and in light of the object and purpose of the Treaty.[454] It does not dispute, for example, that:

a. Fair and equitable treatment is to be accorded "at all times" both to Iranian companies and to the property (i.e., all forms of property, whether tangible or intangible, and including interests in property as in Article IV(2)) and enterprises of such companies;[455]

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449 Cf. *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 28, para. 57, finding that the reference to "international law" in Article IV(2) is to the minimum standard of protection for property.

450 Iran's Memorial, pp. 90-91, paras. 5.29-5.30 and p. 96, para. 5.44.

451 Iran's Memorial, p. 91, para. 5.31 and p. 97, para. 5.45.

452 *Ibid.*, pp. 91-93, paras. 5.32-5.35 and p. 98, para. 5.46.

453 *Ibid.*, p. 93, para. 5.36 and p. 98, para. 5.47.

454 See *ibid.*, pp. 87-89, paras. 5.22-5.25.

455 See *ibid.*, pp. 87-88, para. 5.23(a) and p. 89, para. 5.24(b). The United States also does not dispute that – as with respect to Article III – each element of protection is afforded to "companies" as broadly defined (see Article III(1)) and without qualification, i.e. protection is afforded to companies including those that are wholly or partly owned or controlled by one of the High Contracting Parties. See below Chapter VII, Section 1(A), p. 169, paras. 7.1-7.10.

b. The treatment to be accorded is not restricted by any territorial limitation on the place where the "treatment" occurs.[456]

6.11 The United States' interpretation depends upon reading the fair and equitable treatment provision as a renvoi to the customary international law minimum standard of treatment. This is an essential part of its contention that the provision is further limited to a prohibition against denial of justice. The United States thus contends both that the fair and equitable treatment provision "subsum[es]"[457] or "encompasses"[458] or "in particular […] includes"[459] the customary international law prohibition on denial of justice,[460] and further that it is limited to a prohibition on denial of justice only.[461]

6.12 Since it occupies a central place in the United States' pleading, Iran will show that this interpretation should be rejected because (i) the fair and equitable treatment provision in Article IV(1) is not limited to the customary international minimum standard, (ii) even if the provision were so limited, it would still not be confined to a protection against denial of justice, and (iii) the provision is not static. However, it is to be emphasised that the U.S. measures amount to a breach of the fair and equitable treatment obligation of Article IV(1), including because they entail a denial of justice. Thus, the United States' restrictive interpretation (even if it were to be accepted) is in no way an answer to Iran's claim under the fair and equitable treatment provision in Article IV(1).

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456 See Iran's Memorial, p. 88, para. 5.23(c).

457 U.S. Counter-Memorial, p. 109, para. 14.9.

458 *Ibid*., p. 110, para. 14.12.

459 *Ibid.*, p. 107, para. 14.3.

460 See also *ibid.*, p. 109, para. 14.9, note 357 stating that "the term 'fair and equitable treatment' is sometimes used as shorthand to refer to all the obligations encompassed within the minimum standard of treatment". The United States does not, however, explain whether this is how it interprets the fair and equitable treatment provision in Article III(2).

461 *Ibid.*, p. 108, para. 14.4: "Iran's claims under Article IV(1) do not meet the high threshold necessary to establish that companies or nationals have been denied justice by the United States". See also *ibid.*, p. 110, para. 14.14 and p. 113, para. 14.23 ("for Iran's claims under Article IV(1) to succeed, it must establish that the challenged measures have resulted in a denial of justice").

i. The fair and equitable treatment provision in Article IV(1) is not limited to the customary international minimum standard

6.13 Iran notes that the United States is unable to put forward any textual basis for its position that this provision is limited to the customary international minimum standard. Unlike other provisions of the Treaty, the fair and equitable treatment provision (and, indeed, Article IV(1) as a whole) contains no reference to "international law" or to the "international minimum standard".[462] Moreover, if the Parties had agreed to limit Article IV(1) to a prohibition against "denial of justice", they would have done so expressly by referring (exclusively) to this concept, but they did not.

6.14 The United States has also elected not to engage with the point that Article IV(1) is materially broader than fair and equitable treatment provisions in other treaties it has concluded.[463] Instead, it seeks to rely on its pleadings in cases concerning Article 1105(1) of the NAFTA which, as Iran highlighted in its Memorial, uses materially different language to Article IV(1) of the Treaty of Amity.[464] Indeed, the United States' position in NAFTA cases relied primarily on the specific language used in Article 1105(1). For example, in its memorial in *Methanex v. USA*, the United States submitted that –

> "the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard."[465]

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462 Nor is there anything in the Treaty text that indicates that a party's conduct will amount to a breach of the provision only if it is, "grossly unfair", "egregious" or "manifest" such that it would shock the conscience or offend a sense of juridical propriety. The treatment required "at all times" is simply "fair and equitable treatment".

463 See Iran's Memorial, p. 88, para. 5.23(b) referring to NAFTA, Article 1105, as interpreted by the NAFTA Commission.

464 U.S. Counter-Memorial, pp. 109-110, paras. 14.8-14.10.

465 *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (13 November 2000), p. 42 (U.S. CM, Annex 143). See also to the same effect e.g. *Mondev International Ltd. v. United States of America*, I.C.S.I.D. Case No. ARB(AF)/99/2, U.S. Counter-Memorial (1 June 2001), p. 34; *Pope & Talbot v. Government of Canada*, Fourth submission of the United States (1 November 2000); *Pope & Talbot*, Fifth Submission of the United States (1 December 2000), para. 7.

6.15 The United States has not attempted in the current Counter-Memorial to explain how its arguments concerning the interpretation of Article 1105(1) of the NAFTA are relevant to the interpretation of the very differently-worded Article IV(1) of the Treaty of Amity.

6.16 It is also curious that, at the same time, the United States should seek to dissuade the Court from considering the reasoning on the interpretation of the fair and equitable treatment standard of the tribunal in a different NAFTA case, *Waste Management v. Mexico* (2004), which Iran referred to in its Memorial because this reasoning has been widely referred to outside the NAFTA context.[466]

a. According to the United States, this is an 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".[467] Yet the United States places weight on its submissions made before NAFTA tribunals between 2000 and 2008 on the meaning of Article 1105(1) of the NAFTA,[468] as to which precisely the same point could be made. To the same effect, it can be said of the United States' reliance on the 2001 interpretation issued by the NAFTA Contracting States pursuant to Article 1131 NAFTA[469] that this post-dates the Treaty of Amity by many decades, concerns different treaty wording, and has no bearing on the Treaty of Amity.[470]

b. The relevance of the *Waste Management* case is that this has been widely followed as to its summation of the elements of the fair and equitable treatment standard, both where this is tied through treaty

466 U.S. Counter-Memorial, pp. 110-111, para. 14.15; cf. Iran's Memorial, p. 90, para. 5.27.

467 U.S. Counter-Memorial, p. 95, para. 12.8.

468 See *ibid.*, p. 109, para. 14.8.

469 *Ibid.*, p. 111, para. 14.15.

470 Moreover, the sole effect of the 2001 interpretation of Article 1105(1) NAFTA was that this provision should be interpreted as limited to the customary international minimum standard. There is no such agreement with respect to Article IV(1) of the Treaty of Amity. Indeed, prior to this case, the United States has not even proposed to Iran that the Treaty Parties should adopt an interpretation of Article IV(1) to this effect.

language to the customary international law minimum standard *and* where it is not.

6.17 As to context, the United States contends that "the provisions of Article IV must be read in the context of Article IV as a whole".[471] This is correct. Yet the United States then suggests that the reference in the full protection and security provision of Article IV(2) to "international law" somehow supports its interpretation that the fair and equitable treatment standard in Article IV(1) is qualified by reference to the international law minimum standard. To the contrary, as Iran explained in its Memorial:

> "The standard of fair and equitable treatment established is not qualified, whether by reference to the customary international law minimum standard of treatment or otherwise. This suggests that, unlike other treaties to which the United States is a party,[472] there was no intention to restrict the Article IV(1) standard of fair and equitable treatment to the customary international law minimum standard. By contrast, at Article IV(2), the Treaty Parties did choose to refer to 'international law' in formulating the protection afforded to national companies".[473]

6.18 As to the object and purpose of the Treaty, as Iran noted in its Memorial, a key aim in the Preamble is "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples". The United States does not disagree with Iran's position that this aim suggests that one object and purpose of the Treaty would be to establish, so far as concerns protected nationals and companies engaged in trade and investment, an important degree of stability and predictability in the legal and regulatory regimes of each Party. This is consistent with Iran's interpretation of the fair and equitable treatment standard in Article IV(1).[474]

6.19 Supplementary means of interpretation confirm that the formulation "fair and equitable treatment" was intended to afford a broad standard of protection, which was neither

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471 U.S. Counter-Memorial, p. 107, para. 14.3.

472 See, e.g., NAFTA, Article 1105, as interpreted by the NAFTA Commission: see NAFTA Free Trade Commission, *Statement on NAFTA Article 1105 and the Availability of Arbitration Documents*, 31 July 2001. For analogous reasoning, see also *Liman Caspian Oil BV and Dutch Investment BV v. Republic of Kazakhstan*, I.C.S.I.D. Case No. ARB/07/14, Award, 22 June 2010, at para. 263.

473 Iran's Memorial, p. 89, para. 5.24(b).

474 Iran's Memorial, p. 89, para. 5.25.

duplicative of the other separate elements of Article IV(1) nor confined to the customary international law minimum standard of treatment:

a. The formulation is one that, according to U.S. sources, the "State Department never attempted to describe exhaustively" and accepted "may not be susceptible of precise definition".[475]

b. As recognised by a commentator that the United States relies on, Vandevelde,[476] the fair and equitable treatment provision "imposed an independent standard of treatment",[477] and "imposed an independent obligation on treaty parties that provided a basis for challenging the legality of host state treatment in situations where the other, more precise provisions of the treaty did not apply".[478] He characterises the provision as establishing "a blanket rule of equitable treatment",[479] and:

> "was intended 'to suggest a general policy of liberal, rather than of narrow construction of the provisions of the treaty.' Where more than

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475 Memorandum dated March 28, 1947, from Vernon Setser to Seymour Rubin, NARA, Record Group 59, Department of State Lot Files, Walter Hollis Papers, quoted in K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), p. 406. This is consistent with the view expressed more recently by the tribunal in *Waste Management*, Award, 30 April 2004, para. 99, that: "Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case".

476 See U.S. Counter-Memorial, p. 13, para. 4.4 citing K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017) (U.S. CM, Annex 3). In preparing this Reply, Iran has been unable to obtain access to the NARA facility (the only institution which holds the U.S. records referred to by Professor Vandevelde) because this facility has been closed due to the ongoing COVID-19 pandemic.

477 K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), p. 402 (U.S. CM, Annex 3).

478 K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), p. 412 (U.S. CM, Annex 3). See also p. 403 noting that: "During negotiations with Belgium, it [the State Department] explained that the purpose of the fair and equitable treatment standard was 'to establish a blanket rule of equitable treatment to be applicable in cases or situations which may not happen to be covered by more specific provisions elsewhere in the treaty'. During negotiations with India, the State Department explained that the provision 'provides a general guidance as to the treatment to be accorded where more specific rules are lacking or sufficient'".

479 K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), p. 403 (U.S. CM, Annex 3). Although in one example the United States referred to a measure that was "grossly unjust", and such a statement made today would naturally be viewed through the prism of the Court's definition of "arbitrariness" in *ELSI*, "such extreme language was rare" and "[i]n any event, this illustration was merely an example of a measure that would violate the standard. Gross injustice was sufficient, but as suggested by the absence of similar language in diplomatic correspondence, it was not necessary to constitute a violation of the fair and equitable treatment standard": pp. 409-410 (U.S. CM, Annex 3).

> one construction of the treaty language was equally possible, the construction that would lead to an equitable result was to be preferred. That is, it provided an interpretive principle for the remaining provisions of the treaty."[480]

c. Iran's interpretation of Article IV(1) is also confirmed by the testimony before the Senate Committee on Foreign Relations of a U.S. State Department senior official explaining the scope of the Treaty of Amity.[481] The then Deputy Assistant Secretary of State for Economic Affairs informed the Committee that the Treaty "strengthen[s] the hands of the Government for the protection of the interests of American citizens abroad in many fields of activity",[482] and is intended to make "at least a modest contribution to the development of the rule of law and of fair treatment of the foreigner and his enterprise".[483]

6.20 As follows from the above, the United States' current position that the fair and equitable treatment provision in Article IV(1) is limited by reference to the customary international law minimum standard is misconceived and should be rejected. Article IV(1) contains a binding treaty obligation that requires the United States to accord fair and equitable treatment to Iranian nationals and companies as well as their property and enterprises.

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480 K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), pp. 405-406, citing Instruction dated October 30, 1953, from the Department of State to the U.S. High Commissioner in Bonn, NARA, Record Group 59, Department of State File No. 611.62A4/10-653; Despatch dated February 26, 1954, from the U.S. High Commissioner in Bonn to the Department of State, NARA, Record Group 59, Department of State File No. 611.62A4/2-2654; Airgram dated December 31, 1951, from the Department of State to the U.S. Political Adviser in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/12-751.

481 Statement of Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs (U.S. CM, Annex 1).

482 *Ibid.*, p. 2 (U.S. CM, Annex 1).

483 *Ibid*., p. 3 (U.S. CM, Annex 1).

ii. Even if fair and equitable treatment provision in Article IV(1) were limited to the international minimum standard, it would not be confined to a protection against denial of justice

6.21 It is common ground between the Parties that Iran's claim with respect to denial of justice is correctly brought under the fair and equitable treatment in Article IV(1). For completeness, moreover, Iran notes that even if this provision were limited by reference to the international minimum standard, on any view the fair and equitable treatment standard in Article IV(1) would not be confined to a protection against denial of justice only. Rather, as Iran explained in its Memorial, the standard will certainly be breached by conduct of the United States that:

a. is arbitrary, grossly unfair, unjust or idiosyncratic;

b. is discriminatory;

c. involves a lack of due process leading to an outcome which offends judicial propriety; and/or

d. defeats the legitimate expectations of Iranian nationals and companies.[484]

6.22 The United States contends that: "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".[485] While the United States wishes to place particular reliance on Article 1105(1) of the NAFTA, it has disregarded (and appears to disagree with) numerous cases which have interpreted even that NAFTA provision as encompassing conduct that is arbitrary,

484 Iran's Memorial, p. 89, para. 5.26.

485 U.S. Counter-Memorial, p. 110, para. 14.14.

grossly unjust, idiosyncratic or discriminatory.[486] This includes *Glamis Gold*, a case the United States currently relies on.[487]

6.23 The United States' assertion that "*Waste Management* is the only authority Iran cites for the test that it would have the Court apply in assessing the challenged measures"[488] also ignores the cases cited in the Memorial as support for Iran's interpretation.[489] If further support were needed in terms of tribunals following the *Waste Management II* case in the context of treaties referring to the international minimum standard (unlike here), reference may be made to many other cases.[490]

6.24 As to the contention that the reasoning of the tribunal in *Waste Management II* (which was presided over by Professor, now Judge, Crawford), "does not accurately reflect the fair and equitable treatment obligation under customary international law's minimum standard of treatment":

a. In support of this criticism, the United States cites only the 2001 interpretation of Article 1105(1) adopted by the Free Trade Commission acting under Article 1131 of the NAFTA. Yet the tribunal in *Waste Management II*

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486 *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009, para. 22 (U.S. CM, Annex 148); *Cargill, Incorporated v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/05/2, Award, 18 September 2009; *Murphy*; *International Thunderbird Gaming Corporation v. The United Mexican States*, I.C.S.I.D., Arbitral Award, 26 January 2006; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (I)*, I.C.S.I.D. Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, 22 May 2012; *Railroad Development Corporation (RDC) v. Republic of Guatemala*, I.C.S.I.D. Case No. ARB/07/23, Award, 29 June 2012, para. 219 ("The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case".

487 See U.S. Counter-Memorial, p. 139, para. 14.82 and U.S. CM, Annex 148.

488 U.S. Counter-Memorial, p. 111, para. 14.15.

489 See Iran's Memorial, para. 5.27 citing the examples of *Perenco Ecuador Limited v. Republic of Ecuador*, I.C.S.I.D. Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 558; *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, I.C.S.I.D. Case No. ARB/06/2, Award, 16 September 2015, para. 291; *Liman Caspian Oil BV and Dutch Investment BV v. Republic of Kazakhstan*, I.C.S.I.D. Case No. ARB/07/14, Award, 22 June 2010, para. 263, para. 285.

490 See e.g. *Railroad Development Corporation (RDC) v. Republic of Guatemala*, I.C.S.I.D. Case No. ARB/07/23, Award, 29 June 2012, para. 219 with respect to Article 10.5 of CAFTA: "The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for the purposes of this case".

(i) explicitly applied that interpretation which (ii) in any event does not specify the content of the international minimum standard.[491]

b. Whereas the United States seeks to criticise the tribunal for "fail[ing] to ground its test in a review of state practice and *opinio juris*, relying instead on other arbitral awards", the tribunal explicitly recalled the reasoning in *ADF* that "any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based on State practice and judicial or arbitral caselaw or other sources of customary or general international law".[492] Further, the tribunal's conclusion as to the content of the minimum standard of treatment of fair and equitable treatment was based on a careful survey of NAFTA arbitral awards.[493]

c. Further, the United States overlooks the fact that the International Law Commission has confirmed that, consistent with Article 38(1)(d) of the Court's Statute: "Decisions of international courts and tribunals, in particular the International Court of Justice, concerning the existence of rules of customary international law are a subsidiary means for the determination of such rules".[494]

iii. The "fair and equitable treatment" provision in Article IV(1) is not static

6.25 The United States is also incorrect to suggest that the phrase "fair and equitable treatment" must be interpreted strictly "as it was understood at the time of the Treaty's conclusion".[495] On any reading (i.e., irrespective of whether a renvoi to customary international law is required) the provision is to be given an evolutionary interpretation.

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491 See *Waste Management, Inc. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/00/3, Award, 30 April 2004 (*Waste Management II*), para. 90.

492 *Waste Management II*, para. 96 citing *ADF*, para. 184.

493 See *Waste Management II*, paras. 91-98.

494 Draft Conclusion 13(1), Draft conclusions on identification of customary international law 2018.

495 U.S. Counter-Memorial, p. 107, para. 14.3.

6.26 In *Dispute regarding Navigational and Related Rights*, the Court reasoned that:

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied".[496]

6.27 Thus, an application of Article 31(1) of the Vienna Convention may lead to the conclusion that:

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[497]

6.28 This is the case with respect to the fair and equitable treatment provision in Article IV(1) of the Treaty of Amity. The generic nature and breadth of the terms "fair and equitable" appear as a paradigm example of terms to be given an evolutionary interpretation. Further, the Treaty is intended to be of continuing duration,[498] and the object of "firm and enduring peace and sincere friendship" is recorded in Article 1.[499] The Court has confirmed that the "spirit and intent" of this objective:

> "animate[s] and give[s] meaning to the entire treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its

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496 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64.

497 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 243, para. 66. Applying these principles, the Court found that the term "*comercio*" in the 1958 treaty between Costa Rica and Nicaragua on the settlement of territorial disputes was to be given an evolutionary interpretation because it is a generic term "referring to a class of activity" (i.e. commerce) and the 1958 treaty was entered into for an unlimited duration, as was evident from its object and purpose.

498 Article XXII provides that the Treaty "shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein".

499 The Treaty, in fact, endured for more than sixty years before the United States issued its notification of termination in response to the Court's Order on Provisional Measures in the *Alleged Violations* case.

> overall objective of achieving friendly relations over the entire range of activities covered by the Treaty."[500]

6.29 For completeness, the United States is wrong insofar as it suggests that the international minimum standard is to be understood as "crystallized"[501] in 1955. This standard could not be static but (as a rule of customary international law) it evolves. The United States omits to mention that, before NAFTA tribunals, it has expressly stated that the minimum standard of treatment does evolve and is "constantly in a process of development".[502] Further, even the standard as advanced by the United States requires an assessment of what (for example) is outrageous.[503] The assessment of the international community and this Court as to what is outrageous could not be the same as in the mid-1920s, which the United States takes as the source for this test.[504]

iv. The elements of the fair and equitable treatment provision in Article IV(1)

6.30 As regards the first three elements of the fair and equitable treatment provision (as identified at paragraph 5.26 of Iran's Memorial and paragraph 6.21 above), the United States does not dispute Iran's understanding of measures which are (a) arbitrary,

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500 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 820, para. 52. See also para. 31 stating that the objective in Article 1 "is such as to throw light on the interpretation of the other Treaty provisions". In his Separate Opinion at the provisional measures stage of the *Alleged Violations* case, after referring to the above passages of the Court's Judgment in *Oil Platforms*, Judge Trindade stated that: "The Court thus found that Article 1 of the 1955 Treaty of Amity allows it to undertake an evolutionary interpretation of the relevant provisions of the Treaty": *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Sep. Op. Judge Trindade, I.C.J. Reports*, p. 657, para. 13.

501 U.S. Counter-Memorial, p. 109, para. 14.8.

502 See, *e.g.*, *ADF Group Inc v. United States of America*, I.C.S.I.D. Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 179. See also *Waste Management*, Award, para. 92.

503 U.S. Counter-Memorial, pp. 118-119, paras. 14.34-14.35.

504 See, *e.g.*, *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009 ('*Glamis*'), para. 22, noting by reference to the 1926 *Neer* standard that "it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously" (*Neer and Neer v. United Mexican States*, Mixed Claims Commission United States-Mexico, Decision, 15 October 1926).

grossly unjust, unfair or idiosyncratic,[505] (b) discriminatory,[506] or (c) involve a lack of due process leading to an outcome which offends judicial propriety, and in particular conduct which would support a complaint of a denial of justice.[507] Rather, as discussed above, it contends that any such measures will breach Article IV(1) only if they amount to a denial of justice under the international minimum standard.

6.31 As to (a), it is well established that a measure will not be arbitrary for the purposes of the fair and equitable treatment standard if it is reasonably related to a rational policy. This, however, requires a consideration both as to the existence of a rational policy and the reasonableness of the act of the State in relation to the policy, as to which it is appropriate to consider the proportionality of the given measure. As noted by the arbitral tribunal in the *Electrabel* case:

> "*Standard for 'Arbitrariness'*: [...] this Tribunal agrees with the *Saluka*, *AES*, and *Micula* tribunals in that a measure will not be arbitrary if it is reasonably related to a rational policy. As the *AES* tribunal emphasised, this requires two elements: 'the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. *A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.' In the Tribunal's view, this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought.* The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. *The test for proportionality* has been developed from certain municipal administrative laws and *requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.*"[508]

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505 See Iran's Memorial, pp. 90-91, paras. 5.29-5.30. Cf. U.S. Counter-Memorial, p. 112, para. 14.18.

506 See Iran's Memorial, p. 91, para. 5.31. Cf. U.S. Counter-Memorial, p. 112, para. 14.18.

507 See Iran's Memorial, pp. 91-92, para. 5.32-5.35. Cf. U.S. Counter-Memorial, p. 112, para. 14.18.

508 *Electrabel S.A. v. Republic of Hungary*, I.C.S.I.D. Case No. ARB/07/1-9, Award, 25 November 2015, para. 179 (footnotes omitted, emphasis added). See also *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, I.C.S.I.D. Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, paras. 573–574.

6.32 As follows from the reasoning of the tribunal in *Blusun*, an assessment of whether a measure is disproportionate may be of particular value in assessing whether conduct is in violation of the FET standard because it "carries in-built limitations and is more determinate. It is a criterion which administrative law courts and human rights courts, have become accustomed to apply to government action".[509]

6.33 As to (b), discriminatory conduct, Iran considers this further in the context of the prohibition of unreasonable or discriminatory measures (section C).

6.34 As to (c), the United States is also wrong insofar as it suggests that the fair and equitable treatment standard protects against due process in the judicial context only to the extent of prohibiting measures that amount to a denial of justice.[510]

6.35 The attempt to elide all alleged breaches concerning judicial acts with denial of justice has been rejected by various investor-State arbitration tribunals.[511] For example, the tribunal in *Tatneft v. Ukraine* reasoned that the fair and equitable treatment standard encompasses both a protection against denial of justice (as well as protection against arbitrary and unreasonable measures and discrimination) and the right to procedural propriety and due process.[512] It rejected the respondent's contention that "the governing element of a finding of liability is 'the egregiousness of the acts constituting denial of due process'", reasoning persuasively that:

> "Judicial impropriety, grave and manifest injustice and bad faith […] indeed have a very important role to play in the consideration of liability for breach of

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509 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, I.C.S.I.D. Case No. ARB/14/3, Award, 27 December 2016, para. 318 ('*Blusun*'). It is noted that according to the tribunal in *Blusun* (which was chaired by Judge Crawford) that the FET at issue (Art 10 ECT) is intended to reflect the customary international law minimum standard: see para 319(3).

510 The U.S. position is unclear since, on the one hand, the Counter-Memorial refers to denial of justice as an example of "a breach of Article IV(1) based on judicial acts" and, on the other hand and in the same passage, the United States also asserts that any such alleged breach will arise "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": see U.S. Counter-Memorial, para. 14.37.

511 See e.g. *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, paras. 4.742–4.743; *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, paras. 394, 405-406 and 411. See also *Al-Bahloul v. Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009 (a case relied on by the United States), para. 221 reasoning that the duty to provide due process and denial of justice are both part of the fair and equitable treatment standard.

512 *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, para. 394.

> the FET. But […] such high standard is not the only one relevant in the present protection of rights under the FET […] Conduct which might not be as grave as to amount to egregiousness or bad faith but which nonetheless interferes with the legitimate exercise of rights of the protected individual might equally qualify as a kind of conduct resulting in liability."[513]

6.36 Thus, judicial acts involving a lack of due process leading to an outcome which offends judicial propriety will breach the fair and equitable treatment provision in Article IV(1) even if this does not amount to a denial of justice.[514]

6.37 The United States also says that "as a matter of customary international law" this Court should defer to the decisions of domestic courts, including presumably the U.S. courts, "unless there is a denial of justice".[515] This is of no assistance to the United States since its measures do amount to a denial of justice; but the United States' attempt to impose the highest possible threshold is anyway misconceived.

6.38 As an obvious point, Iran's present claims are all brought under the Treaty of Amity not customary international law. The Court's jurisdiction flows from the Treaty and its task is to apply its provisions. A particular judgment of the U.S. courts may properly be disavowed if it is shown either to be in breach of any provision of the Treaty (including the requirement of due process under the fair and equitable treatment provision) or a denial of justice under customary international law. This approach is consistent with the statement of the tribunal in *Azinian* (in a passage the United States relies on) that: "What must be shown is that the court decision itself constitutes a violation of the treaty".[516] Similarly, the tribunal in *Helnan v. Egypt* reasoned:

> "the Tribunal will accept the findings of local courts as long as no deficiencies in procedure or substance, are shown in regard to the local proceedings which

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513 *Ibid.*, para. 411.

514 An example of such a judicial act would be the revocation of a licence by a domestic court.

515 U.S. Counter-Memorial, p. 120, para. 14.36.

516 *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 99 (U.S. CM, Annex 161) quoted at U.S. Counter-Memorial, para. 14.36, fn. 402 (emphasis added).

> are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice".[517]

6.39 As to the content of the prohibition on denial of justice, the Parties are agreed that the well-known definition in Article 9 of the Harvard Law School, Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners provides guidance:

> "A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." [518]

6.40 Once again, however, the United States has elected not to engage with Iran's case as set out in its Memorial. In particular, the United States does not dispute that:

a. the 'fair and equitable' standard in Article IV(1) prohibits *inter alia* obstruction of access to the U.S. courts, including circumstances where such obstruction is the result of legislation or executive decree and circumstances where a party is prevented from raising applicable defences;[519]

b. a lack of due process can be the result of the operation of the domestic laws or regulations governing a judicial procedure, and not only of a failure by the judiciary to apply rules of procedure;[520] and

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517 *Helnan International Hotels A/S v. Arab Republic of Egypt*, I.C.S.I.D. Case No. ARB/05/19, Award, 3 July 2008, para. 106. See also *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, para. 198.

518 Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (Cambridge, Mass., 1961) and (1961) 55 *American Journal of International Law*, at pp. 548-584 referred to at Iran's Memorial, para. 5.32. Applied e.g. in *Liman Caspian Oil BV and Dutch Investment BV v. Republic of Kazakhstan*, I.C.S.I.D. Case No. ARB/07/14, Award, 22 June 2010, at para. 277; also quoted at J. Paulsson, *Denial of Justice in International Law* (Cambridge: C.U.P., 2005), at p. 96. See also U.S. Counter-Memorial, p. 119, para. 14.35 citing the identical text of the 1929 Draft Articles (U.S. CM, Annex 169).

519 See Iran's Memorial, p. 92, para. 5.33.

520 *Ibid*.

c. where legislation or executive orders deny to a given alien fundamental procedural rights, and such legislation or executive orders are implemented by the domestic courts in circumstances where there is no reasonable prospect of recourse against the legislation or executive order by appeal or challenge at the domestic level, there will *prima facie* be a denial of justice in breach of the fair and equitable treatment standard in Article IV(1). [521]

6.41 As regards retroactive measures (whether executive, legislative or judicial), although there is no general prohibition under international law, retroactivity is plainly relevant to an assessment of what is fair and equitable, including by reference to reasonableness.[522] While the United States seeks to rely on the *National & Provincial Building Society* case,[523] this demonstrates the ECtHR's very considerable concern as to retroactive legislation that interferes with pending proceedings (see para. 5.19 above).[524]

6.42 As to what constitutes a "manifestly unjust" judgment of a domestic court, it is notable that the United States insists on the formulation of the Mixed Claims Commission in the 1927 *Chattin* case.[525]

a. Notwithstanding the approach to the formation of customary international law the United States affects to adopt in its Counter-Memorial,[526] the Mixed Commission in that case did not formulate the minimum standard of

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521 *Ibid*., p. 92, para. 5.34.

522 *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, I.C.S.I.D. Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, para. 578. See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, I.C.S.I.D. Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, paras. 325–330.

523 U.S. Counter-Memorial, p. 125, para. 14.48 referring to U.S. CM Annex 188, para. 93.

524 *National & Provincial Building Society, et al. v. United Kingdom* (117/1996/736/933-935), Judgment (Oct. 23, 1997), paras. 107 and 112 (U.S. CM, Annex 188).

525 U.S. Counter-Memorial, pp. 118-119, paras. 14.34-14.35.

526 See U.S. Counter-Memorial, p. 111, para. 14.15, where the United States contends that the Award in *Waste Management* "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".

treatment after an analysis of State practice.[527] Rather, the Mixed Commission repeated its finding in the 1926 *Neer* case which, "[w]ithout attempting to announce a precise formula", was based on the opinions of commentators and, by its own admission, went further than their views without an analysis of State practice.[528]

b. In other cases the United States has specifically relied on *Neer* and has accepted that the international minimum standard can evolve (see para. 6.29 above).[529]

6.43 In relation to the fourth element of the fair and equitable treatment provision (as identified at paragraph 5.26 of Iran's Memorial and paragraph 6.21 above), the United States contends that "no doctrine of legitimate expectation exists as a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation" under the minimum standard of treatment.[530] This also is misconceived. As the ad hoc committee in *MTD v. Chile* aptly recognised: "The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have".[531] Thus, contrary to the contention of the United States, the question is not whether a "doctrine of legitimate expectations […] is part of general international law",[532] but whether the treaty standard of fair and equitable

527 Cf. U.S. Counter-Memorial, pp. 111-112, paras. 14.16–14.17. As regards the role of previous decisions in relation to the existence of rules of customary international law see e.g. *Railroad Development Corporation (RDC) v. Republic of Guatemala*, I.C.S.I.D. Case No. ARB/07/23, Award, 29 June 2012, para. 217 ("as such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue. There is ample evidence of such practice in these proceedings. It is an efficient manner for a party in a judicial process to show what it believes to be the law").

528 *Neer and Neer v. United Mexican States*, Mixed Claims Commission United States-Mexico, Decision, 15 October 1926, para. 4. See also *Railroad Development Corporation (RDC) v. Republic of Guatemala*, I.C.S.I.D. Case No. ARB/07/23, Award, 29 June 2012, para. 216.

529 See e.g. *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009, para. 21.

530 U.S. Counter-Memorial, p. 113, para. 14.21.

531 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, I.C.S.I.D. Case No. ARB/01/7, Decision on Annulment, 21 March 2007 ('*MTD*'), para. 67.

532 U.S. Counter-Memorial, p. 112, para. 14.19. See also p. 113, para. 14.21 referring to the absence of any "independent host State obligation" as a component element of fair and equitable treatment under customary international law.

treatment in Article IV(1) will be breached by conduct that defeats the legitimate expectations of Iranian nationals and companies. This is confirmed in the Court's observations in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, an authority the United States relies on. In that case, the Court stated:

> "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".[533]

6.44 Ultimately, the question is whether the U.S. measures are fair and equitable, and it is instructive to consider the various elements that tribunals have consistently looked at, or considered useful tools, in determining whether a given measure is unfair and inequitable. The United States is plainly wrong to suggest that it can have its measures subjected to one isolated element of the fair and equitable standard only, namely denial of justice which has the highest threshold, and ignore all other elements.

C. Unreasonable or discriminatory measures

6.45 It is common ground between the Parties that the protection against "unreasonable or discriminatory measures" in Article IV(1) encompasses protection from a denial of justice. Thus, it is undisputed that Iran's denial of justice claim falls within the scope of this provision.

6.46 With respect to Iran's other claims under this provision, the United States contends that the specific and mandatory protection against "unreasonable or discriminatory measures" in Article IV(1) does not impose an "independent obligation under the Treaty", but merely "elucidate[s] the denial of justice obligation" under customary international law which is found in the fair and equitable treatment provision.[534] This

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533 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 559, paras. 160-161.

534 U.S. Counter-Memorial, p. 109, para. 14.9 and pp. 113-114, para. 14.24.

is to pay no regard whatsoever to the ordinary meaning of the words of the Treaty and the other basic tools of interpretation (see paras. 6.4-6.7 above).

6.47 The ordinary meaning of the language is mandatory ("shall") and imposes different obligations. Article IV(1) provides that the United States "shall refrain from applying unreasonable or discriminatory measures".[535] It contains no reference to "international law" or to a "denial of justice", although such language would no doubt have been used if the Parties had agreed to limit the obligation as the United States contends.

6.48 The current United States' position is also inconsistent with its submissions before the Chamber of this Court in *ELSI*. In that case, the United States argued that the object and purpose of the provision prohibiting "arbitrary or discriminatory measures" and this "formula in particular" "indicate that the prohibition of 'arbitrary or discriminatory' measures should be construed broadly, to protect investors against government action which violated the basic principles of non-discrimination and 'fair play' which underlie the Treaty".[536] In particular, the United States stated that:

a. "by the use of the disjunctive 'or' in the phrase 'arbitrary or discriminatory', Article 1 prohibits 'arbitrary' measures as distinct from, and in addition to, 'discriminatory measures'".[537]

b. "The prohibition of 'arbitrary' measures conveys above all the commitment of the respective Governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of government authority".[538] Arbitrary measures "include those which are

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535 See Iran's Memorial, pp. 93-94, paras. 5.37 to 5.39. See also with respect to reasonableness *Electrabel S.A. v. Hungary*, Award, 25 November 2015 (I.C.S.I.D. Case No. ARB/07/19), para. 179. As to the test for proportionality, see further paras. 6.31-6.32 above.

536 U.S. Memorial (15 May 1987), *I.C.J. Pleadings, Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, volume 1, p. 76. Unlike its claim under the full protection and security standard, the U.S. claim for breach of this provision was not formulated as a claim for a denial of justice and was articulated as invoking wider protections: cf. *ibid.*, p. 98.

537 *Ibid.*, p. 76.

538 *Ibid.*

unreasonable, in the sense that they are not based on sufficient or legitimate reasons, or are unduly unjust or oppressive".[539]

c. "To 'discriminate' is to make distinctions in treatment, show partiality (*in favor of*) or prejudice (*against*)."[540]

6.49 The current contention that the prohibition of "unreasonable or discriminatory measures" merely "elucidate[s] the denial of justice obligation" under customary international law is untenable.[541] The United States asserts that, whereas "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",[542] there is no "generalized obligation for States to refrain from [...] discrimination" [543] under customary international law. As to this, a denial of justice is sufficient but not necessary to demonstrate a breach of the provision:

a. Certain unreasonable or discriminatory measures in connection with judicial acts will, of course, amount to a denial of justice. It by no means follows, however, that the treaty protection in Article IV(1) against unreasonable or discriminatory measures that would impair legally acquired rights is reducible to a protection against denial of justice. Moreover, the treaty protection is expressed in absolute and unqualified terms.

b. Tellingly, the United States provides no support for its assertion that the word "'unreasonable' […] must be understood in terms of the high threshold required to establish a violation of the denial of justice obligation".[544] This proposition depends on an assumption that the word "unreasonable" is "used

539 *Ibid*., p. 77.

540 *Ibid*., p. 80.

541 U.S. Counter-Memorial, p. 109, para. 14.9 and p. 114, para. 14.25.

542 *Ibid.*, p. 114, para. 14.25.

543 *Ibid.*, p. 112, para. 14.18.

544 *Ibid.*, p. 114, para. 14.25.

in the context of the denial of justice obligation", thereby assuming the contested interpretation of the provision in the United States' favour.[545]

D. Effective means of enforcement

6.50 It is, again, common ground that the protection afforded by the obligation to assure effective means of enforcement for lawful contractual rights encompasses a protection against denial of justice.

6.51 The United States, once again, contends that the protection extends no further, with the result that Iran's other claims under this provision fail. This is incorrect.

6.52 According to the United States: "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".[546] This is a *non sequitur*. The fact that a treaty provision concerns the judicial framework does not mean that it is necessarily limited to a protection against a denial of justice. Similarly, the fact that a failure to assure effective means of enforcement of the rights of foreign nationals or companies may also amount to a denial of justice does not mean that this delimits the extent of the treaty protection.[547]

6.53 Indeed, as Iran explained in its Memorial, as follows from the context of this provision alongside (but separate from) the obligation to accord fair and equitable treatment, the obligation to afford effective means of enforcement is not merely a restatement of the prohibition on denial of justice.[548] Investor-State arbitration tribunals have interpreted treaty provisions which require "effective means" as establishing "a distinct and potentially less demanding test, compared to denial of justice in customary

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545 *Ibid.*

546 U.S. Counter-Memorial, p. 115, para. 14.27.

547 *Ibid.*, p. 118, para. 14.31.

548 Iran's Memorial, p. 95, para. 5.41.

international law", which "requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case".[549]

6.54 The United States contends that the effective means of enforcement provision is "intended to encapsulate many of the procedural elements" of denial of justice which it understands as a requirement of freedom of access to court, which however is specifically protected under Article III(2).[550]

6.55 Although the United States suggests that the drafters placed particular importance on this provision as a "component of the denial of justice obligation", it has put forward no *travaux* confirming its position.[551] Nor is the United States assisted by the materials which, it says, show that the "obligation to provide 'effective means' for enforcement of contractual rights has […] been historically considered a component of the customary international law protection against denial of justice".[552]

a. The views of the 1926 Committee of Experts for the Progressive Codification of International Law concerned the scope of the different obligation to provide foreign nationals with "the necessary means for defending their rights". The same point applies with respect to the United Kingdom's proposed definition of denial of justice as including circumstances where a foreign national "is not afforded in the courts a

549 See e.g. *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, paras. 11.3.2 – 11.3.3 citing *Chevron I*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010. The provision at issue in these cases required that "each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements and investment authorisations". Although there is a competing line of cases, these appear less convincing as they fail to give full effect to this discrete provision, i.e. in circumstances where there is already a separate prohibition of denial of justice.

550 U.S. Counter-Memorial, pp. 115-117, paras. 14.28-14.29.

551 U.S. Counter-Memorial, p. 115, para. 14.27. Vandevelde, a commentator relied on by the U.S. elsewhere, states that the provision "reflect[s] the greater concern at the time about the adequacy of the courts" but he does not link it with either the international minimum standard or the concept of a denial of justice. See K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (2017), p. 500.

552 U.S. Counter-Memorial, p. 116, para. 14.29.

reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals".[553]

b. The 1929 Harvard Law School draft codification (which was superseded by the 1961 Harvard Law School Draft Convention referred to in Iran's Memorial[554]) does not support the United States' position that an obligation to afford "effective means of redress for injuries" was simply a component of the obligation not to deny justice. To the contrary, the 1929 draft articles addressed these two obligations in separate provisions (draft articles 5 and 9 respectively).[555]

SECTION 2.
THE BREACHES OF ARTICLE IV(1) BY THE UNITED STATES

6.56 There have been breaches by the United States of all three of the protections contained within Article IV(1).

A. Breaches of the fair and equitable treatment provision in Article IV(1)

6.57 The United States has left large parts of Iran's case on fair and equitable treatment unanswered. It has elected to deal with the case with respect to denial of justice only (although the U.S. denial of justice is in any event sufficient to, and does establish, a breach of Article IV(1)).

6.58 It follows that, save so far as concerns its misconceived arguments on interpretation, the United States has no response to the case advanced in Iran's Memorial that the U.S. measures breach the fair and equitable treatment standard in Article IV(1) because they

553 *Ibid.*

554 See Iran's Memorial, p. 91, para. 5.32.

555 U.S. CM, Annex 169.

are (a) arbitrary, grossly unjust, unfair or idiosyncratic,[556] (b) discriminatory,[557] or (c) involve a lack of due process leading to an outcome which offends judicial propriety (other than conduct which would support a complaint of a denial of justice). Any such response could, and should, have been made in the U.S. Counter-Memorial. Iran reserves its rights to respond to the United States should it later seek to rebut Iran's other claims under Article IV(1).

6.59 In this section, Iran replies to the United States' limited response to its claims under the fair and equitable treatment standard in Article IV(1) with respect to denial of justice.

6.60 In its Memorial, Iran explained that the legislative, executive and judicial acts at issue in this case involve a lack of due process leading to an outcome which offends judicial propriety and/or have resulted in a denial of justice so far as concerns Iranian companies.[558] Three aspects of Iran's claim for denial of justice are unrelated to the issue of customary international law State immunity, and are therefore unaffected by the Court's Judgment on Preliminary Objections:

a. The first aspect of Iran's claim for denial of justice is that multiple Iranian companies and their enterprises have been or are being denied the right to raise a defence based on respect for their separate juridical status, as well as the right to be afforded that defence if the conditions which would otherwise apply under U.S. law are made out.

b. The second aspect of Iran's claim is that the property of multiple Iranian companies and their enterprises has been subjected to enforcement proceedings and execution to satisfy liability judgments rendered by the U.S. courts against the Iranian State for its (purportedly) wrongful acts in proceedings to which those companies were not even parties and in relation to which no allegations or (purported) findings were made against them. The

556 See Iran's Memorial, pp. 90-91, paras. 5.29-5.30. Cf. U.S. Counter-Memorial, p. 112, para. 14.18.

557 See Iran's Memorial, p. 91, para. 5.31. Cf. U.S. Counter-Memorial, p. 112, para. 14.18.

558 Iran's Memorial, p. 98, para. 5.46.

United States does not dispute this. It characterises the effect of the U.S. measures as follows:

> "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".[559]

c. The third aspect of Iran's claim is that multiple Iranian companies and their enterprises have been or are being denied the rights of defence through legislation having retroactive effect, and the removal of the ability to rely on defences (whether under U.S. law or international law) and on elementary legal principles such as *res judicata*, limitation of actions and collateral estoppel.

i. Denial of rights of the defence of separate juridical status and subjection of Iranian companies to enforcement action in respect of the (purported) liability of the Iranian State

6.61 In response to the first and second aspects of Iran's claim for denial of justice, the United States makes six points. Since the United States addresses these two aspects together, Iran will follow the same structure for convenience.

6.62 First, the United States contends that "none of the portions of the statutes Iran invokes dealing with sovereign immunity [as a matter of international law] may serve as a ground for any alleged breach of Article IV(1) or (2)".[560] This overstates the effect of the Court's Judgment on Preliminary Objections.[561] To the extent that the relevant provisions also abrogate respect for the separate juridical status of Iranian companies or specifically remove defences which would otherwise be available to Iranian companies, they continue to form part of Iran's claims that fall within the Court's jurisdiction.

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559 U.S. Counter-Memorial, p. 122, para. 14.40.

560 U.S. Counter-Memorial, p. 122, para. 14.39.

561 *Ibid.*

6.63 Second, the United States contends that Iran has not shown that any of the proceedings at issue amounted to an obstruction of access to courts. This is a restatement of the United States' incorrect interpretation of Article III(2) (see paras. 5.5-5.27 above). The same applies to the related assertion that Iran has not shown "a failure to provide those guarantees which are generally considered indispensable to the proper administration of justice; or […] a manifestly unjust judgment".[562] As with respect to what is required for freedom of access to courts, the United States contends that all that matters is that "Iran hired U.S. counsel and made arguments carefully considered by the courts, as reflected in their decisions".[563] There are two obvious problems with this line of argument:

a. First, the United States is wrong to suggest that *Iran* participated in the proceedings against the relevant Iranian companies, which have separate juridical status from the Iranian State.

b. Second, the United States ignores the fact that the U.S. measures have specifically abrogated by legislative or executive fiat defences/arguments which would otherwise have been available to the relevant Iranian companies, and that the U.S. courts have implemented those measures.

6.64 Third, the United States seeks to characterise Iran's claim as "broad brush arguments, without regard to the facts of specific cases".[564] This is no answer. The way that Iran has put its claim is a reflection of the broad-brush approach that is inherent in the U.S. measures, since these disregard the separate juridical status of Iranian companies and treat their property as available for enforcement to satisfy liability judgments entered against the Iranian State. The specific cases establish specific instances of breach, but the detailed facts of a given case may be of little relevance.

6.65 The key factual point is that liability judgments entered against Iran have been and are being enforced against the property of Iranian companies notwithstanding the absence

562 *Ibid.*, p. 122, para. 14.40.

563 U.S. Counter-Memorial, p. 122, para. 14.41.

564 *Ibid.*

of any allegations or findings of the liability of those companies with respect to the acts at issue in the liability judgments. For example:

a. No allegations or (purported) findings of wrongdoing were made against Bank Markazi in connection with the 1983 bombing of the U.S. marine barracks in Beirut that was the subject of the underlying liability judgment against Iran which was enforced against Bank Markazi's property in the *Peterson* litigation.

b. No allegations or (purported) findings of wrongdoing were made against Bank Melli in connection with the bombing of a bus by Hamas that was the subject of the underlying liability judgment against Iran which was enforced against Bank Melli's property in the *Weinstein* enforcement proceedings.[565]

c. No allegations or (purported) findings of wrongdoing were made against Bank Melli in connection with the acts that were the subject of the underlying liability judgments against Iran (in the *Bennett*, *Acosta*, *Heiser* and *Greenbaum* cases), which were enforced against the contractual debt of USD 17.6 million owed to Bank Melli by Visa and Franklin in the *Bennett* enforcement proceedings.[566]

d. No allegations or (purported) findings of wrongdoing were made against Bank Melli in connection with the kidnapping and mistreatment of a journalist in Beirut that was the subject of the underlying liability judgment/judgments against Iran which were enforced against Bank Melli's property in the *Levin* enforcement proceedings.[567]

e. No allegations of (purported) findings of wrongdoing were made in connection with the 1996 bombing of the Khobar Towers in Saudi Arabia that was the subject of the underlying liability judgment against Iran which

565 See para. 2.68 above.

566 See para. 2.70 above.

567 See para. 2.79 above.

was enforced in the various *Heiser* proceedings against the property of (a) TIC in 2011, (b) Bank Melli, the Iranian Marine & Industrial Company, Iran Air or NIOC in 2016, (c) Bank Sepah, Iranohind Shipping Company, IRISL, Export Development Bank of Iran and Bank Melli in 2013, (d) Bank Saderat, the Export Development Bank of Iran, Behran Oil Company, Bank Melli and Siba Bank Melli in 2013.[568]

6.66 The exception concerns liability judgments rendered by the U.S. courts in the *Havlish v. Bin Laden et al.* and *Hoglan*, *Burnett* and *Ryan* litigation against Bank Markazi, NIOC, NITC, NPC, NIGC and Iran Air, purporting to find (on the basis of four affidavits from disaffected former Iranian officials, a journalist and a consultant for the U.S. authorities) that those Iranian companies were agencies or instrumentalities of Iran and that (other than NITC) they were used to facilitate terrorism financing generally, such that they could somehow be held specifically liable for supposedly providing material support in connection with the terrorist acts of 11 September 2001.[569] The court's purported finding that "Plaintiffs have demonstrated several reasonable connections between the material support provided by [the Iranian companies] and the 9/11 attacks" and that "the 9/11 attacks were caused by Defendants' provision of material support to al Qaeda" was untenable and absurd.[570] Indeed, during a hearing before the Committee on Foreign Affairs of the U.S. Congress on 19 June 2019, the U.S. Special Representative for Iran testified that Iran was not responsible for the terrorist acts of 11 September 2001:

> "**Mr. Sherman.** Do you take the--did the Islamic Republic bomb us on 9/11?
>
> **Mr. Hook.** Did the Islamic Republic bomb us on 9/11?
>
> **Mr. Sherman.** Did the Islamic Republic and one of the entities responsible for the deaths on 9/11 [sic]?
>
> **Mr. Hook.** No."[571]

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568 See para. 2.111 above.

569 See paras. 2.41-2.58 above.

570 *Havlish, et al. v. Bin Laden, et al.*, U.S. District Court, Southern District of New York, 22 December 2011, No. 03 MD 1570 (S.D.N.Y 2011), p. 52, para. 31 (IM, Annex 52). See further para. 2.42 above.

571 Oversight of the Trump Administration's Iran Policy', Hearing before the Subcommittee on the Middle East, North Africa, and International Terrorism of the Committee on Foreign Affairs, House of Representatives, One Hundred and Sixteenth Congress, First Session, 19 June 2019, Serial No. 116-48 (IR, Annex 6).

6.67 Further, while the United States seeks to emphasise the facts of the *Rubin* case as being of special relevance, those proceedings are not part of (and, indeed, are not mentioned in the Memorial in connection with) Iran's claim under Article IV(1).[572] Whereas Article IV(1) concerns protections which must be afforded to Iranian nationals and companies and their property, the United States contends: "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".[573] The property at issue was the cultural property of the Iranian State, and no question of the rights to be afforded to Iranian companies arose.

6.68 Fifth, the United States seeks to rely on the absence of any decided case directly on point, i.e. to the effect that the U.S. measures constitute a denial of justice.[574] Thus, it is said that "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".[575] The absence of direct authority, however, merely highlights the extreme nature of the U.S. measures and the absence of any comparable practice by other States.

6.69 As to the U.S. courts, these have rejected any reliance on Article IV(1) (as well as any other provision of the Treaty of Amity and any other laws requiring fundamental due process) on the basis that the executive and legislative U.S. acts trump any conflicting laws (see further para. 2.67 above).

6.70 Sixth, the United States contends that "the corporate form is not inviolable" and invokes the doctrine of the lifting of the corporate veil as it was articulated by the Court

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572 The United States seeks to rely on the inclusion of the *Rubin* case in Attachment 2 to Iran's Memorial, which contains a table of enforcement cases decided or pending (at that time) before the U.S. courts. However, Iran's Memorial does not refer to Attachment 2 with respect to its claims under Article IV(1) of the Treaty of Amity.

573 U.S. Counter-Memorial, p. 123, para. 14.41.

574 See U.S. Counter-Memorial, p. 123, para. 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".

575 *Ibid.*, p. 126, para. 14.50.

in *Barcelona Traction*, relying on the following passage of the Court's Judgment in that case:

> "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 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*."[576]

6.71 There is no basis in the Treaty for the proposition that the requirement of respect for separate juridical status may be bypassed or ignored.[577] But, in any event, following the Court's logic in *Barcelona Traction*, the requirement of respect for the separate juridical status of companies is derived from a general principle of international law as identified by reference to the major legal systems of the world. Similarly, in relation to the doctrine of lifting the corporate veil, the Court referred to: "The wealth of practice already accumulated on the subject in municipal law". Thus, even accepting that a principle of lifting the corporate veil may apply in certain exceptional cases, the United States would still have to show that the circumstances it now seeks to rely on as justifying lifting the corporate veil reflect (at the very least) an established general principle of international law under Article 38(1)(c) of the Court's Statute.[578] Yet, the United States has made no such showing. Instead, it relies on the views of a single academic commentator, whose writing does not purport to engage with the facts of the present case and takes matters no further than the vague articulations of the doctrine under U.S. law.[579] The United States approach also stands in marked contrast to its (misconceived) insistence on Iran satisfying the strict requirements for emergence of a rule of customary international law (see para. 6.24 above).

6.72 Further, none of the circumstances identified in the passage from *Barcelona Traction* quoted above are relevant in the present case. None of the relevant Iranian companies

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576 *Barcelona Traction, Light And Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 39, para. 56 (emphasis added).

577 See above at paras. 4.5-4.10.

578 See above at para. 4.28.

579 See U.S. Counter-Memorial, p. 124, para. 14.44 citing A. Badia, *Piercing the Veil of State Enterprises in International Arbitration* (2014), at 55-59 (U.S. CM, Annex 186).

were even parties to the liability proceedings which were enforced against their property, and in relation to which no allegations or (purported) findings were made against them.[580]

6.73 The United States' position is that the separate juridical status of the Iranian companies should be disregarded because their shareholder (i.e. the Iranian State) is alleged to have supported terrorism. The U.S. measures were not adopted on the basis of an allegation or (purported) finding that Iran has committed such acts through a misuse of the corporate form of, for example, Bank Markazi, or that it has somehow relied on its separate juridical status to evade liability. Indeed, the U.S. courts have entered liability judgments against Iran, and the express purpose of the U.S. measures at issue in this case is to facilitate recovery of any compensation by the plaintiffs in those cases.

6.74 Indeed, if, consistent with *Barcelona Traction*, the basis for the U.S. measures were allegations or (purported) findings that Iran has misused the corporate form of its companies to perpetrate injustice or to evade liability, there would have been no need for the United States specifically to abrogate the *Bancec* presumption of separateness and permit attachment against the property of instrumentalities of Iran through Section 1610(g) of the FSIA and Section 201 of the TRIA. The presumption does not apply where the sovereign is found to have abused the corporate form to work a "fraud or injustice."

6.75 According to the United States, the U.S. measures "sought to ensure that victims of terrorism were not unduly prejudiced in their efforts to obtain and enforce valid court judgments against terrorist actors, including state sponsors of terrorism".[581] Thus, it is said that "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

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580 See further above at paras. 2.68 (regarding the enforcement of the liability judgment in the *Weinstein* proceedings against the property of Bank Melli), 2.70 (regarding the enforcement of the liability judgment in the *Bennett* proceedings against the property of Bank Melli), 2.79 (regarding the enforcement of the liability judgment in the *Levin* proceedings against the property of Bank Melli), 2.85 (regarding the *Peterson I* proceedings), 2.111 (regarding the enforcement of the liability judgment in the *Heiser* proceedings against the property of TIC), and 2.119 (regarding the enforcement of the liability judgment in the *Heiser* proceedings against the property of various Iranian companies) above.

581 U.S. Counter-Memorial, pp. 45-46, para. 6.10.

to seek justice and compensation against terrorism actors and their state sponsors".[582] The measures are also said to be justified and reasonable because Iran "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".[583]

6.76 The United States has failed to show that lifting the corporate veil for this reason – i.e. in order to obtain what it characterises as "justice" pursuant to a hostile foreign policy against Iran – is an established basis for the application of the doctrine in any other country, let alone as a general principle of international law. Instead, relying on a conclusory passage from one of its own court judgments, the United States merely asserts that:

> "it was both reasonable and justified […] 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".[584]

6.77 Yet, the existence of the doctrine of lifting the corporate veil under international law, and its applicability to the facts of the present case, are not self-judging questions which can be answered by reference to U.S. law. These are questions for the Court, applying international law.

ii. Legislative interference in judicial proceedings and denial of rights of defence, including with retrospective effect

6.78 In response to the legislative interference in judicial proceedings, and the specific removal of rights of defence available to Iranian companies, including with retroactive effect,[585] the United States makes two points.

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582 *Ibid*., p. 42, para. 6.2. See also p. 124, para. 14.45: "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'".

583 *Ibid.*, p. 124, para. 14.45.

584 *Ibid*., citing *In re Cambridge Biotech Corp.*, 186 F.3d at 1376 (U.S. CM, Annex 187).

585 With respect to the retroactive effect of the U.S. legislative measures and its implementation by the U.S. courts see paras. 2.60, 2.61, 2.63 and 2.104 above.

6.79 First, the United States, again, contends that this ground falls outside the Court's jurisdiction as a result of its Judgment on Preliminary Objections.[586] This is apparently because the defences which were specifically abrogated by the U.S. measures with retroactive effect – *res judicata*, limitation of actions, and collateral estoppel – "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".[587] Yet the fact that, as a matter of the organisation of internal law, the United States treats the relevant domestic proceedings as related to Section 1605A of the FSIA is irrelevant. Indeed, this is merely to point to the legislative mechanism by which the United States has permitted the enforcement of liability judgments entered against Iran against the property of separate Iranian companies. The abrogation of these defences with retroactive effect is a question separate from and additional to the abrogation of immunity.

6.80 Second, the United States suggests that Iran is required to establish that "a State is obligated under customary international law to provide these three defences". This is incorrect and fails to engage with Iran's case. Iran's complaint is not that U.S. law never provided for these three defences, but that it formerly did so, and that the rights of the relevant Iranian companies to rely on them were specifically abrogated by targeted legislative measures.

6.81 Third, the United States contends that "merely because a measure has retroactive application does not make the measure a denial of justice".[588] This general observation is of no assistance to the United States. As to the general position, it is noticeable that the United States has not engaged with Professor Paulsson's conclusion that: "It is not difficult to see that the retroactive application of laws by judges must be characterised as a denial of justice if the courts thereby make themselves the tools of 'targeted legislation'."[589] In any event, however, the Court is concerned only with the adoption

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586 U.S. Counter-Memorial, p. 125, para. 14.46.

587 *Ibid*.

588 *Ibid*., p. 125, para. 14.47.

589 See Iran's Memorial, pp. 92-93, para. 5.35 citing J. Paulsson, *Denial of Justice in International Law* (Cambridge: C.U.P., 2005), at p. 199, internal cross-reference omitted.

of the particular retroactive U.S. measures in the specific circumstances of the present case, and these amount to a denial of justice for the reasons explained in Iran's Memorial.[590]

a. The provisions of Section 502 of the ITRSHRA (as codified in Section 8772 of Title 22 of the U.S. Code) specifically abrogate, for the purpose of then ongoing *Peterson I* proceedings, the immunity from enforcement under U.S. law to which Bank Markazi would have otherwise been entitled (and which it had invoked) in respect of its property applied retroactively. The U.S. courts implemented this measure by allowing enforcement actions against the property of Bank Markazi at issue in the *Peterson I* proceedings.[591]

b. In the same way, the U.S. measures culminating in Section 1226 of the NDAA 2020 specifically abrogate Bank Markazi's same rights with respect to its property which is the subject of the *Peterson II* proceedings, and the U.S. courts have implemented this measure by entertaining enforcement actions (see Chapter II above).[592] It is noted that Section 1226 NDAA goes even further than Section 502 ITRSHRA since it allows the U.S. courts to make "an order directing that the asset [i.e. Bank Markazi's property] be brought to the State in which the court is located and subsequently to execution or attachment in aid of execution, […] without regard to concerns relating to international comity".

590 Iran's Memorial, p. 98, para. 5.46(d).

591 See *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013) (IM, Annex 58), *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014) (IM, Annex 62), *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) (IM, Annex 66) and *Peterson, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 6 June 2016, No. 10 Civ. 4518 (S.D.N.Y. 2016) (IM, Annex 68).

592 See *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. District Court for the Southern District of New York, Opinion and Order, 20 February 2015, No. 13-cv-9195-KBF (IR, Annex 50), *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. Court of Appeals for the Second Circuit, Opinion and Order, 21 November 2017, Case 15-0690 (IR, Annex 58) and *Peterson, et al. v. Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, U.S. Court of Appeals for the Second Circuit, Opinion, 22 June 2020, Case 15-0690 (IR, Annex 88); see above paras. 2.97-2.108.

c. Similarly, enforcement actions were allowed against the property of Bank Melli.[593]

6.82 The United States relies on the Judgment of the ECtHR in *National & Provincial Building Society et al. v. United Kingdom*, but this supports Iran's position. In that very different case, the ECtHR held that the U.K. authorities enactment of retrospective tax legislation to cover an unintended temporal gap in the scope of application between successive legislation – arising as a result of a technical deficiency in regulations – did not entail a denial of access to court in breach of the right to a fair trial under Article 6(1) of the ECHR. This was not a case arising from targeted measures against the applicants (let alone on the basis of their nationality or ownership/control by a particular state), and that this case is in no way analogous to treatment of Iranian companies such as Bank Markazi under the U.S. measures.

6.83 Moreover, as noted in Chapter V above, as a general statement of principle, the ECtHR considered that reasons adduced by a State to justify retrospective legislation that has the effect of influencing pending judicial proceedings must be "treated with the greatest possible degree of circumspection".[594] On the specific facts of the case before it, however, the ECtHR concluded that:

> "the decision of the authorities to legislate with retrospective effect to remedy the defect in the 1968 Regulations was taken *without regard to the pending legal proceedings and with the ultimate aim of restoring Parliament's original intention with respect to all building societies* whose accounting periods ended in advance of the start of the fiscal year. That the extinction of the restitution proceedings was a significant consequence of the implementation of that aim cannot be denied. *Nevertheless, it cannot be maintained that the [applicant banks] were the particular targets of the authorities' decision*".[595]

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593 See *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, Eastern District of New York, 20 December 2012, No. 12 Civ. 3445, (E.D.N.Y. 2012) (IM, Annex 54), and *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, Order and Opinion, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016) (IM, Annex 64).

594 See *National & Provincial Building Society, et al. v. United Kingdom*, para. 112. This has been reiterated in subsequent cases not involving litigation against the State itself. See, *e.g., Ducret v. France*, Application No. 40191/02, Judgment (12 June 2007), paras. 33-42.

595 *National & Provincial Building Society, et al. v. United Kingdom*, para. 110 (emphasis added). See also at paras. 81-82.

6.84 Further, the ECtHR found that the applicants were aware of Parliament's original intention, that the pending litigation was "in reality […] a deliberate strategy to frustrate the original intention of Parliament" by securing a windfall and that the applicants "could not safely rely on the Treasury remaining inactive in the face of a further challenge to Parliament's original intention, the more so since that challenge was directed at the validity of the Treasury Orders which formed the legal basis for the very substantial amounts of revenue collected from 1986 onwards not just from building societies but also from banks and other deposit institutions".[596] There is no suggestion in the present case that the U.S. measures have been imposed in an effort to prevent the Iranian companies from obtaining a windfall. Rather, they are designed to effect punishment against Iran and secure the recovery of compensation by U.S. plaintiffs.

6.85 The ECtHR also took into account the fact that: "The judicial review proceedings launched by the applicant societies had not even reached the stage of an inter partes hearing" at the time of enactment of the retrospective legislation.[597] By contrast, the U.S. measures targeting Iranian companies (including State-owned companies) were adopted long after the relevant enforcement proceedings were initiated:

a. The U.S. measures targeting Bank Markazi were imposed in *Peterson I* (via E.O. 13599 and Section 502 ITRSHRA 2012) while the enforcement proceedings were ongoing and some four years after the plaintiffs had obtained restraint orders from the U.S. courts in 2008.[598]

b. In *Peterson II* measures were imposed (culminating in the NDAA 2020) while the case was pending before the U.S. Supreme Court, around seven years after

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596 *National & Provincial Building Society, et al. v. United Kingdom*, para. 111. See also para. 112: "It must also be observed that the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the decisive stance taken when enacting [the legislation]. They had engaged the will of the authorities in the tax sector, an area where recourse to retrospective legislation is not confined to the United Kingdom."

597 *National & Provincial Building Society, et al. v. United Kingdom*, para. 112. Further, the Court noted that the tax sector is one where "recourse to retrospective legislation is not confined to the United Kingdom". By contrast, the United States has not put forward any evidence that the U.S. measures are similar to those adopted by any other State.

598 See Iran's Memorial, para. 2.58. See also para. 2.96 above.

the enforcement proceedings were initiated in 2013[599] and around two years after the Court of Appeals held that the bond proceeds could not be attached under the FSIA because they were outside the territory of the United States.[600]

B. Breach of the protection against unreasonable or discriminatory measures in Article IV(1) by the United States

6.86 As explained in Iran's Memorial, there has been a series of legislative and executive acts of the United States – implemented by the U.S. courts – that have singled out, and continue to single out, Iranian companies in order to deny them generally available and elementary defences, including with respect to the recognition of separate juridical personality.[601]

6.87 The United States' sole response to Iran's claim that the measures are unreasonable is to say that "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 judgment or otherwise compensate its victims".[602] Since this is the policy which was actually relied on at the time and which underpins the U.S. measures, the questions are whether this was a rational policy and, if so, whether the U.S. measures were reasonably connected to that policy.[603]

6.88 The United States' argument fails under both limbs.

6.89 As to the existence of a rational policy, the United States assumes the veracity of its grave allegations against Iran – and, in the case of the alleged liability of certain Iranian companies (which the U.S. courts have assimilated with the State of Iran) with respect

599 See para. 2.107 above.

600 See para. 2.104 above.

601 Iran's Memorial, p. 99, para. 5.48.

602 U.S. Counter-Memorial, p. 127, para. 14.53.

603 See e.g. *Electrabel S.A. v. Republic of Hungary*, I.C.S.I.D. Case No. ARB/07/1-9, Award, 25 November 2015, para. 179. See further para. 6.31 above.

to the terrorist acts of 11 September 2001[604] – on the basis of the judgments of its own courts (which are strictly denied), applying an expansive concept of "material support" (as mandated by U.S. legislation) which is not reflected in a rule of international law.[605] The U.S. measures are not justified by a rational policy since they are underpinned by a unilateral and political designation of Iran as a so-called "State sponsor of terror".

6.90 More generally, the United States' continued assertion that the affected Iranian companies whose property has been or is being seized are "agencies or instrumentalities" of the Iranian State likewise relies on the United States' characterisation which disregards the *Bancec* factors which would otherwise have applied under U.S. law.

6.91 As to the second limb, there is anyway no reasonable connection between the policy and the U.S. measures. Importantly, it is not the United States' case that the U.S. measures are reasonable because the relevant Iranian companies were alleged or found to be involved in the (purported) wrongdoing which led to the liability judgments against Iran.

a. In its Counter-Memorial, the United States seeks to emphasise its allegations – unconnected to any of the above proceedings with which this case is concerned – that certain Iranian financial institutions (including Bank Markazi, Bank Melli, Bank Sepah and Bank Saderat) are involved in what it calls Iran's "deceptive banking practices".[606] Further, the United States appears to attempt to use this to draw a link between the "assets at issue in the *Peterson* litigation, and Iran's deceptive financial conduct, including conduct involving assets in the *Peterson* litigation".

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604 See paras. 2.41-2.54 above.

605 For the purpose of the relevant U.S. measures, "material support" is defined in 18 USC §§ 2339A(b)(1): "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." See also Iran's Memorial, p. 18, para. 2.7, note 40.

606 U.S. Counter-Memorial, pp. 81-85, paras. 11.10-11.17.

b. However, the allegations against these Iranian companies are advanced specifically in the context of the United States' response on Executive Order 13599. The United States has not stated that they were relied on with respect to the other U.S. measures at issue in this case.

6.92 The United States also denies that it has singled out the Iranian companies at issue in the present case, relying on its designation of certain other States as so-called "State sponsors of terrorism".[607]

6.93 Even if the United States were correct that its measures did not single out Iranian companies (which is denied: see paras. 6.95-6.96 below), it would be of no assistance to the United States in establishing either the existence of a rational policy (in light of the unilateral and political nature of the designation and the excessively broad notion of "material support") or a reasonable connection between such a policy and the U.S. measures at issue in this case (given the absence of any allegation or finding at the time the measures were adopted of any involvement on the part of the relevant Iranian companies in the purported wrongdoing of Iran which was the subject of the liability judgments).

6.94 Further, U.S. measures and their implementation against the relevant Iranian companies are not equivalent to the treatment of the companies of other States. In particular, the United States accepts (as it must) that there is no equivalent example of legislative interference in pending judicial proceedings as in the Peterson case with respect to the property of Bank Markazi which, on any view, was plainly singled out through Section 502 ITRSHRA.[608]

a. The attempt to downplay the significance of Section 502 as "one element of the overall legal regime" is irrelevant.

b. The same applies to the contention that "the circumstances that led to this statute involved questions of New York law that were unique to assets at issue

607 *Ibid.*, p. 127, para. 14.53 and p. 128, paras. 14.54-14.55.

608 *Ibid*., pp. 128-129, para. 14.56.

in the *Peterson* litigation". More accurately, the statute targeted Bank Markazi and interfered with pending litigation against it so as to remove certain defences which would have otherwise been available under New York law.

6.95 As for discrimination, at the level of the specific U.S. measures, Iran and its companies have been singled out for uniquely unfavourable treatment. In particular, there is no parallel, with respect to the companies of other so-called State sponsors of terror, to Section 502 ITRSHRA or Section 1226 which specifically targeted the property of Bank Markazi which was/is the subject of ongoing enforcement proceedings in *Peterson I* and in *Peterson II* and ensured that Bank Markazi lost those proceedings.

6.96 More generally, with respect to the U.S. measures which specifically abrogated the *Bancec* presumption of separateness, the U.S. court has referred to this as part of "The Never-Ending Struggle to Enforce Judgments Against Iran".[609]

C. Breach of the obligation to assure effective means of enforcement for lawful contractual rights of Iranian companies in Article IV(1) by the United States

6.97 The United States has also breached the obligation to assure effective means of enforcement for lawful contractual rights of Iranian companies under Article IV(1) of the 1955 Treaty. It has failed to provide a proper system of laws and institutions (including a judiciary) that assures effective means of enforcement of such rights in cases in which liability judgments entered against Iran have been enforced against the property of Iranian companies who were not alleged or found to have been involved in the acts giving rise to liability.

6.98 As Iran has explained, the U.S. measures rendered illusory the lawful contractual rights of (a) Bank Melli to receive monies owed pursuant to agreements it had concluded with Visa, Franklin and Mastercard concerning the use of credit cards in Iran, and

609 *In re Islamic Republic of Iran Terrorism Litigation*., 659 F. Supp. 2d 31, 45- 46, 49 (D.D.C. 2009) (IM, Annex 44). See also the legislative history of the NDAA 2008 as recorded in 154 Cong. Rec. 499 (22 January 2008), at p. 501: "I also want to make special mention of the inspiration for this new legislation. […] Congress's support of my provision will now empower those victims to pursue Iranian assets to obtain this just compensation for their suffering. This is true justice through American rule of law".

(b) TIC to receive monies owed by Sprint Communications Company LP pursuant to their bilateral telecommunications carrier relationship.

6.99 The United States has made no attempt either to rebut the claim that these contractual rights were vested in those Iranian companies or to suggest that those companies somehow did not comply with U.S. law.

6.100 It is no answer for the United States to say that the protection under the third element of Article IV(1) applies only where Iranian companies have sought to enforce their contractual rights before the U.S. courts. Further, Bank Melli did appear before the U.S. court to contest the seizure of its property (i.e. to enforce its lawful contractual rights) in the *Bennett* and *Weinstein* proceedings but this effort was futile as a result of the U.S. measures. In these circumstances, since the U.S. courts had established the position they would adopt, it would have been equally futile for the TIC to appear in an attempt to enforce its lawful contractual rights.

CHAPTER VII.
THE BREACHES OF ARTICLE IV(2) AND ARTICLE V(1) OF THE TREATY OF AMITY

SECTION 1.
BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT TO PROTECTION AND SECURITY FOR ITS COMPANIES AND NATIONALS UNDER ARTICLE IV(2)

A. Iran's entitlement to the most constant protection and security of the property and interests in property of its nationals and companies, in no case less than that required by international law

7.1 The United States is incorrect to suggest that the protection and security required to be afforded under Article IV(2) is limited to that available under the international minimum standard. Further, even if the protection and security obligation under the international minimum standard were to apply, this is not limited to "physical" protection of property.[610]

7.2 As in relation to Article IV(2), the United States has elected not to engage with the ordinary meaning of the language of the first sentence as explained in Iran's Memorial. It offers no response to the basic point that the text expressly requires the "most constant protection and security" without any qualification, and that the level of protection "required by international law" operates as a "floor".[611] If the Treaty Parties had agreed to limit the obligation to "physical" interferences, they could have expressly included words to that effect.[612] By contrast, however, they expressly

610 See further T. Weiler, *The Interpretation of International Investment Law* (Nijhoff 2013), pp. 129-182.

611 Iran's Memorial, p. 101, para. 5.56.

612 See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.15.

extended the protection to "interests in property", i.e. intangible property which cannot be subjected to physical interference.[613] This should be an end to the argument.

7.3 Rather than purporting to apply the rules of interpretation in the Vienna Convention, the United States instead bases its position on an argument regarding what "protection and security" clauses in other treaties "have traditionally been understood" to mean.[614] At a very obvious level, this is to ignore the specific wording of Article IV(2) of the Treaty of Amity, including the express protection of intangible property. Further, it is anyway wrong to suggest that such clauses are limited to protection against physical harm. It is likewise wrong to suggest that *ELSI* provides no support for the contrary view, or that Iran seeks to transform the first sentence of Article IV(1) into a stabilisation clause.

7.4 First, the United States' claim that "protection and security" clauses have "traditionally" been understood to require States to provide protection against physical harm is supported by reference to certain investor-State arbitration awards issued between 2006 and 2010. These awards do not of course concern the Treaty of Amity and cannot have informed the Parties' agreement when the Treaty was concluded half a century earlier.[615] In any event, as is well-known, there are many recent investor-State arbitration cases which have reached the opposite conclusion.[616] The United States is also not assisted by citing various cases concerning physical attacks on

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613 See also *Siemens A.G. v. The Argentine Republic*, I.C.S.I.D. Case No. ARB/02/8, Award, 6 February 2007, para. 303: "As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than "physical" protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved". See too Moss, 'Full Protection and Security' in A. Reinisch (ed.), *Standards of Investment Protection* (O.U.P. 2008), pp.134-135, endorsing this approach.

614 U.S. Counter-Memorial, p. 131, para. 14.65.

615 See U.S. Counter-Memorial, p. 131, para. 14.65, note 450. Cf. U.S. attempt to criticise Iran's reliance on *Waste Management*.

616 See, *e.g.*, *Anglo American PLC v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB(AF)/14/1, (Tawil, Vinuesa, Derains) Award, 18 January 2019, para. 482; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, I.C.S.I.D. Case No. ARB/07/22, Award, 23 September 2010, para. 13.3.2; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 246 (U.S. CM, Annex 180).

property in which the question of whether the relevant protection and security provision encompassed legal security did not arise.[617]

7.5 Second, the United States claims that the *ELSI* case provides no support for Iran's interpretation because the Chamber rejected its claim that delay in ruling upon the lawfulness of the requisition of the plant amounted to a breach of the "most constant protection and security" provision in the 1948 Italy-United States FCN Treaty.[618] According to the United States: "The Court simply did not decide the interpretative issue that Iran has put before it here".[619] This is an incomplete and incorrect reading of the judgment, and an attempt to gloss over the case the United States put before the Chamber.

7.6 The United States now contends that both aspects of its claim for breach of the protection and security provision in *ELSI* "were rooted in an alleged failure to protect ELSI's physical assets, namely its plant and equipment". As the Chamber recorded, however, the United States specifically claimed that "the 'property' to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself".[620] This was specifically stated to include intangible property such as the shares in ELSI.[621] The Chamber concluded

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617 See U.S. Counter-Memorial, p. 132, para. 14.65 and note 451. Although the United States refers specifically to acts by "criminal actors" it appears to accept that the provision applies to the conduct of State actors.

618 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 66, para. 111, applying Article V(1) of the 1948 Italy-United States FCN Treaty. That provision may be seen as a less stringent standard than Article IV(2) of the Treaty of Amity in that the requirement is that: "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."

619 U.S. Counter-Memorial, p. 132, para. 14.66.

620 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 64, para. 106. Italy claimed that "property" was limited to immovable property.

621 See U.S. Reply, *I.C.J. Pleadings, Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, volume II, p. 391: "Articles V (1) and (2) speak of protection and security for […] 'property', not 'immovable property'. Property in its ordinary sense is not confined to immovable property, and when the Treaty intends to cover immovable property, such as in Article VII, it expressly says so. In this case, the property of Raytheon and Malchett in Italy was ELSI itself. The entire entity of ELSI – plant, equipment, receivables, inventories, goodwill, and other intangibles – was at stake when the requisition occurred. The Respondent was obligated to protect ELSI from the deleterious effects of the unlawful requisition. The failure to overturn the Mayor's order, and the failure to provide ELSI with any security from trespass, deprived Raytheon and Malchett of the security and protection for their investment to which they, as 100 per cent owners of ELSI, were entitled."

that it had jurisdiction over this claim,[622] and found that the word "property" in the protection and security provision included "the shares themselves".[623] It follows that the Chamber considered that the protection and security provision extended to intangible property.

7.7 The Court proceeded to adjudicate on the merits of the U.S. claim under Article V, which it considered required compliance with the minimum international standard as supplemented by the national treatment and most-favoured-nation treatment standards, and rejected it on the basis that:

> "It must be doubted whether in all the circumstances, the delay in the Prefect's ruling in this case can be regarded as falling below that standard. Certainly, the Applicant's use of so serious a charge as to call it a 'denial of procedural justice' might be thought exaggerated".[624]

7.8 Plainly, the Chamber would not have considered it necessary to rule on the merits of the U.S. claim if it had concluded that the provision did not cover legal protection and security of intangible property. Indeed, commentary the United States now relies on *ELSI* as support for the contrary proposition.[625]

7.9 The reasoning in *ELSI* applies with even greater force in the present case since, unlike Article V of the U.S.-Italy Treaty, Article V(1) of the Treaty of Amity expressly covers "interests in property" and refers to "international law" as a floor rather than a ceiling.

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622 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, pp. 41-42, paras. 48-49.

623 *Ibid.*, p. 64, para. 106: "While there may be doubts whether the word 'property' in Article V, paragraph 1, extends, in the case of shareholders, beyond the shares themselves, the Chamber will nevertheless examine the matter on the basis argued by the United States that the 'property' to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself".

624 *Ibid.*, p. 66, para. 111. The Chamber's reasoning in this passage indicates that it did not consider that the international minimum standard was limited to a protection against denial of justice.

625 Dolzer and Schreuer (U.S. CM, Annex 163). Notably, the United States has not included the relevant passages at pp. 163-164 in its annex. See also *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 264: "While the ICJ's Chamber rejected the argument on factual grounds, this decision indicates that "protection and security" is not restricted to physical protection but extends to legal protection through the domestic courts." See also para. 263: "Contrary to Respondent's assertions, it is apparent that the duty to protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights."

7.10 Third, contrary to the United States' contention, it is not Iran's position 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".[626] Rather, as the United States also recognises, Iran's case is that the provision prohibits "any executive or legislative measures *formulated specifically* to remove legal protections".[627] Thus, the United States' mischaracterisation of Iran's interpretation as amounting to a general stabilisation clause – "a guarantee that the legal framework applying to Iranian property must forever remain unchanged" – is unavailing.[628]

B. Breach by the USA of the first limb of Article IV(2)

7.11 The United States' response to Iran's claims under the first limb of Article IV(2) amounts to nothing more than a repetition of its flawed interpretation, i.e. the United States does nothing more than point to the absence of a case based on "physical invasion by criminal actors".[629] Iran reserves its right to respond should the United States later seek to rebut its claims.

626 U.S. Counter-Memorial, p. 134, para. 14.71.

627 U.S. Counter-Memorial, p. 134, para. 14.71 quoting Iran's Memorial, pp. 101-102, para. 5.57 (emphasis added).

628 U.S. Counter-Memorial, p. 134, para. 14.72.

629 See *ibid*., p. 135, paras. 14.74-14.76.

SECTION 2.

BREACH BY THE UNITED STATES OF THE PROHIBITION ON TAKING UNDER ARTICLE IV(2)

A. Iran's entitlement to freedom from expropriation of the property and interests in property of its companies and nationals, except for a public purpose and the payment of just compensation

7.12 The United States disagrees with two aspects of Iran's interpretation of the second sentence of Article IV(2).

7.13 First, the United States claims that Iran's position that "Article IV(2) requires some form of actual or substantial taking" mis-states the applicable test.[630] Iran, however, was simply referring to the ordinary meaning of the language (and in particular the word "taking") in its context.[631] It is correct that international tribunals have interpreted "expropriation" (which is synonymous with a "taking") to mean that the property holder has been "radically deprived of the economic use and enjoyment of its [property], as if the rights related there […] had ceased to exist".[632]

7.14 Second, as anticipated in Iran's Memorial,[633] the United States invokes the doctrine of "police powers" despite the fact that this is not mentioned in the provision and was also not referred to by the U.S. State Department when it was asked to explain the scope of taking provisions to the Senate.[634] Further, the United States has elected not

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630 U.S. Counter-Memorial, p. 138, para. 14.82.

631 See Iran's Memorial, p.105, paras. 5.63 and 5.65.

632 See U.S. Counter-Memorial, para. 14.82 citing *Glamis*, para. 357. Multiple tribunals have come to the same conclusion using similar language: see e.g. *Electrabel S.A. v. The Republic of Hungary*, I.C.S.I.D. Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 6.62 and the authorities citied therein.

633 Iran's Memorial, p. 107, para. 5.71.

634 See *Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcommittee of the Senate Committee On Foreign Relations*, 82nd Cong. 4 (1952) (Statement of Harold F. Linder, Deputy Assistant Secretary for Economic Affairs), p. 398 (U.S. CM, Annex 2). Nor is the point made in *Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the Senate Committee on Foreign Relations*, 84th Cong. (1956) (statement of Thorsten V. Kalijarvi, Department of State) (U.S. CM, Annex 1),

to engage with Iran's position that: "on any analysis, an exercise of 'police powers' must be non-discriminatory and designed and applied to achieve legitimate public welfare objectives, i.e. proportionate and not in violation of other applicable principles of international law".[635] Rather, the United States simply states that an exercise of "police powers' must be "a *bona fide*, non-discriminatory regulation".[636] It has not commented on the further requirements identified by Iran and has not attempted to show that these are satisfied on the facts of the present case.

7.15 Further, the United States' contention that it is "entitled to significant deference in determining what measures are necessary to serve its chosen purpose" is based on writings of Sohn and Baxter and Christie in the early 1960s[637] suggesting that what is a public purpose has been rarely discussed by international tribunals. Whilst this may have been accurate in the 1960s, it is not so now: international tribunals regularly engage in an assessment of the reasonableness and proportionality of state measures, including determination of the existence of a public purpose. There are two separate stages to the test to be applied:

a. The first question is whether there exists a legitimate policy aim. As to this, a State is entitled to a certain level of deference but the matter is still one which

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although the State Department was specifically asked to address the scope of the expropriation provision in the U.S.–Nicaragua FCN Treaty: see p. 21. Cf. U.S. Counter-Memorial, p. 156, para. 17.7 stating that if Iran's interpretation of Article X(1) were correct "the U.S. Senate's summary certainly would have mentioned the fact". Notably, the doctrine of "police powers" is also not mentioned in Wilson's explanation of the provisions of U.S. FCN treaties which protect property: see R. Wilson, *United States Commercial Treaties and International Law* (1960), chapter IV.

635 Iran's Memorial, p. 107, para. 5.71. Iran further explained that it considers that the element of proportionality is implicit, but notes that this is supported by various cases also: see e.g. *Corn Products International, Inc. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/04/1, Award, paras. 87-88, referring to *Fireman's Fund Insurance Company v. Mexico*, I.C.S.I.D. Case No. ARB(AF)/02/1, Award, para. 196. If further support were required, reference may be made to: *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 122; *Azurix Corp. v. The Argentine Republic (I)*, I.C.S.I.D. Case No. ARB/01/12, Award, 14 July 2006, paras. 311–312; *Burlington Resources Inc. v. Ecuador*, I.C.S.I.D. Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 504; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, I.C.S.I.D. Case No. ARB/06/11, Award, 5 October 2012, paras. 406–409; *Philip Morris v. Uruguay*, I.C.S.I.D. Case No. ARB/10/7, Award, 8 July 2016, at para. 305.

636 U.S. Counter-Memorial, p. 136, para. 14.78.

637 *Ibid.*, p. 136, para. 14.79.

is reviewable by the Court.[638] The passage that the United States quotes from *Brownlie's Principles of Public International Law* is of no assistance to it since this refers specifically to "taxation, trade restrictions such as quotas, revocation of licences for breach of regulations, or measures of devaluation", none of which are relevant here.[639]

b. The second question is whether the particular measures are reasonable and proportionate. This question is also reviewable by the Court and it is subject to a broad standard of review.[640] The measures must be suitable and necessary to achieve the legitimate policy aim (including the unavailability of alternative measures[641]), and Iranian nationals or companies must not be subjected to an undue burden. As the Court held in *Oil Platforms*, "whether a given measure is 'necessary' is 'not purely a question for the subjective judgment of the party […] and may thus be assessed by the Court".[642] This is equally true for the other elements of the proportionality analysis.

7.16 The United States also accuses Iran of trying to "erase any meaningful line between acts of the executive and legislative branches of government and acts of the judiciary".[643] In its Memorial, Iran explained that the acts of the U.S. courts which have given effect to legislative and executive acts of the United States, which are themselves expropriatory, are capable of constituting a taking in violation of Article IV(2). The United States, by contrast, asserts (without citing any authority) that "decisions of domestic courts acting in the role of neutral and independent arbiters

638 See e.g. *Philip Morris v. Uruguay*, paras. 302-304.

639 U.S. Counter-Memorial, p. 136, para. 14.78.

640 See e.g. *Philip Morris v. Uruguay*, paras. 305-306.

641 *Panel Report, Canada – Wheat Exports and Grain Imports*, para. 6.226; *Panel Report, EC – Trademarks and Geographical Indications (US)*, paras 7.458–7.460; *Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes*, para. 70.

642 *Oil Platforms (Islamic Republic of Iran v. United States of America*), *Judgment, I.C.J. Reports 2003*, p. 183, para. 43. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

643 U.S. Counter-Memorial, p. 138, para. 14.81.

of legal rights should be considered separately from legislative and executive branch actions" and that "[s]uch decisions do not give rise to a claim for expropriation".[644]

7.17 Yet the conduct of all State organs discharging judicial functions is automatically attributable to the State and, if those organs act in a manner which is contrary to international law (including the provisions of the Treaty), this will give rise to international responsibility on the part of the State. Many cases have rejected the current U.S. position and confirmed the existence of judicial expropriation.[645] For example, the tribunal in *Saipem v. Bangladesh* found that the conduct of the respondent State's domestic courts amounted to an unlawful expropriation in breach of the relevant BIT;[646] there was no additional requirement for the claimant to establish denial of justice or exhaustion of local remedies.[647]

B. Breach by the USA of the prohibition of takings under Article IV(2)

7.18 The United States contends that the legislative and executive measures at issue in this case are not expropriatory for five reasons, all of which are misconceived and should be rejected.

7.19 The United States' first reason is a repetition of its misconceived argument that Bank Markazi is not an Iranian "company" for the purposes of the Treaty.[648]

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644 *Ibid*. Where it considers that this advances its case, the United States in fact seeks to establish a link between the legislative and executive measures and the judicial decisions: see *ibid*., p. 142, para. 14.94.

645 See *Saipem v. Bangladesh*, I.C.S.I.D. Case No. ARB/05/7, Award, 30 June 2009, para. 129; *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, I.C.S.I.D. Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 118 ("The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State has expropriated it by decree"); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, I.C.S.I.D. Case No. ARB/13/1, Award, 22 August 2017, paras. 648-649; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, I.C.S.I.D. Case No. ARB/05/16, Award, 29 July 2008, para. 702-704; *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award, 29 July 2014, paras. 459-461.

646 *Saipem v. Bangladesh*, I.C.S.I.D. Case No. ARB/05/7, Award, 30 June 2009, para. 129.

647 *Saipem v. Bangladesh*, Award, para. 181.

648 U.S. Counter-Memorial, p. 140, para. 14.86.

7.20 The second reason put forward by the United States is that the measures are "directed at enforcing judicial judgments, thereby satisfying a debt owned by Iran", rather than "directed at the taking of the property of Iranian companies".[649] This is to seek to gloss over the obvious point that the measures expressly provide for this debt to be satisfied by enforcing and executing against the property of Iranian companies which the United States considers to be agencies or instrumentalities of Iran. In any event, the motive for a taking is not what matters under international law.

7.21 The United States' third reason is that the executive and legislative measures "standing alone" are incapable of constituting a taking because the fact that they enabled enforcement action in order to satisfy judgments entered against Iran "is far too contingent and tenuous to constitute an expropriation under international law"[650]. Yet, far from being a remote or indirect issue, the intended result of the U.S. measures is that the property of Iranian companies be taken, and the U.S. courts have implemented that will. Insofar as the Court considers that the executive and legislative measures are not themselves expropriatory, these form part of a series of acts the combined effect of which amounts to a taking.

7.22 The fourth reason the United States advances, with respect to Executive Order 13599, is that "blocking orders […] are not expropriatory, including because they are by nature temporary and do not themselves alter ownership of the blocked assets".[651] Expropriation is not limited, however, to situations of a change in ownership. Executive Order 13599 (as well other "blocking" measures such as TRIA) entails a taking because it "blocks" all property of the relevant Iranian companies located in the territory of the United States. The United States does not dispute that "blocked" assets may not be transferred, paid, exported, withdrawn or otherwise dealt with.[652] There measures are temporary only in the most technical sense that the United States *could* repeal them if it chose to do so. Both E.O. 13599 and Section 502 ITRSHRA were introduced in 2012 and have remained in force since (i.e. for around 8 years to

649 *Ibid.*, p. 140, para. 14.87.

650 *Ibid.*

651 U.S. Counter-Memorial, p. 141, para. 14.88.

652 See Iran's Memorial, p. 4, para. 1.12, footnote 9.

date). In these circumstances, the Iranian companies have been "radically deprived of the economic use and enjoyment of its [property], as if the rights related there […] had ceased to exist".[653]

7.23 The United States' fifth reason is its invocation of the police powers doctrine, characterising the U.S. legislative measures as having been enacted "to provide victims of terrorist acts with the ability to obtain redress from the sponsors of those acts, including Iran".[654] However, as already noted, the United States has made no serious attempt to establish a sound basis for invocation of police powers, even if such were applicable, and in particular has not shown that the legislative measures are reasonable and proportionate. As follows from the breach of Article IV(1), they are unreasonable (see paras. 6.86-6.94 above). Further, the measures are not suitable to achieve their stated aim since they wrongly conflate the relevant Iranian companies with the Iranian State, in disregard of their separate juridical status, and those companies are subjected to an undue burden, i.e. the measures are disproportionate. This is especially so as the Iranian companies were not even alleged to have been involved in the alleged wrongdoing of Iran which was the subject of the underlying liability judgments. Rather, the Iranian companies have been targeted on the sweeping basis that they are agencies or instrumentalities of Iran whose separate juridical status has been abrogated pursuant to the U.S. measures. The only exception concerns the purported, and absurd, liability findings against the Iranian companies in the proceedings concerning the terrorist acts of 11 September 2001.

7.24 Moreover, the United States also seeks to pass over in two short paragraphs its judicial measures implementing the executive and legislative measures by seizing the property of the Iranian companies and ultimately ordering its turning over to the various plaintiffs. The contention that the judicial measures cannot entail takings because the executive and legislative measures were taken in the exercise of police powers adds

653 See U.S. Counter-Memorial, p. 139, para. 14.82 citing *Glamis*, para. 357. Multiple tribunals have come to the same conclusion using similar language: see e.g. *Electrabel S.A. v. The Republic of Hungary*, I.C.S.I.D. Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 6.62 and the authorities citied therein.

654 U.S. Counter-Memorial, p. 141, para. 14.90.

nothing.[655] Likewise, the United States' submission that "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 [commensurate] reduction in Iran's liabilities" merely assumes the legitimacy of disregarding the separate juridical status of the relevant Iranian companies and conflating them with the Iranian State.[656] In any event, the United States points to no authority in support of its unorthodox approach of looking at the "overall impact".

SECTION 3.
BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT FOR ITS COMPANIES AND NATIONALS TO BE PERMITTED TO LEASE, ACQUIRE AND DISPOSE OF PROPERTY

7.25 The United States attempts to limit the scope Article V(1) in three ways, in both respects reading in restrictive wording for which there is no basis in the Treaty text. Article V(1) states:

> "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."

7.26 First, as to the circumstances in which a Treaty Party will be in breach of the obligation to "permit" the nationals and companies of the other Party to dispose of property of all kinds by sale, testament, or otherwise, the United States contends that this will only be engaged when the relevant national or company has actually attempted to dispose of its property and has been prevented from doing so. This is an attempt to exclude from the scope of Article V(1) measures – such as those at issue in the present case – which expressly prohibit a Party's nationals or companies from disposing of their property, thereby rendering such disposal impossible. The United States' position

655 *Ibid*., p. 142, para. 14.94.

656 *Ibid*., p. 143, para. 14.95.

rests on an artificial and empty distinction – the imposition of such a sweeping prohibition not only makes disposal impossible but also renders any attempt at disposal futile. Iran's position is not based on an expansive interpretation of the word "permitted" as encompassing "facilitated".[657]

7.27 Second, the United States contends that the entirety of the provision is reducible to a protection on the basis of most-favoured-nation treatment.[658] In other words, it contends that the first sentence of Article V(1) is qualified by the second sentence. This is to ignore the ordinary meaning of the Treaty text and, rather than giving effect to the context,[659] it renders redundant the drafters' separation of the provision into two sentences and the repetition of the mandatory term "shall" in both sentences. Meaning and effect is to be given to the actual text by interpreting this as providing for two related but distinct obligations. That the second sentence supplements the first sentence is evident from the use of the linking phrase "[t]he treatment accorded in these respects" and the phrase "in no event".

7.28 Third, linked to the protection which is afforded on the most-favoured-nation treatment basis, the United States contends that Iran must show that the relevant Iranian companies have been treated less favourably than the companies of a third State which are "in a like situation".[660] This, again, is to attempt to read into Article V(1) language which is not there but which may be found in other treaties (such as in Article 1103 of the NAFTA which uses the phrase "in like circumstances"). The second sentence of Article V(1) will be breached if Iranian companies have been treated less favourably than "companies of any third country". The provision contains no additional limitation or qualification. Thus, there is no need for Iran to show that "an agency or instrumentality of a state sponsor of terrorism […] received better treatment than the companies that are the subject of its Article V(1) claims".[661] It is sufficient for Iran to show that the companies of a third State holding property in the

657 Cf. *ibid*., p. 144, para. 15.4.

658 *Ibid.*, pp. 143-144, para. 15.1 and 15.5.

659 Cf. *ibid*., p. 144, para. 15.5.

660 *Ibid*., p. 145, paras. 15.8-15.9.

661 *Ibid.*, p. 145, para. 15.9.

United States are not subject to the same restrictions with respect to disposal of that property as the Iranian companies at issue here, and this is plainly the case.

7.29 Once the United States' incorrect interpretation falls, it becomes clear that the United States has no defence to Iran's claims under Article V(1) with respect to its companies that, as the intended effect of the U.S. legislative and executive measures as implemented by the U.S. courts, have been deprived of their right to dispose of their property as they see fit.

CHAPTER VIII.
THE BREACHES OF ARTICLES VII(1) AND X(1) OF THE TREATY OF AMITY

SECTION 1.
ARTICLE VII(1) OF THE TREATY OF AMITY: BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT TO FREEDOM, INCLUDING FOR ITS COMPANIES AND NATIONALS, FROM RESTRICTIONS ON THE MAKING OF PAYMENTS, REMITTANCES AND OTHER TRANSFERS OF FUNDS TO OR FROM THE TERRITORY OF THE UNITED STATES

A. Article VII(1) of the Treaty of Amity

8.1 It is recalled that, pursuant to Article VII(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."

8.2 In its Memorial, Iran demonstrated that, pursuant to its ordinary meaning, Article VII(1) establishes a general prohibition of "restrictions" on the making of payments, remittances, and other transfers of funds to or from the territory of the United States and/or Iran. The United States does not disagree that the prohibition in the first sentence of Article VII(1) is drawn very broadly through use of the term "restrictions", which is unqualified. However, while purporting to criticise Iran for adopting an "improper and opportunistic reading of the Treaty",[662] the United States seeks impermissibly to rewrite the first sentence as if it read:

> "Neither High Contracting Party shall apply *exchange* restrictions on the making of payments, remittances, and other transfers of funds *in foreign*

662 U.S. Counter-Memorial, p. 152, para. 16.14.

exchange to or from the territories of the other High Contracting Party, except […]"

8.3 The United States seeks to justify this attempted rewriting, which "ignores [the] text",[663] on the basis that the exceptions in Article VII(1) and also Articles VII(2) and (3) expressly refer to "exchange restrictions".[664] But this merely demonstrates that certain types of restrictions are permitted with respect to foreign exchange and that, where the Treaty Parties intended to refer to "exchange restrictions", they did so expressly. It is, of course, correct that Article VII(1) is to be read in its context, but this confirms that the first sentence establishes a very broad prohibition, with the rest of Article VII(1) as well as paragraphs (2) and (3) being concerned solely with permitted exceptions in terms of certain "exchange restrictions". In this way, Article VII is indeed to be read as a "cohesive unit with one paragraph informing the meaning of the others".[665]

8.4 The sole authority relied upon by the United States for its restrictive interpretation is a statement in the 1929 case of *Payment of Various Serbian Loans* to the effect that: "special words, according to elementary principles of interpretation, control […] general expressions".[666] This approach was not codified in the Vienna Convention,[667] was not referred to in the International Law Commission ('ILC')'s Commentaries on the preceding Draft Articles,[668] and was understandable on the facts of that case since the issue was whether references in the bonds to "francs" should be read consistently with references to "gold francs". The present case, however, is very different because the broad word "restrictions" is not equivalent to a reference to a specific currency ("francs") as to which there was no suggestion in the relevant text that the parties were then seeking to make a specific exception with respect to gold francs.

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663 *Ibid*., p. 152, para. 16.14.

664 *Ibid.*, p. 147, paras. 16.4-16.5.

665 *Ibid.*, p. 151, para. 16.11.

666 *Ibid.*, p. 147, para. 16.6 referring to *Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats, and Slovenes), 1929 P.C.I.J. Series A, No. 20*.

667 Cf. Article 34 regarding the special meaning of words.

668 *Serbian Loans* was cited in connection with other rules such as when preparatory works may be resorted to: see Yearbook of the International Law Commission (1966), Vol. II, p. 223. [The principle does not appear to have been discussed at the Vienna Conference.]

8.5 Further, the United States dedicates a number of paragraphs to an account of the negotiating history of Article VII.[669] This, however, is inconclusive at best. The fact that the heading of the provision in certain documents was "exchange control" is of no assistance, not least since no such heading was included in the final version of the Treaty of Amity.[670] Likewise, the fact the Parties at times referred to the provision as "relating to" exchange restrictions, or that Iran expressed concerns about not permitting exchange restrictions, is both unsurprising and immaterial: much of the provision is concerned with exchange restrictions specifically and in great detail. Contrary to the United States' assertion, nothing in the *travaux* it has put forward confirms its current view that the first sentence is concerned with restrictions to foreign exchange only.

8.6 The United States also appears to suggest that the U.S. measures at issue do not fall within the broad prohibition on restrictions on transfers of funds because they are "simply designed to enable the enforcement of valid court judgments".[671] The prohibition, however, applies irrespective of the motive of the relevant restriction.

B. Violation of Iran's entitlement to freedom, including for its companies and nationals, from restrictions on the making of payments, remittances and other transfers of funds to or from the territory of the United States

8.7 The United States contends that the U.S. measures "do not constitute restrictions on payments, remittances or transfers to or from the territories of the other High Contracting Party".[672] This is to ignore Iran's obvious practical point that the effect of the U.S. legislative and executive measures is that funds transferred to the United States in future will be "blocked" and made subject to enforcement, whilst funds already in the United States are already "blocked" and made subject to actual or threatened attachment, execution and dissipation, and their payment or transfer to the

669 U.S. Counter-Memorial, pp. 148-152, paras. 16.7-16.13.

670 Cf. *ibid*., p. 148, para. 16.7.

671 *Ibid*., p. 146, para. 16.2.

672 *Ibid*., p. 152, para. 16.16.

territory of Iran is an impossibility.[673] The express effect of assets being "blocked" is that they "may not be transferred, paid, exported, withdrawn, or otherwise dealt in",[674] and that they become available for enforcement and execution pursuant to Section 201 of the TRIA.

8.8 This is what has occurred. For example, the payments in respect of Bank Markazi's proceeds generated from the U.S. securities, which it had purchased and which were/are at issue in the *Peterson* proceedings, were to be collected by Clearstream in the United States and then deposited in Bank Markazi's bank account in Luxembourg. The U.S. measures have rendered such transfers impossible, instead ensuring that the funds remained in the United States so that they were/are available for the pending enforcement actions.

8.9 The United States contends that this restriction is imposed because the U.S. measures are "designed to enable the enforcement of valid court judgments", but this is to seek to read into Article VII(1) a non-existent qualification by reference to motive.[675]

8.10 The United States provides no support for its assertion that Iran seeks to "expand Article VII's reach far beyond the intended scope and purpose".[676] It does not point, for example, to any evidence in the *travaux* showing that the prohibition was to apply without prejudice to the enforcement of judgments.

8.11 It is of no assistance to the United States to say that, on the facts of a different and hypothetical case, Iran's approach would mean that "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".[677] That is incorrect. A measure of general

673 See Iran's Memorial, p. 111, para. 6.7.

674 U.S. Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22). For a definition of "Government of Iran" in the E.O. 13599, see *supra*, para. 2.96b and footnote 212.

675 U.S. Counter-Memorial, p. 152, para. 16.16.

676 *Ibid.*, p. 153, para. 16.16.

677 *Ibid.*, p. 152, para. 16.16.

application introduced to ensure the payment of judgments would not be a restriction on transfer (etc.) "to or from the territories of the other High Contracting Party".

SECTION 2.

ARTICLE X(1) OF THE TREATY OF AMITY: BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT TO FREEDOM OF COMMERCE BETWEEN THE TERRITORIES OF IRAN AND THE UNITED STATES

A. Article X(1) of the Treaty of Amity

8.12 Pursuant to Article X(1) of the Treaty of Amity:

> "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

8.13 The United States does not dispute that the Court has found that the term "commerce" in Article X(1) "includes commercial activities in general – not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce".[678] Such ancillary activities include the products of commerce, including debts which are owed to Iran and its nationals and companies in respect of commerce between the territories of the Parties.

8.14 Nevertheless, the United States ignores the ordinary meaning of this provision and instead seeks to cut its scope down to either "commerce that is related to navigation" or, in the alternative, "trade in goods". Both of these interpretations are contrary to the ordinary meaning of the words "there shall be freedom of commerce and navigation". Moreover, as the United States appears to accept, its primary position that "commerce" means "commerce that is related to navigation" is an attempt to re-argue the interpretation that was specifically rejected by the Court in *Oil Platforms*.

678 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 819, para. 49, quoted at *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 200, para. 80. The Court also rejected the U.S. contentions to the effect that the term was restricted to maritime commerce.

i. "Commerce" is not restricted to "commerce related to navigation"

8.15 Pursuant to the ordinary meaning of the words "freedom of commerce and navigation", Article X(1) requires both freedom of commerce "and" freedom of navigation between the territories of the High Contracting Parties.[679] Contrary to the United States' contention, this reading in no way "simply read[s] the term 'navigation' out of Article X".[680]

8.16 Rather, it is the United States that seeks to rewrite the requirement for freedom of "commerce", which is stated in absolute terms without any qualification, as if it instead read:

> "Between the territories of the two High Contracting Parties, there shall be freedom of commerce *that is related to* navigation."

8.17 If the Treaty Parties had agreed significantly to limit "freedom of commerce" in this way, they would have done so expressly.

8.18 Notwithstanding the United States' attempt to use different terminology, there is no material difference between its current argument that "commerce" is limited to "commerce related to navigation" and its position before the Court in *Oil Platforms* that "commerce" is restricted to "maritime commerce".[681] Indeed, its current position rests on the contextual argument that: "Aside from Paragraph 1, every paragraph in Article X explicitly focuses on vessels".[682]

8.19 In a passage which the United States notably does not cite, the Court expressly rejected that argument reasoning that:

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679 This is also apparent from Article X(3), which refers to the liberty of vessels to "come with their cargoes to all ports, places and waters […] open to foreign commerce and navigation".

680 U.S. Counter-Memorial, p. 157, para. 17.9.

681 See *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection*, CR 96/13 (Crook), pp. 30-31: "In Article X(1), the parties did not agree to protect commerce in the abstract sense of all economic activity. Rather through the totality of Article X, they agreed to take specified practical steps in operating their ports and in regulating navigation. These are spelled out in the five specific paragraphs, in Article X, which give concrete meaning to the general goal set by Article X(1)."

682 U.S. Counter-Memorial, p. 155, para. 17.4.

> "The Court must indeed give due weight to the fact that, after Article X, paragraph 1, in which the word 'commerce' appears, the rest of the Article clearly deals with maritime commerce. Yet this factor is not, in the view of the Court, sufficient to restrict the scope of the word to maritime commerce, having regard to other indications in the Treaty of an intention of the parties to deal with trade and commerce in general. The Court also takes note in this connection of the recital in Article XXII of the Treaty which states that the Treaty was to replace, *inter alia*, a provisional agreement relating to commercial and other relations, concluded at Tehran on 14 May 1928. The Treaty of 1955 is thus a Treaty relating to trade and commerce in general, and not one restricted purely to maritime commerce.
>
> Also to be considered is the entire range of activities dealt with in the Treaty – as, for example, the reference in Article IV to the freedom of companies to conduct their activities, to enjoy the right to continued control and management of their enterprises, and 'to do all other things necessary or incidental to the effective conduct of their affairs'.
>
> In these circumstances, the view that the word 'commerce' in Article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court"[683]

8.20 In its Judgment on Preliminary Objections, the Court recalled and endorsed its earlier interpretation of Article X(1) in *Oil Platforms*.[684]

8.21 Remarkably, the United States now asks the Court to "revisit" its prior interpretation of Article X(1) (and its specific rejection of the U.S. position) without even attempting to engage with the Court's reasoning. It puts forward no reason why the Court should depart from its carefully considered view in *Oil Platforms*. Rather, the United States simply reiterates its previous arguments as to context,[685] invokes a self-serving account of its own understanding during the negotiation of the Treaty,[686] and (without mentioning this fact) relies on the same commentary it had put before the Court, which the Court no doubt considered carefully, in *Oil Platforms*.[687]

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683 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 817, paras. 41-43. See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 199, para. 80.

684 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 34, para. 78.

685 U.S. Counter-Memorial, p. 155, para. 17.4.

686 *Ibid.*, pp. 155-156, paras. 17.5-17.8.

687 Each of the authorities referred to at U.S. Counter-Memorial, p. 156, para. 17.8 (the Sullivan Study and the writings of Walker and Piper) were relied upon in the U.S. oral submissions in *Oil Platforms*: see

8.22 Further, the fact that Iran may have expressed particular concerns regarding the non-discriminatory treatment of vessels (as proposed in the later paragraphs) sheds no light on its understanding of the term "commerce" in Article X(1).[688] If anything, this merely highlights that the Treaty Parties agreed without difficulty on the use of the broad term "commerce" in that provision. Likewise, the United States is not assisted by a table of contents to an earlier draft of the Treaty which labelled Article X as "Navigation".[689] No such table of contents or heading to the provision is found in the final version of the Treaty.

8.23 The United States also seeks to distinguish *Oil Platforms* on the basis that "the factual allegations [in that case] focused on activity in the Persian Gulf, ensuring that Iran's Article X claim at least retained some connection to a navigational context".[690] This, however, played no part in the Court's reasoning and its interpretation, applying the rules codified in the Vienna Convention, of the word "commerce".

ii. "Commerce" is not restricted to "trade in goods"

8.24 The United States is also wrong to suggest that the term "commerce" in Article X(1) is restricted to "trade in goods".[691] Although this is presented as an alternative interpretation, it is merely an attempt by the United States to recast its primary position that "commerce" means "commerce related to navigation" (which is in turn the same as its position in *Oil Platforms* that "commerce" means "maritime commerce"). Thus, the United States again places great weight on the subsequent paragraphs of Article X as supposedly demonstrating that "it is a navigation provision" and "taking in context,

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Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, CR 96/13 (Crook), p. 30. In any event, these materials do not assist the United States. For example, the observation recorded in the Sullivan Study that Article X "is considered as having special relevance to seaborne traffic" does not amount to a statement that the word "commerce" in Article X(1) is so limited. Likewise, the observation in the Senate report that Article X "details the rights of vessels flying the flag of either party in the ports of the other and in general provides national and most-favoured-nation treatment, except for coastwise, inland and fishing traffic" is an accurate summary of the detailed provisions in Article X(2) to (4).

688 See U.S. Counter-Memorial, p. 155, para. 17.6.

689 *Ibid.*, p. 155, para. 17.5.

690 *Ibid.*, p. 157, para. 17.9.

691 *Ibid.*, pp. 157-158, paras. 17.10-17.13.

the type of commerce that Article X(1) refers to is the type of commerce that can take place via vessel: trade in goods".[692] The "alternative" interpretation therefore adds nothing and fails for the reasons already referred to (see paras. 8.15–8.23 above).

8.25 In any event, this alternative interpretation should also be rejected for additional reasons.

8.26 First, as to context, the United States recognises that Article VIII addresses the entry and treatment of goods, and Article IX addresses customs administration. If the Parties had agreed to limit Article X(1) to trade in goods, they would have said that expressly (using the same language as in those other provisions or by way of a cross-reference to those provisions), but they did not do so. To give to Article X(1) its ordinary meaning is not to "swallow up these other provisions",[693] and no good faith interpretation of Article X(1) would lead to it somehow cutting across or being inconsistent with Articles VIII and IX, which appears to be what the United States is suggesting.

8.27 Second, contrary to the United States' contention, the Court's Judgment in *Oil Platforms* provides no support for such a narrow reading. The fact that the specific facts of that case involved allegations regarding trade of Iranian oil is immaterial to the Court's reasoning. As Iran noted in its Memorial, the Court specifically reasoned that: "the expression 'international commerce' designates, in its true sense, 'all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations' […]".[694]

a. Remarkably, the United States does not refer to this passage in its Counter-Memorial.

b. Moreover, the Court also considered that the Treaty of Amity is "a Treaty relating to trade and commerce in general" and considered that the freedom of

692 U.S. Counter-Memorial, p. 157, para. 17.11.

693 *Ibid.*, p. 161, para. 17.24.

694 See Iran's Memorial, p. 113, para. 6.13 referring to *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 818, at para. 45.

companies to conduct their activities under Article IV (none of which necessarily involve trade of goods) informed the meaning of the word "commerce".[695]

8.28 Third, even if the United States were correct that "what was contemplated when the Parties negotiated the Treaty of Amity"[696] was that the word "commerce" referred to "trade of goods"[697] (which could not be accepted), this would still not assist the United States. In accordance with the Court's established jurisprudence, the term "commerce" must be understood as having the meaning it bears when the Treaty is to be applied. Today, as the Court recognised in *Oil Platforms*, international "commerce" is widely understood as encompassing e.g. modern financial operations.

a. This follows from the Court's acceptance in the *Dispute regarding Navigational and Related Rights* that the term "*comercio*" ("commerce") is a generic term "referring to a class of activity" (i.e. commerce) and the fact that, like the 1958 treaty at issue in that case, the Treaty of Amity was intended to be of continuing duration (as follows from the terms of Article XXII[698] and the object of "firm and *enduring* peace and friendship" recorded in Article I: see para. 6.28 above).[699] The Court rejected the argument that "*comercio*" in the phrase "navigation for the purpose of commerce" was limited to trade in goods, finding that it encompassed other activities that are commercial in nature, i.e. engaged in for profit-making purposes.[700]

b. The Court's reasoning applies with even greater force in the present case since the formula used in Article X(1) ("freedom of commerce and navigation") is

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695 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 817, para. 41.

696 U.S. Counter-Memorial, p. 158, para. 17.13.

697 See *ibid.*, p. 153, para. 17.2.

698 Article XXII provides that the Treaty "shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein".

699 The Treaty, in fact, endured for more than sixty years before the United States issued its notification of termination in response to the Court's Order on Provisional Measures in the *Alleged Violations* case.

700 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 244, paras. 70-71.

broader than that at issue in *Dispute regarding Navigational and Related Rights* ("navigation for the purposes of commerce"). Iran referred to this case in its Memorial. The United States has elected not to engage with this point.

8.29 Fourth, the United States contends that "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".[701] This is misconceived. Iran's interpretation reflects the ordinary meaning of the words in their context and in light of the Treaty's object and purpose (as confirmed by the Court in *Oil Platforms*). In these circumstances, Iran does not also need to show that its interpretation is supported by any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. No doubt if the United States had been able to identify subsequent practice in support of its interpretation, it would have done so.

iii. The territorial limitation

8.30 In its Memorial, Iran noted that: "the Court has emphasised that Article X(1) protects 'freedom of commerce' that is '[b]etween the territories of the two High Contracting Parties', as opposed to commerce that involves a series of discrete sales via actors in third States".[702] The United States is incorrect that "Iran's Memorial does not even attempt to address Article X(1)'s important territorial limitation".[703] Rather, it is the United States that has elected to ignore paragraphs 6.15 to 6.18 of Iran's Memorial which address precisely this issue.

8.31 The United States contends that Article X(1) requires freedom of "direct trade" between the territories of the Parties only.[704] As Iran noted in its Memorial, on the very different facts of the *Oil Platforms* case, the Court held that a series of distinct transactions involving the sale of Iranian oil and ultimate purchase by a customer in

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701 U.S. Counter-Memorial, p. 158, para. 17.13.

702 Iran's Memorial, p. 113, para. 6.15.

703 *Ibid.*, p. 159, para. 17.15.

704 *Ibid.*, p. 158, para. 17.14.

the U.S. is not "commerce" between Iran and the United States.[705] The Court did not, however, make a more general finding that only "direct trade" or "direct commerce" is covered by Article X(1).

8.32 Further, the United States has not seriously responded to Iran's reliance on the Court's reasoning in *Nicaragua* as demonstrating the breadth of acts that may interfere with international law rights to freedom of commerce.[706] Nor has it sought to rebut Iran's position that "the mining of a port where trade takes place can be seen as a physical equivalent to the automatic 'blocking' and/or seizure of all assets of Iran and Iranian companies, including where a given State-owned Iranian bank provides a necessary gateway to commerce".[707] Notably, the United States does not dispute that Article X(1) covers legal impediments to commerce, and merely says that the provision has previously been considered in the context of physical impediments and that Iran's interpretation is "novel".[708] Of course, that merely reflects the rarity with which a provision such as Article X(1) has come before this Court, and in contending that "there appears to be no limit as to what Iran construes as a potential impediment to commerce"[709] is seeking to divert attention away from Iran's interpretation of Article X(1) pursuant to the usual rules on treaty interpretation and Iran's application of this provision by reference to the very specific and unusual facts of the current case.

8.33 Additionally, insofar as the United States suggests that Article X(1) is limited to "the commercial relationship between the Parties" (i.e. the Iranian State and the United States), this is incorrect.[710]

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705 Iran's Memorial, pp. 113-114, para. 6.15.

706 See *ibid.*, pp. 114-115, paras. 6.17-6.18.

707 *Ibid.*, pp. 114-115, para. 6.18.

708 U.S. Counter-Memorial, p. 161, para. 17.22.

709 *Ibid.*

710 *Ibid.*, p. 161, para. 17.21.

B. Violation of Iran's entitlement to freedom of commerce between the territories of Iran and the United States, under Article X(1) of the Treaty of Amity

8.34 The United States does not engage with the argument that, at a very obvious level, the U.S. measures "blocking" and/or seizing the assets of Iranian companies and disregarding their separate juridical status have rendered impossible commerce between the territories of the two Treaty Parties so far as concerns the Iranian companies who have been targeted.[711] Such assets includes the products of commerce between Iran and the United States in relation to the contractual debts owed by U.S. companies to: (a) TIC (debts owed by Sprint), (b) Bank Melli (debts owed by Visa, Franklin and MasterCard), and (c) the Ministry of Defence[712] (debts owed by Cubic and now represented by a favourable arbitral award) in respect of services provided by those U.S. companies in Iran.

8.35 That the U.S. measures negate the rights of Iran and Iranian companies under Article X(1) is also evident, for example, from the fact that in February 2018 (prior to the U.S. withdrawal from the JCPOA) the U.S. courts ordered Boeing to disclose to the plaintiffs in the *Shlomo Leibovitch* case documents concerning the sale of aircraft to Iran, a transaction which had earlier been licensed by the United States.[713] As this example illustrates, the United States is incorrect to assert that "measures applying to terrorism-related litigation have too tenuous a connection" to commerce between the territories of the Treaty Parties.[714]

8.36 The United States also emphasises the complexity of its internal law with respect to so-called "U-turn transactions".[715] This does not engage with the obvious point that until 2008 the United States allowed commerce between the territories of the Parties which made use of the U-turn arrangement while, thereafter, the U.S. measures treated

711 See Iran's Memorial, p. 116, para. 6.19(b)-(c).

712 It is noted that the Ministry of Defence ('MODAFL') is not designated in the Annex to Security Council 1373 (2006).

713 *Leibovitch v. Islamic Republic Iran*, 297 F. Supp. 3d 816 (N.D. Ill. 2018) (IR, Annex 81).

714 U.S. Counter-Memorial, p. 161, para. 17.21.

715 *Ibid.*, pp. 159-160, paras. 17.16-17.17.

the assets which were at issue in the *Peterson* litigation as the property of Bank Markazi with the U.S. courts making a finding to this effect. It is no answer to this for the United States to reiterate its incorrect position that Article X(1) concerns "direct commerce" only.[716] The relevant securities in which Bank Markazi had an interest were issued in the United States by U.S. entities (the FRBNY or the DTC) and they were purchased by Bank Markazi which negotiated the purchase price and paid in U.S. dollars using the services of Clearstream, which also then managed the securities and collected interest from the U.S. depositories in the United States and credited Bank Markazi's bank account in Luxembourg. Citibank, a U.S. company, held the relevant securities in the U.S. and charged fees for its services.[717] Thus, the transaction was direct commerce between the territories of Iran and the United States with Bank Markazi instructing an agent for the specific purpose of completing the transaction. This is very different from the "series of commercial transactions" concerning the sale of Iranian oil at issue in the *Oil Platforms* case.[718]

8.37 Finally, the United States' contention that Article X(1) is inapplicable to the U.S. measures because they govern terrorism-related litigation adds nothing to its position that the provision covers only "direct commerce" and "trade in goods".[719]

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716 *Ibid.*, p. 160, para. 17.19.

717 It is a matter of public knowledge that Citibank charges a fee for such services: see the model Global Custodial Services Agreement; The Endowment PMF Master Fund, L.P., clause 16, (IR, Annex 110): "The Client agrees to pay all fees, charges and obligations incurred from time to time for any services pursuant to this Agreement as determined in accordance with the terms of the fee agreement separately provided to the Client, together with any other amounts payable to the Custodian under this Agreement. The Client agrees that the Custodian may debit the Cash Account to pay any such fees, charges and obligations. The Client agrees that all fees and amounts paid to the Custodian shall be payable without deduction for Taxes, which are the responsibility of the Client." It is to be noted that the Order dated 9 July 2013 of the U.S. District Court required Citibank to "deposit the Blocked Assets, plus all accrued interest thereon to date, minus any reasonable fees calculated thereon": *Peterson v. Islamic Republic of Iran, Bank Markazi, Citibank and Clearstream*, U.S. District Court for the Southern District of New York, 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, 9 July 2013, No. 10-cv-4518-KBF, p. 8, para. 3 (IR, Annex 43). See also Application of Fund Trustee Pursuant to Section 5.6 of the Fund Agreement for Approval of Settlement with Citibank, N.A. on Claim to Recover Costs Assessed Against the Segregated Account and for Approval of Trustee's Counsel's Application for Attorney's Fees, 17 May 2019, p. 6 referring to Citibank fees for, *inter alia*, "holding the levied-upon Bonds" (IR, Annex 68).

718 See Iran's Memorial, pp. 113-114, para. 6.15 referring to *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 201, para. 83.

719 See U.S. Counter-Memorial, pp. 160-161, paras. 17.21-17.25.

PART II.

THE OTHER U.S. DEFENCES DOES NOT BAR IRAN'S CLAIMS

CHAPTER IX
THE DUTY TO EXHAUST LOCAL REMEDIES DOES NOT BAR IRAN'S CLAIMS

9.1 As part of its strategy of narrowing Iran's claims down to near vanishing point by ignoring the actual terms of Iran's Application and Memorial, the United States presents Iran's case as being essentially one of diplomatic protection. It asserts that "for Iran to bring any claims on behalf of [Iranian] companies, international law requires that Iran first demonstrate that the companies have exhausted their remedies in the United States […] With very few exceptions, the Iranian companies have not exhausted their local remedies".[720] This argument is based on a mischaracterisation of the facts underlying Iran's claims and on a flawed approach to the law on diplomatic protection.

9.2 In its Memorial, Iran clearly set out the nature of its claims:

> "Iran thus claims *both in its own right and on behalf of the Iranian companies impacted by the U.S. measures* at issue in this case. As to the former, it is emphasised that the harm inflicted by the U.S. measures on Iran is qualitatively different from the harm inflicted upon individual Iranian companies. The harms arise from an attempt to seize property of the Iranian State by imposing liability upon entities that the Treaty requires (*inter alia*) to be regarded as separate from the State and to seize their property, under U.S. law. It is an attempt to put pressure upon the Iranian State by targeting entities in which the Iran State has an economic interest, in breach of various U.S. obligations under the Treaty."[721]

720 U.S. Counter-Memorial, p. 72, para. 10.1.

721 Iran's Memorial, p. 120, para. 7.8 (emphasis added).

9.3 Iran's claims are State-to-State claims concerning U.S. violations of obligations owed directly to Iran under the Treaty of Amity.[722] The rights of Iran with respect to the treatment to be afforded to the Iranian State exist in parallel with the rights of Iran with respect to the treatment to be afforded to its companies and nationals under the Treaty. This is not a case of diplomatic protection requiring the exhaustion of local remedies.

9.4 This chapter will first show that local remedies have, in any event, been pursued and exhausted, and this pursuit has demonstrated that there are no reasonably available remedies in the U.S. legal system for Iran and its companies[723] and/or the local remedies provide no reasonable possibility of such redress.[724] It will then explain that, the Court may rule on the violation of rights of a State arising from injuries suffered directly or indirectly by that State, without requiring the prior exhaustion of local remedies.

SECTION 1.
LOCAL REMEDIES HAVE BEEN EXHAUSTED TO THE EXTENT THAT THEY ARE REASONABLY AVAILABLE

9.5 Iranian companies Bank Markazi and Bank Melli tried to obtain redress through local remedies and in fact exhausted all the avenues that had been left open to them. The experience of these companies with the U.S. legal system confirms the absence of the reasonable possibility of effective redress in domestic courts for Iran or any of its companies.

9.6 Bank Markazi, the Central Bank of Iran, challenged its individualised, discriminatory and retroactive treatment under the ITRSHRA before the District Court, the Court of

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722 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, p. 46, para. 130.

723 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 60, para. 44.

724 *Ibid.*; International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), Articles 14 and 15.

Appeals for the Second Circuit, and the U.S. Supreme Court.[725] As explained in the next section, Section 502 of the ITRSHRA guaranteed that Bank Markazi would lose its case, removing all its potential defences with retroactive effect.

9.7 Bank Melli, one of the first banks ever incorporated in Iran and a state-owned company, appeared in the *Weinstein* and *Bennett* cases to challenge the attachment of its property to satisfy a terrorism-based judgment against Iran: but this was also to no avail. The District Court and the Courts of Appeals for the Second and Ninth Circuits considered that Congress had made clear its intent that assets of *any* entity regarded by U.S. law as an "instrumentality" of an alleged terrorist State were available to satisfy the "terrorism judgment" against the State itself, even though Bank Melli was not named as a defendant in any of the cases against Iran and was not itself alleged to have been involved in any underlying terrorist activity.[726] TRIA § 201(a) and FSIA § 1610(g) pre-determined the outcome. Petition for certiorari to the U.S. Supreme Court was denied.[727]

9.8 The experiences of Bank Markazi and Bank Melli confirmed that a well-established exception to the local remedies rule excludes the application of the rule in this case. As Article 15(a) of the ILC Draft Articles on Diplomatic Protection provides,

> "Local remedies do not need to be exhausted where:
>
> (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress".[728]

9.9 The United States argues that the "[e]xhaustion of local remedies is excused only in relatively rare circumstances where remedies are 'obviously ineffective' or 'obviously

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725 The District Court observed that Bank Markazi "filled the proverbial kitchen sink with arguments": quoted in *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) pp. 9-10 (IM, Annex 66).

726 *Bennett, et al. v. The Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016) (IM, Annex 64); *Weinstein, et al. v. Islamic Republic of Iran, et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010) at pp. 7-12 (IM, Annex 47).

727 Filed 26 December 2019, denied 30 March 2020.

728 International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), p. 20, Article 15.

futile'".[729] But the "obvious futility" test was rejected by the ILC in its commentary on Draft Article 15 because it "sets too high a threshold".[730] The correct test is as expressed in ILC Draft Article 15(a), and it requires the taking into account of the availability of remedies and of the possibility of effective redress. In applying the test, the Court is to assume that Iran's claims are meritorious.[731]

9.10 The ILC observes that the exception to the duty to exhaust local remedies has been applied in cases in which

> "the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection."[732]

9.11 Many of these scenarios apply to the situation facing Iranian companies seeking remedies in the United States. Most strikingly, local remedies provide no reasonable possibility of effective redress because the acts complained of by Iranian companies consist of U.S. legislation (as well as executive and judicial measures) and actions mandated by it, which bind the domestic courts. As the Tribunal held in the *Arbitration under Article 181 of the Treaty of Neuilly*, non-exhaustion of local remedies cannot be pleaded when recourse to national courts offers no possibility of obtaining justice because these courts are bound by national legislation: "the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing

729 U.S. Counter-Memorial, pp. 73-74, para. 10.3.

730 International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), p. 77, para. (3).

731 International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), p. 79, para. (4), citing *Finnish Ships Arbitration*, (1934) 3 R.I.A.A. 1479, at p. 1504 and the *Ambatielos Claim (Greece v United Kingdom)*, 12 R.I.A.A. 83 (1956), pp. 119-120.

732 International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), p. 79, para. (3) (footnotes omitted).

his official duties. There rarely exist local remedies against the acts of authorised organs of the state".[733]

9.12 In *Ambiente Ufficio S.p.A. v. Argentine Republic*, the Tribunal, chaired by Judge Simma, applied the ILC's "well-reasoned and well-balanced restatement of the threshold applicable to the futility exception".[734] The Claimant argued that the futility exception applied because, *inter alia*, a specific Argentinian law "shut[] the door to any possibility to obtain redress […] since it prevented the domestic courts from fulfilling the very functions the *recourse to domestic courts* prerequisite was said to serve".[735] In addition, the Supreme Court of Argentina had taken a legal stance that "demonstrated that any bondholder attempting to obtain payment by resorting to the domestic courts of Argentina would face a rejection of his claims, so that any such attempt would have constituted a totally useless and frustrating exercise".[736] The Tribunal accepted these arguments and concluded that "having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile."[737] Similarly in this case, specific U.S. legislation as well as a Supreme Court judgment have rendered local remedies futile

9.13 As set out in Chapter II of this Reply, the impugned U.S. measures have created a discriminatory and comprehensive regime applicable to Iranian companies that is in practice not reviewable in the local courts, takes away the competence of local courts to grant an appropriate and adequate remedies, and removes any semblance of judicial protection from Iranian companies subject to the regime. The fact that U.S. courts are, in the words of *Ambiente v Argentina*, "prevented from fulfilling the very functions the *recourse to domestic courts* prerequisite was said to serve"[738] is openly

733 "Principal Question", (1934) *American Journal of International Law*, vol. 28, no. 4, pp. 773-807, at p. 789.

734 *Ambiente Ufficio S.p.A. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 610.

735 *Ibid.*, para. 615.

736 *Ibid.*, para. 616.

737 *Ibid.*, para. 620.

738 *Ibid.*, para. 615.

acknowledged by the courts. For example, in a judgment of 9 March 2020, the U.S. District Court for the District of Columbia held:

> "Having already concluded that the Court possesses subject-matter jurisdiction, *little else is required to show that the Levinsons are entitled to relief. 28 U.S.C. § 1605A(c).* The private right of action in the FSIA terrorism exception provides that a foreign government is liable to a U.S. citizen "for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1), (c). *As a result, 'a plaintiff that offers proof sufficient to establish a waiver of foreign sovereign immunity under § 1605A(a) has also established entitlement to relief as a matter of federal law' if the plaintiff is a citizen of the United States. Fritz, 320 F. Supp. 3d at 86–87; see Hekmati, 278 F. Supp. 3d at 163 ('Essentially, liability under § 1605A(c) will exist whenever the jurisdictional requirements of § 1605A(a)(1) are met.').*"[739]

9.14 The U.S. observation that "in many cases the [Iranian] entity simply did not appear to oppose attachment"[740] ignores the reality of the legal regime that has been created, targeting Iran and its companies, and the hopelessness of their position under U.S. law. It is disingenuous for the United States to state that "the U.S. judicial system has always been available to Iran and its nationals to pursue their legal interests"[741] when the Chief Justice of its own Supreme Court is on the record as stating that there has been "unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance".[742] He observed that

> "however difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line. The Court's failure to enforce that boundary in a case as clear as this reduces Article III [of the Constitution] to a mere 'parchment barrier [] against the encroaching spirit' of legislative power."[743]

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739 *Levinson, et al. v. Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Memorandum Opinion, 9 March 2020, No. 1:17-cv-00511, p. 25 (IR, Annex 82 – emphasis added).

740 U.S. Counter-Memorial, p. 75, para. 10.9.

741 *Ibid.*, p. 75, para. 10.10.

742 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), Chief Justice Roberts dissenting (joined by Justice Sotomayor), p. 7 (IM, Annex 66).

743 *Ibid.*, p. 14 (IM, Annex 66).

9.15 As Iran set out in its Memorial – and in Chapter VI of this Reply –, Iranian companies have been "singled out in order to deny to them generally available and elementary defences" such as the recognition of their juridical status (including their separate legal personality) and the absence of responsibility for the debts of third persons.[744] U.S. legislation has "gone so far as to target one specific case involving an Iranian company (Bank Markazi in the *Peterson I* case, through Section 502 of the ITRSHRA), removing all available defences through legislation, with retroactive effect", including the removal of the ability to rely on "elementary legal principles such as *res judicata*, limitation of action, and collateral estoppel".[745] The joint dissenting opinion of Chief Justice Roberts and Justice Sotomayor described how Section 502 of ITRSHRA rendered any challenges by Bank Markazi futile in the U.S. courts:

> "Section [502] does precisely that, changing the law—for these proceedings alone—simply to guarantee that respondents win. The law serves no other purpose—a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute 'sweeps away … any … federal or state law impediments that might otherwise exist' to bar respondents from obtaining Bank Markazi's assets […]".[746]

9.16 In these circumstances, and regardless of the matter of constitutionality under U.S. law (which could no longer be tested after the majority decision in *Peterson I*), these statements show in the clearest possible terms how exhaustion of local remedies has been rendered futile. The futility of local remedies has only become more entrenched.

9.17 As noted above,[747] there is also a separate enforcement proceeding in the *Peterson II* case in which judgment creditors of Iran have been seeking to execute their billion-dollar default judgments against Iran, against proceeds owned by Bank Markazi. In December 2019, the U.S. Congress enacted Section 1226 of NDAA 2020 in the same way as it did with respect to Bank Markazi's securities at issue in the *Peterson I*

744 Iran's Memorial, pp. 97-98, para. 5.45. See above Chapter VI, para. 6.86.

745 *Ibid.*, pp. 96-97, para. 5.44.

746 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), Chief Justice Roberts dissenting (joined by Justice Sotomayor) at p. 7 (IM, Annex 66).

747 See paras. 2.97-2.108 above.

case.[748] Congress thus intervened in a case while it was actually pending before a U.S. Court "simply to guarantee that respondents win".[749] Congress amended a law that had been designed to guarantee that the *Peterson I* plaintiffs win against Bank Markazi, to ensure that the *Peterson II* plaintiffs obtain the turnover of the Bank's bond proceeds to satisfy judgments against Iran. As a result of that amendment, the U.S. Supreme Court remanded the case to the Court of Appeals, to proceed on the basis of the newly amended law.

9.18 Other Iranian companies whose assets were taken pursuant to judgments did not appear before U.S. courts because it was obviously a futile exercise due to the laws enacted by Congress such as TRIA and 2008 FSIA's amendments and the legal stance of the courts in the cases against Bank Markazi and Bank Melli.[750]

SECTION 2.

IRAN'S CLAIMS DO NOT REQUIRE THE EXHAUSTION OF LOCAL REMEDIES

9.19 Local remedies have been exhausted. Further pursuit of a remedy is futile. But even if local remedies had not been exhausted in all U.S. proceedings relevant to Iran's claims, this case "*concerns the position of Iran* and the protections to which *it* [i.e., Iran] and Iranian companies are entitled under the 1955 Treaty of Amity; […] Iran has been singled out by the United States for this unlawful treatment at great, and increasing, cost to Iran's economy."[751]

9.20 It is trite law that in direct international claims, brought by a State in respect of injury to itself caused by another State, the exhaustion of local remedies rule is not applicable. In its commentary on the Draft Articles on Diplomatic Protection, the ILC explains:

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748 See para. 2.107 above.

749 *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), Chief Justice Roberts dissenting (joined by Justice Sotomayor) at p. 7 (IM, Annex 66).

750 See para. 6.100 above.

751 Iran's Memorial, p. 3, para. 1.10 (emphasis added).

> "Paragraph 3 [sc. of Article 14 of the Draft Articles] provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim."[752]

9.21 In the context of the jurisprudence of the Court, the present case falls in the category of claims in which there is an injury to the State which in part consists in, and is interdependent with, the injuries to companies that are nationals of the State. In other words, while in principle an injury to an individual company may in fact be entirely negligible as far as its actual impact upon the State is concerned, but could nonetheless be taken up as an indirect claim under international law, there may be injuries to a company or companies which have, for example, such a serious impact upon the State as such and its economy as to constitute an direct injury to the State; and remedies for such injuries may be pursued by the State by means of a direct claim under international law.

9.22 In the *Avena* case, Mexico asked the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention on Consular Relations, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".[753] The Court observed that

> "the individual rights of Mexican nationals under paragraph 1*(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. In the present case Mexico does not, however, claim to be acting solely on that basis. *It also asserts its own claims, basing them on the injury which it contends that it has suffered, directly and through its nationals*, as a result of the violation of the United States of the obligations incumbent upon it under Article 36, paragraph (1) *(a), (b)* and *(c)*."[754]

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752 International Law Commission, Draft articles on diplomatic protection, with commentaries, U.N. Doc. A/61/10 (2006), p. 79, para. (9).

753 *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 23, para. 14(1).

754 *Ibid.*, pp. 35-36, para. 40 (emphasis added).

9.23 In *Avena* and *LaGrand*, as in the present case, the provisions of the relevant treaty create individual rights for the nationals concerned, which also secure important interests of and may be invoked by their national State.[755] Consequently, in the words of the Court in *Avena*, violations of the rights of the nationals may

> "entail a violation of the rights of the sending State, and […] violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of *interdependence of the rights of the State and of individual rights*, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered *both directly and through* the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*. The duty to exhaust local remedies does not apply to such a request. Further, […] the *Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection.*"[756]

9.24 The fact that a claim refers to the effect of measures upon named companies does not mean that the claim is necessarily an indirect claim. As was noted above, the injury to the State and the violation of the State's right may consist in whole or in part in injuries that were proximately inflicted upon particular companies. The detail put forward by Iran in its pleadings on the impact of U.S. measures on Iranian companies constitute demonstrations or illustrations of the U.S. breach of its obligations owed directly to Iran under the Treaty.

9.25 Consistent with this approach, in its recent Judgment in *Ukraine v. Russian Federation*, the Court considered that violations of the rights of individual Ukrainian nationals were illustrative of the pattern of conduct that Ukraine alleged constituted a breach of the relevant treaty, and did not trigger the application of the rule on exhaustion of local remedies:

> "The Court notes that, according to Ukraine, the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea. The Court also notes that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows, in the view of the Court, that,

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755 *Ibid.*, citing also *LaGrand (Germany v United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77.

756 *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 36, para. 40 (emphasis added).

> in filing its Application under Article 22 of CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case."[757]

9.26 There are losses sustained by specific Iranian companies as a result of the U.S. measures, in respect of which Iran will particularise its claims at a later stage in these proceedings.[758] Iran's case is, however, focused on the duties owed by the United States to the State of Iran and on the damage inflicted on Iran-U.S. commercial relations generally and on the 'non-material' or 'moral' damage sustained by Iran. The object and purpose of the Treaty of Amity includes removing obstacles to commerce between the two peoples. Iran's claim is, fundamentally, about the right of Iran to insist upon the observance of the agreed rules and principles according to which each of the Parties to the Treaty of Amity is bound to treat any and all companies of the other Party. It is this general attack upon Iran and its rights that is evident in the general legal measures adopted by the United States and is illustrated by particular violations of the rights of specific Iranian companies.

9.27 In the two cases concerning injury to corporations cited by the United States, in which the Court has found it necessary for the local remedies to have been exhausted, the principal or only claim has been one of *indirect* injury to the State. Indeed, both cases were named after the companies whose rights were at issue – Interhandel and ELSI. In the *Interhandel* case, the United States raised the failure by Switzerland to exhaust local remedies as a preliminary objection. The Court clarified that it was an objection to admissibility and proceeded to answer it. It noted that "the Swiss Government appears to have adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies".[759] In fact, Switzerland had labelled as the

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757 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, p. 46, para. 130.

758 Iran's Memorial, pp. 118-119, paras. 7.1-7.6.

759 *Interhandel Case, Judgment of March 21st, 1959, I.C.J. Reports 1959*, pp. 28-29.

first of its "Principal Submissions" the submission that the United States was under an obligation to restore the assets of Interhandel. Its "Alternative Principal Submission" was a request for the Court to declare that the property, rights and interests of Interhandel in a German corporation "have the character of non-enemy (Swiss) property" and that the United States was consequently acting contrary to its obligations in refusing to return the property.[760]

9.28 In the *ELSI* case, a Chamber of the Court rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies. The Chamber had "no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]".[761] In its submissions, the United States had sought a declaration that Italy had breached a bilateral treaty and supplement thereto and that owing to these violations

> "the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis."[762]

9.29 The single-minded, company-focused submissions of Switzerland in *Interhandel* and of the United States in *ELSI* contrast with the submissions of Iran in this case, which are not in any way limited to the alleged damage suffered by one or two Iranian companies as a result of the U.S. measures.

9.30 Iran's submissions in its Application amply demonstrate that Iran's claims go to measures that impact on Iran and its companies broadly, and are not confined to one company or one incident:

> "[…] Iran respectfully requests the Court to adjudge, order and declare as follows:

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760 *Ibid.*, pp. 12-13.

761 *Ibid.*, p. 43, para. 52.

762 *Ibid.*, p. 22, para. 11(2).

(a) That the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by Iran;

(b) That by its acts, including the acts referred to above and in particular its (a) failure to recognize the separate juridical status (including the separate legal personality) of all Iranian companies including Bank Markazi, and (b) unfair and discriminatory treatment of such entities, and their property, which impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, and (c) failure to accord to such entities and their property the most constant protection and security that is in no case less than that required by international law, (d) expropriation of the property of such entities, and (e) failure to accord to such entities freedom of access to the US courts, including the abrogation of the immunities to which Iran and Iranian State-owned companies, including Bank Markazi, and their property, are entitled under customary international law and as required by the Treaty of Amity, and (f) failure to respect the right of such entities to acquire and dispose of property, and (g) application of restrictions to such entities on the making of payments and other transfers of funds to or from the USA, and (h) interference with the freedom of commerce, the USA has breached its obligations to Iran, inter alia, under Articles III (1), III (2), IV (1), IV (2), V (1), VII (1) and X (1) of the Treaty of Amity;

(c) That the USA shall ensure that no steps shall be taken based on the executive, legislative and judicial acts (as referred to above) at issue in this case which are, to the extent determined by the Court, inconsistent with the obligations of the USA to Iran under the Treaty of Amity;

[…]

(e) That the USA (including the US courts) is obliged to respect the juridical status (including the separate legal personality), and to ensure freedom of access to the US courts, of all Iranian companies, including State-owned companies such as Bank Markazi, and that no steps based on the executive, legislative and judicial acts (as referred to above), which involve or imply the recognition or enforcement of such acts shall be taken against the assets or interests of Iran or any Iranian entity or national;

(f) That the USA is under an obligation to make full reparations to Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the USA; and

(g) Any other remedy the Court may deem appropriate."[763]

9.31 In sum, the United States' argument that Iran is under a duty to exhaust local remedies and has not discharged this duty must fail. The discriminatory scheme targeting Iran and its companies prevents U.S. courts from providing effective redress. The judicial outcome has been pre-determined, sometimes expressly in respect of the specific

763 Iran's Application, pp. 16-17, para. 33. See also submissions in Chapter VIII above.

cases. As the United States admits[764] in respect of key cases every avenue of the U.S. legal system *has* been explored, exhausted and found to be ineffective. These cases concern the Central Bank of Iran, Bank Markazi, and the important state-owned bank, Bank Melli. Finally, Iran's claims arise from injuries to the State itself, which in part consists in, and is interdependent with, the injuries to its companies. The local remedies rule is therefore inapplicable in the first place.

764 U.S. Counter-Memorial, pp. 75-76, para. 10.1.

CHAPTER X.
ARTICLE XX(1) OF THE TREATY OF AMITY DOES NOT BAR IRAN'S CLAIMS WITH REGARD TO E.O. 13599

10.1 The United States contends 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."[765] The United States' position is that E.O. 13599, issued on 5 February 2012 and implementing Section 1245 of the 2012 NDAA,[766] explicitly recognises a connection between the alleged deceptive financial practices used by Iranian institutions and the alleged Iranian illicit activities.[767]The United States alleges that Iran supported terrorism and violated missile and arms trafficking obligations and that the United States "needed to take measures" to address these violations.[768]

10.2 Iran recalls that its claims involve a number of U.S. executive, judicial and legislative measures. Only a small part of its complaints is linked to E.O. 13599, which blocks the property of Iran and Iranian financial institutions. By denying the separate juridical status of Iranian companies, E.O. 13599 constitutes a breach of Article III(1), V and X(1) of the Treaty of Amity, among many other breaches claimed by Iran.[769] The U.S. defence on Article XX(1) therefore only concerns a very limited aspect of Iran's claims. In any case, Iran shows in the present Chapter that both defences invoked by the United States, based on Articles XX(1)(c) and (d) of the Treaty of Amity, are unsubstantiated and must be rejected.

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765 *Ibid.*, p. 76, para. 11.2.

766 Section 1245(b) of the 2012 NDAA states that "[t]he 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 […] efforts to deceive responsible financial institutions and evade sanctions" (IM, Annex 17).

767 U.S. Counter-Memorial, pp. 79-81, para. 11.9.

768 *Ibid.*, p. 81, para. 11.10.

769 See Chapters IV, VII and VIII above.

SECTION 1.

ARTICLE XX(1)(C) DEFENCE REGARDING ARMS TRAFFICKING IS UNFOUNDED

10.3 Article XX(1)(c) provides:

> "1. The present Treaty shall not preclude the application of measures:
>
> *(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."

10.4 The United States argues that:

> "[s]ubparagraph (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."[770]

10.5 This extract from the U.S. Counter-Memorial puts very strikingly the discrepancy between the U.S. argument and the provision on which it is allegedly based. On the one hand, the United States explains that the 1955 Treaty of Amity does not preclude measures *regulating* the production or traffic in arms, and on the other hand, it alleges that this defence would cover a measure that does not itself actually regulate arms, nor relates to arms, but which is imposed with *the goal of addressing another State's behaviour relating* to arms.

10.6 There can be no surprise that the United States does not even try to interpret Article XX(1)(c) but limits itself to a long litany of serious allegations according to which Iran is involved in arms production and traffic.[771] The only U.S. attempt to bring Executive Order 13599 within the ambit of the provisions of Article XX(1)(c) is the following: the Executive Order is said to be part of the "regulatory scheme" because it "works in conjunction with other proliferation- and terrorism-related measures to deter – and thus to 'regulate' within the meaning of the Treaty – Iranian

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770 U.S. Counter-Memorial, p. 82, para. 11.11 (emphasis added).

771 *Ibid.*, pp. 82-86, paras. 11.11-11.18.

pursuit of ballistic missiles […]".[772] The argument is ill-founded: Executive Order 13599 does not *regulate the production of or traffic in* arms, it provides for *sanctions* which are, if at all, very indirectly related to arms. This is not a regulation within the meaning of Article XX(1)(c). Such a regulation would be for instance a ban or limitation of the export of U.S. arms to Iran.[773]

10.7 Following the U.S. line of argumentation, any measure regulating any sort of activity, taken with the underlying goal of influencing the production of or traffic[774] in arms by or with Iran would be covered by the defence in Article XX(1)(c). But Article XX(1)(c) reads "measures regulating the production of or traffic in arms". It does not read "measures regulating anything which has a more or less remote relation with the production of or traffic in arms". As is clear from any fair reading, Executive Order 13599 does not provide for any kind of regulation of the actual production or traffic in arms.

10.8 It is noted that in the six pages of the U.S. Counter-Memorial arguing that "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"[775], the United States does not refer once to the text of Executive Order 13599 to make its point, let alone engage in an interpretation of Article XX(1)(c).

10.9 The text of Executive Order 13599 is strikingly absent from the argument – for good reason: none of its provisions, in full or in part, regulates arms production or trafficking. None of the words, "arms", "weapons" or "ammunition" appears in the text of the Order. Its section 1 provides in relevant part:

> "All property and interests in property of the Government of Iran, including the Central Bank of Iran […] [and] of any Iranian financial institution […] are

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772 U.S. Counter-Memorial, p. 86, para. 11.18.

773 Such a ban on export of arms and military equipment from US and anywhere in the world to Iran is actually already in place since the U.S. Embassy crisis in Tehran. It is outside the scope of the present case.

774 The term "*commerce*" is used for "traffic" in the French version of the Treaty of Amity (IM, Annex 1).

775 U.S. Counter-Memorial, Chapter 11, Section A.

> blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in."[776]

This has nothing to do with the alleged arms production and trafficking and is irrelevant to the exception contained in Article XX(1)(c).

10.10 Further, if it were accepted, the U.S. allegations would mean that by signing the Treaty of Amity in 1955, the United States considered that Iran could challenge its implementation by objecting to the production of arms in the U.S. In other words, as now interpreted by the United States, the Treaty would have permitted Iran lawfully to block the assets of all U.S. companies involved in one way or another in the U.S. nuclear weapons programme. This does not make any sense and it is in direct contradiction with the U.S. position regarding subparagraph (d). On the one hand, the United States argues that Article XX(1)(c) recognises the right of one Party to regulate the production of arms of the other Party, notwithstanding the fact that the production of arms is at the very heart of the sovereign rights of that other Party,[777] including its right to security. Yet, on the other hand, it contends that Article XX(1)(d) is an expression of the unquestionable capacity of one State to decide what is necessary to protect its security, without any control by the judge.

10.11 The U.S. view is, moreover, contradicted by the history of this type of clause. States, and particularly the United States, have always wanted to exclude the issue of arms from their treaties of amity and commerce, because arms represent a special category of goods on which they are eager to keep full control.[778]

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776 Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22).

777 Of course, the production of some category of arms is prohibited in international law, but this is not relevant here since the U.S. contention is that Article XX(1)(c) permits a Party to regulate the production of any sort of arm by the other Party, whether or not prohibited by international law.

778 This was already the case in 1778 in the Treaty of Amity and Commerce between the United States and France, which is the ancestor of the post-World War II FCN treaties and whose Article 26 provided: "This Liberty of Navigation and Commerce shall extend to all kinds of Merchandizes, excepting those only which are distinguished by the name of contraband; And under this Name of Contraband or prohibited Goods shall be comprehended, Arms, great Guns, Bombs with the fuzes, and other things belonging to them, Cannon Ball, Gun powder, Match, Pikes, Swords, Lances, Spears, halberds, Mortars, Petards, Granades Salt Petre, Muskets, Musket Ball, Bucklers, Helmets, breast Plates, Coats of Mail and the like kinds of Arms proper for arming Soldiers, Musket rests, belts, Horses with their Furniture, and all other Warlike Instruments whatever." (Treaty of Amity and Commerce Between The United States and France, 6 February 1778, available at avalon.law.yale.edu/18th_century/fr1788-1.asp).

10.12 At the time of conclusion of the 1955 Treaty of Amity, the U.S. law then in force was contained in the Munitions Control Act of 1947. The Presidential Memorandum introducing the Act stated that it was concerned with "supervising *this country's* international traffic and trade in arms and munitions of war" and that it applied to "anyone engaged in manufacturing, exporting, or importing" arms in the United States. Thus, the purpose of this legislation was formally stated to be:

> "to authorise supervision of the exportation of arms, ammunition, implements of war related commodities, and the importation of arms, ammunition, and implements of war; to provide for the registration, under certain conditions, of *manufacturers, exporters, importers*, and certain dealers in munitions of war; and to provide for obtaining more adequate information concerning the international traffic in arms."[779]

President Truman made clear that he wanted his Government to:

> "have control over traffic in weapons which will permit [it] to act in accordance with [its] position in the United Nations and will be adaptable to the changes in the international situation. Therefore, there must be new legal provisions enabling the exercise of discretion in the granting or rejecting of applications for export or import licenses for arms, ammunition, and implements of war and related items."[780]

10.13 Article XX(1)(c) is the logical continuity in international law of the U.S. internal position. Nothing in the FCN treaties concluded by the United States precludes the United States' right to regulate its own production/manufacturing of arms, nor its ability to export/import these arms in accordance with its international policy and regulations, and it is obvious that the United States' reserved right also benefits its contracting party. This cannot be reconciled with the U.S. argument according to which it could arbitrarily decide economic and financial sanctions in response to conduct of the other Party concerning the other Party's (alleged) arms production.

10.14 The United States also seeks to rely on various resolutions of the U.N. Security Council to justify its asserted application of Article XX(1)(c) to the challenged

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779 Munitions Control Act of 1947, Message from The President of the United States transmitting a proposal for legislation to control the exportation and importation of arms, ammunition, and implements of war, and related items, and for other purposes, 15 April 1947, U.S. Department of State Bulletin, Vol. XVI, No. 408, 27 April 1947, p. 750 (IR, Annex 8) (emphasis added).

780 *Ibid*, p. 751.

measures.[781] However, a comparison between the cited resolutions of the U.N. Security Council (more specifically, Resolutions 1747 (2007) and 1929 (2010)), on the one hand and what the Executive Order effectively regulates on the other hand is telling. It precisely shows that, contrary to the invoked resolutions, which do call States to regulate production of and trafficking in arms, the Executive Order does nothing of the kind, which confirms that it was not taken with the purpose to enforcing such regulation.[782]

10.15 Already in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court made clear that the defence contained in Article XX(1)(c) only applies to measures that are directed to the production of or traffic in arms – not to any measures that could have had an impact on Nicaragua's own production of arms. Noting that "[i]n its Counter-Memorial on jurisdiction and admissibility, the United States relied on paragraph 1(c) as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims", the Court narrowed down the potential scope of the defence, and clarified that "[t]his paragraph appears however to be relevant *only in respect of the complaint of supply of arms* to the contras."[783] This finding is equally relevant in the present case. The defence provided for in Article XX(1)(c) has a clear meaning and cannot defeat a claim challenging measures which are unrelated to the purpose of this provision.

SECTION 2. ARTICLE XX(1)(D) DEFENCE REGARDING U.S. ESSENTIAL SECURITY INTERESTS IS UNFOUNDED

10.16 Article XX(1)(d) of the Treaty of Amity provides:

> "1. The present Treaty shall not preclude the application of measures:

781 U.S. Counter-Memorial, p. 77, para. 11.4.

782 As a reminder: by its Resolution 2231 of 10 July 2015, the Security Council decided that "[t]he provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015) shall be terminated" (para. 7(a)).

783 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, I.C.J. Reports 1986*, p. 140, para. 280 (emphasis added).

> (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."

10.17 According to the United States, "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)".[784] This allegation is based on an erroneous interpretation of this provision.

10.18 First of all, it is worth noting that the United States still argues that Article XX(1) "simply removes such measures from the scope and application of the Treaty",[785] while the Court expressly said the contrary:[786] Article XX(1) "afford[s] the Parties a defence on the merits".[787] The question, therefore, is whether the violations of the Treaty arising from the U.S. challenged measures fall within the scope of one of the defences contained in Article XX(1), correctly interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[788]

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784 U.S. Counter-Memorial, p. 86, para. 11.19.

785 *Ibid.*, p. 87, para. 11.21.

786 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 25, para. 45; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018*, p. 635, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 811, para. 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), Merits, Judgment, I.C.J Reports 1986, p. 116, para. 222 and p. 136, para. 271.

787 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 25, para. 47.

788 Vienna Convention on the Law of treaties, Article 31(1).

A. Article XX(1)(d) is not self-judging

10.19 Although the United States does not straightforwardly assert that it considers Article XX(1)(d) to be self-judging, its interpretation of that provision amounts to such a contention since it asks the Court to recognize that:

a. "[t]he Article XX(1)(d) exception is broad and a high degree of deference is due to the State invoking it.";[789]

b. this provision establishes "a State's 'paramount right'";[790]

c. "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.";[791]

d. "[t]he United States' determination to this effect warrants substantial deference";[792]

e. "the phrase 'its essential security interests' makes clear that it is the assessment of the Party invoking the defence 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 defence – based on its specific circumstances, and its own perception of those circumstances."[793]

10.20 Contrary to these assertions, the Court already made clear that a clause such as Article XX is not a self-judging clause. In the *Nicaragua* case, it stated that "the Court has first to determine whether the actions of the United States complained of as

789 U.S. Counter-Memorial, p. 86, para. 11.20.

790 *Ibid.*, p. 87, paras. 11.21 and 11.22.

791 *Ibid.*, p. 88, para. 11.23.

792 *Ibid.*, p. 88, para. 11.24.

793 *Ibid.*, p. 90, para. 11.29.

breaches of the 1956 FCN Treaty have to be regarded as "measures [...] necessary to protect its essential security interests".[794] The same holds true in the present case: it is for the Court, not the United States, to determine whether the actions of the United States complained of as breaches of the Treaty of Amity must be regarded as "necessary to protect its essential security interests".

10.21 The non-self-judging character of similar clauses has also been highlighted several times by investment treaty tribunals. For instance in the *CC/Devas (Mauritius) v. India* case, the tribunal had to determine whether "India (or Peru, or any other State having a treaty with a similar provision [to Article 11(3) of the Treaty[795]]) can dismiss any case simply by saying that it considers the actions forming the basis of the claim to be in its 'essential security interests'".[796] The Tribunal answered:

> "Indeed, it is well established by judgments of the International Court of Justice (the 'ICJ') and investment arbitration awards that, *unless a treaty contains specific wording granting full discretion to the State* to determine what it considers necessary for the protection of its security interests, national security clauses are not self-judging. Turning to the text of Article 11(3) of the Treaty, it plainly does not contain any explicit language that the Tribunal would regard as granting discretion of that nature to the State."[797]

This same argument invoking State sovereignty and its wide margin of manoeuvre, which would allow it to decide subjectively what is necessary or not, has also been raised by Argentina before several international tribunals. All these tribunals denied to the defendant State the possibility to decide for itself and with conclusive effect whether the challenged measures were necessary or not.[798]

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794 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 135-136, para. 271.

795 Mauritius-India BIT (1998), Article 11 (3) "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals or plants."

796 *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para. 218.

797 *Ibid.*, para. 219 (emphasis added).

798 *CMS Gas Transmission Company v. The Argentine Republic*, I.C.S.I.D. Case No. ARB/01/8, Award, 12 May 2005, paras. 370-373; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/01/3, Award, 22 May 2007, para. 331; *Sempra Energy International v. Argentine Republic*, I.C.S.I.D. Case

B. The court must determine whether the alleged measure was necessary to protect essential security interests

10.22 When "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[799] the significance of Article XX(1) of the Treaty of Amity leaves no room for doubt: the measures concerned must be "necessary to protect [the] essential security interests" of the High Contracting Party invoking them as a defence. In other words, there must be a link between the measures in question and the alleged essential security interests. In the present case, it is for the United States to establish that such a link exists and it is for the Court to determine whether the plea of necessity invoked by the United States has been substantiated.

10.23 The U.S. unwillingness to engage in a proper interpretation of Article XX(1)(d) is apparent through its reading of the Court's Judgment in *Djibouti v. France*. It only retains two words, "wide discretion" from the relevant passage, while, notably, the Court put the emphasis on its duty to assess the reality of the necessity to protect essential security interests. This is all the more noticeable as, in that case, Article 2(c) of the Convention concerning judicial assistance in criminal matters of 27 September 1986 between Djibouti and France provides that "[j]udicial assistance may be refused […] *[i]f the requested State considers* that execution of the request is likely to impair its sovereignty, security, public policy or other essential interests".[800] Not only is the expression "likely to impair its […] security […] or other essential interests" much wider than "necessary to protect its essential security interests", but also, and decisively, the Treaty of Amity does not of course contain any formula equivalent to the italicised expression. In any event, the Court stressed that "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 (see *Certain German Interests in*

No. ARB/02/16, Award, 28 September 2007, para. 388; *Continental Casualty Company v. Argentine Republic*, I.C.S.I.D. Case No. ARB/03/9, Award, 5 September 2008, paras. 189-195; *El Paso Energy International Company v. Argentine Republic*, I.C.S.I.D. Case No. ARB/03/15, Award, 31 October 2011, para. 609.

799 Article 31 of the Vienna Convention on the Law of Treaties.

800 Convention concerning judicial assistance in criminal matters of 1986 between France and Djibouti, 1695 U.N.T.S. 297 at p. 304 (emphasis added).

Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, p. 30, and *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167 […])."[801] The Court also stressed that such an assessment requires objective proof showing "that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2".[802] In the present case, the United States does not even attempt to establish a meaningful relationship between the measures complained of and its alleged essential security interest.

10.24 In a recent award, a PCA Tribunal interpreting Article 12 of the Germany-India BIT worded in terms similar to Article XI of the U.S.-Argentina BIT commented on the requirements concerning "essential security interests" and establishing that measures are "necessary" as follows:

a. "In respect of the existence of essential security interests, the Tribunal accept[ed] that a degree of deference is owed to a state's assessment";

b. But it immediately added: "[h]owever, such deference cannot be unlimited";

c. Then, basing itself on an ECtHR decision in which the Court held that the notion of national security cannot be stretched "beyond its natural meaning",[803] the Tribunal stated that:

> "the limits of essential security interests contemplated in Article 12 cannot be stretched beyond their natural meaning. For the Tribunal, the natural meaning of the treaty terms requires the presence of interests concerned with *security* (as opposed to other public or societal interests) that are *"essential"*, i.e. that go to the core (the "essence") of state security."[804]

d. Finally, with respect to the requirement that the prohibition or restriction be imposed only "to the extent necessary for" the protection of such essential security interests, the Tribunal also considered that "the deference owed to the

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801 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

802 *Ibid.*

803 *C.G. and Others v. Bulgaria*, European Court of Human Rights, Application No. 1365/07, Final Judgment, 24 July 2008, para. 43.

804 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 236.

state cannot be unlimited, as otherwise unreasonable invocations of Article 12 would render the substantive protections contained in the Treaty wholly nugatory."; and it concluded:

> "239. To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted to protect the essential security interests at stake and was *objectively required in order to achieve that protection*, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations."[805]

10.25 The United States does not even try to argue that the measures were objectively required or that there were no reasonable alternatives open to it. Nor does it discuss what is objectively necessary to protect its security interests, or what can be considered to be an essential security interest.

C. The measures were not necessary to protect the U.S. essential Security interests

10.26 As to whether the United States' essential security interests are engaged in this case, it is true that the Court has considered that such concept "certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past".[806] This finding was made in relation to Article XXI(1)(d) of the 1955 FCN Treaty between Nicaragua and the United States, which is drafted in the same way as the provision under discussion. But it must be noted that the Court immediately clarified that it was up to the Court:

> "to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'".[807]

10.27 In other words, any margin of appreciation as to "essential security interests" is far from being unlimited, as the Court has again explained in a particularly clear manner

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805 *Ibid.*, paras. 234-239 (emphasis added).

806 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 117, para. 224.

807 *Ibid.*

in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* between Djibouti and France, on which the United States relies.[808]

10.28 The United States asserts, as if it could not be challenged, that it:

> "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"[809]

and that:

> "[i]t has a similarly clear essential security interest in halting Iran from advancing its ballistic missile program".[810]

10.29 Iran does not argue that the generalised U.S. allegations concerning terrorism and alleged ballistic missile programs could not be related to its security. But *this is not the question before the Court*. The key question is whether U.S. *essential* security interests were *engaged in 2012* when it issued E.O. 13599 to block the assets of all Iranian financial institutions. The United States does not explain in its pleading what an essential security interest is, nor what essential security interests could have been engaged when it took these measures in 2012, let alone does it seek to establish a link between the security interests invoked and the measure which was decided.

10.30 The main point here is that to allege that confiscating or blocking the assets of commercial banks is necessary to preserve U.S. essential security interests is artifice.

10.31 It is for the United States to establish, and for the Court to assess, whether the measures were "necessary" to protect these interests. The United States only explains that it was trying to achieve foreign policy goals with "earlier measures targeting Iran's illicit conduct"[811] and that, because of the alleged lack of effectiveness of these earlier measures, it had to introduce E.O. 13599. This in no sense answers the critical question

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808 U.S. Counter-Memorial, p. 88, para. 11.23.

809 *Ibid.*, p. 88, para. 11.25.

810 *Ibid.*

811 *Ibid.*, p. 93, para. 11.35.

of why E.O. 13599 was "necessary" to protect the alleged essential security interests. The United States does not even explain what "necessary" means or what the criteria are for measures to be considered "necessary" by the Court.

10.32 In considering whether E.O. 13599 was "necessary" to protect the alleged essential security interests of the United States, it is useful to ask whether this measure was objectively required in order to achieve the protection, taking into account whether the United States had reasonable alternatives which would have been less in conflict or more compliant with its international obligations under the Treaty. As to this, it is worth noting that, while the United States seeks to rely on an alleged international concern with respect to preventing alleged terrorist attacks and Iran allegedly advancing a ballistic missile program, no State and no international organisation has considered it necessary (let alone lawful and appropriate), to take measures equivalent to those indicated in E.O. 13599.

10.33 It is striking that, with regard to allegations of terrorism, the United States is relying on U.N. Security Council Resolutions in 1995 and 2001[812] and, with respect to allegations concerning ballistic missiles, the United States cites Resolution 1929 (2010). Under these resolutions, the freeze of the assets of the entities was subject to two alternative conditions. First, the entities sanctions were required first to have been designated by the Security Council or its Committee. Second, the sanctions were restricted to entities which were considered to have been engaged in, directly associated with, or provided support for, Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems.[813]

10.34 The key difference between the UNSC measures and E.O. 13599 is that the UNSC measures froze the assets of *targeted* and (so far as the Security Council was concerned), *relevant* Iranian entities while the E.O. 13599 concerns the assets of *untargeted* and *irrelevant* Iranian institutions. By doing so, E.O. 13599, sets the stage for a permanent confiscation of Iranian companies' assets through the execution of judgments against

812 *Ibid.*, p. 89, para. 11.27.

813 See UNSC Resolutions 1737 (2006), para. 12; Resolution 1803 (2008), para. 10 and Resolution 1929 (2010), para. 21.

these companies. E.O. 13599 fits into a pre-existing scheme[814] of U.S. measures designed to establish blocked funds as a pool of assets which any judgment creditor who has been awarded compensation against Iran can access at wish and which have no link whatsoever with their particular case. Such decisions have no regard to the exclusive purpose set out in Article XX, paragraph 1, of the Treaty of Amity: i.e., the preservation of the essential security interests of the Party invoking that provision.

10.35 In order to achieve the alleged aims, it could not be "necessary" to target all Iranian financial institutions given that the alleged essential interests concern acts allegedly being carried out by Iran, not a series of separate legal entities. By referring to a whole package of unfounded allegations against Iran, the United States seeks to avoid the appropriate legal assessment of the necessity of the measures. The United States cannot expect the Court to accept that its essential security interests were engaged in 2012 on the basis of such general allegations. It is notable that no other State, nor the Security Council, has taken such extreme measures.

10.36 It is also revealing that the only fact on which the United States relies happened in 2016, four years after the imposition of E.O. 13599.[815] As the Court already declared in the *Nicaragua* case:

> "In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States", even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date".[816]

10.37 Moreover, in terms of the U.S. measure chosen by it to achieve the alleged aims, it is not merely a question of this being radically in conflict with the substantive provisions of the Treaty, it also leads to the abrogation of the immunity to which Iran is entitled

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814 See, e.g., Iran's Memorial, pp. 31-32, paras. 2.36-2.37.

815 U.S. Counter-Memorial, p. 90, para. 11.28.

816 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 141, para. 281.

as a matter of customary international law. A measure "necessary" for the purposes of Article XX(1)(d) could not be one that cut across fundamental principles of international law.

10.38 There is an important parallel to the *Nicaragua* case. There the Court found:

> "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests". [817]

10.39 The same basic point applies. For many years (many more than four) the United States had been making allegations regarding Iranian support of terrorism and production of ballistic missiles. There was nothing in 2012 that suddenly made the extraordinary measure of E.O. 13599 "necessary".

10.40 Not only was the measure not objectively *necessary*, E.O. 13599 was not even *relevant* to address the U.S. alleged essential security interests. The question must be asked: how could indistinctly blocking the assets of Iran and all Iranian financial institutions be relevant to preserving the U.S. security interests? The answer is fairly obvious: it is not.

10.41 As is apparent from the above:

a. E.O. 13599 does not regulate the production of, or traffic in, arms and as such, it does not fall under the provisions of Article XX(1)(c);

b. As a non-self-judging provision, Article XX(1)(d) requires the Court to evaluate the measures taken by the United States;

c. These measures, including E.O. 13599, were not taken in 2012 because U.S. essential security interests were engaged but for U.S.' internal policy purposes; and

d. In any event, these measures were not necessary for protecting US essential security interests, and the United States bears the burden to prove otherwise.

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[817] *Ibid.*, p. 141, para. 282.

CHAPTER XI.
THE UNITED STATES' UNCLEAN HANDS AND ABUSE OF RIGHTS DEFENCES ARE INADMISSIBLE AND UNFOUNDED

11.1 The United States tries to divert the attention of the Court away from its task of interpreting or implementing the Treaty, as set out in Article XXI(2) of the Treaty, by contending again and again that what Iran seeks in this case is not what Iran repeatedly says that it seeks, namely a judgment of the Court holding that the United States' international responsibility is engaged because of its breaches of the Treaty of Amity, and drawing the consequence of such responsibility. This is a sort of mantra in U.S. pleadings, already repeated during the preliminary objections phase, according to which Iran is not really invoking the Treaty with the aim of having its treaty rights respected; rather, Iran is somehow improperly *using* the Treaty as a "shield".[818]

11.2 On the basis of this recurring allegation, the United States seeks to develop two legal arguments based on two partly overlapping "doctrines": the doctrine of "clean hands", and the doctrine of "abuse of rights". Iran will respond to these defences in turn below.

SECTION 1.
THE UNITED STATES' UNCLEAN HANDS DEFENCE

11.3 According to the United States:

> "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."[819]

11.4 In so doing, the U.S. overlooks the crucial fact that the objection on unclean hands has already been decided by the Court in its Judgment on the U.S. preliminary objections.

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818 U.S. Counter-Memorial, p. 166, para. 18.12.

819 *Ibid.*, p. 54, para. 8.4.

11.5 Iran accepts that submissions aiming at the inadmissibility of the Application do not coincide with a plea on the merits and that the matter is not *res judicata* in the technical sense although the Court has already squarely dismissed the U.S. argument. But this does not mean that the Parties may, at the merits stage, ignore the reasoning at the root of the Court's Judgment on preliminary objections in the case. Yet, in the present case, the United States limits itself to asserting that the Court "should dismiss Iran's claims on the basis that the impugned U.S. measures are in response to Iran's conduct",[820] without referring to the Court's findings and arguments in its decision on preliminary objections.[821]

11.6 However, much of the reasoning of the Court's 2019 Judgment is equally valid for the merits on the one hand and the admissibility of the Application on the other. Thus, the Court made it abundantly clear "that the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based";[822] this is a determinative finding in dismissing the U.S. claim based on the clean hands doctrine either as a preliminary matter or on the merits.

11.7 Moreover, the Respondent strikingly distorts the unclean hands doctrine as interpreted by the case-law of this Court and other international courts and tribunals. While acknowledging that:

> "the Court has not previously applied the doctrine of unclean hands [and] that some doubt has been expressed about the doctrine's scope and status",[823]

the U.S. alleges that the Court has discretion in applying the doctrine of unclean hands, while taking into account considerations of justice and fairness.

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820 *Ibid.*, p. 54, para. 8.23.

821 *Ibid.*, Chapter 8.

822 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 44, para. 122.

823 U.S. Counter-Memorial, p. 54, para. 8.5.

11.8 The United States makes three arguments trying to show that the Court should apply the unclean hands doctrine:[824]

a. States have relied in the past on the clean hands doctrine before international courts and tribunals which would establish it as part of positive international law (Section 1);

b. the doctrine is received as a kind of general principle of international law (Section 2); and

c. it applies absent an express treaty provision and absent any direct link between the alleged violation and the conduct of which the Respondent complains (Section 3).

A. International courts and tribunals have not applied the clean hands doctrine despite many invocations by states

11.9 As a result of a distorted analysis of the case-law of this Court and other tribunals mainly based on truncated quotes of the selected decisions, the Respondent comes to the conclusion that although many States have relied on the unclean hands doctrine, this doctrine "has never [been] rejected […] as a matter of principle"[825] and is recognised as a principle of equity.

11.10 Besides the fact that equity is not a source of public international law,[826] it is worth stressing that while the clean hands doctrine has been raised by States in many cases both at the preliminary and at the merits stage, as noted by the ILC in the commentary of its 2001 Articles on State Responsibility, "[t]he so-called 'clean hands' doctrine has been invoked principally in the context of the admissibility of claims before

824 *Ibid.*, pp. 54-59, paras. 8.5-8.12.

825 *Ibid.*, p. 56, para. 8.9.

826 Equity was the exclusive basis of the two Mixed Claims Commissions invoked by the United States (U.S. Counter-Memorial at pp. 57-58, para. 8.10) *Good Return and the Medea*, Opinion of the Commissioner, Mr. Hassaurek, 8 August 1865, page. 107; *Frierdich and Co. Case*, Opinion of Umpire, 31 July 1905, p. 54. Moreover, when the relevant passages of these two very ancient opinions – which the United States only quotes very partially – are read in their entirety, they are much less coinciding with the U.S. thesis than it alleges.

international courts and tribunals, though rarely applied.[827] It […] does not need to be included" among the circumstances precluding wrongfulness.[828]

11.11 The Second report on State responsibility of the last Special Rapporteur of the ILC on the issue sheds more light on the resistance of the Commission *vis-à-vis* the notion of clean hands:

> "Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of 'clean hands', whether as a ground of admissibility or otherwise, is, in Salmon's words, 'fairly long-standing and divided'.[829]
>
> It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:
>
> > 'In any event, it appears that these cases are all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State.
> >
> > When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible.[830]"[831]

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827 Fn. 319 in the original text: "See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, pp. 392–394."

828 ILC Articles on State Responsibility in ILC Yb 2001, Vol. II, Part 2, Report of the Commission to the General Assembly of its 53rd Session (2001), commentary of Chapter V, p. 72, para. (9).

829 Fn. 666 in the original text: "Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", p. 249."

830 Fn. 667 in the original text: "Ibid., p. 259. See also Garcia-Arias, "La doctrine des 'clean hands' en droit international public", p. 18; and Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux"."

831 Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, 17 March, 1 and 30 April, 19 July 1999, pp. 82-83.

11.12 For its part the Court has *never* accepted an argument based on the clean hands doctrine.[832] As noted by the United States, "[a]t least 13 different States have sought to rely on it before the Court in a range of different contexts".[833] In many of those cases, States had raised a clean hands objection but the Court did not even refer to it in its Judgment.[834]

11.13 This case-law is far from establishing that the clean hands doctrine has been accepted in positive international law as a defence for preventing the examination of a case by international courts and tribunals. Whether at the preliminary stage or as an argument on the merits, there is no so-called clean hands doctrine that could lead the Court to "reject Iran's invocation of the Treaty pursuant to the doctrine of unclean hands".[835] The Court should apply the same ruling to the same argument that the United States already raised as an admissibility objection as the arbitral tribunal did in the *Guyana v. Suriname* case:

> "The Tribunal's ruling on this issue extends both to Suriname's admissibility argument based on clean hands and to its argument that clean hands should be considered on the merits of Guyana's Third Submission to bar recovery."[836]

11.14 Even accepting *arguendo* that the clean hands doctrine were to be found in international law, its status and exact contours are certainly subject to debate.[837] In

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832 For other cases, outside the World Court, where international tribunals did not deal with the issue, see e.g.: *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, I.C.S.I.D. Case No. ARB/07/24, Award, 18 June 2010, para. 317; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 492; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, I.C.S.I.D. Case No. ARB/14/3, Award, 27 December 2016, para. 273.

833 *Ibid.*

834 *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, 1. C. J. Reports 1999*, raised by Belgium, the United States, the United Kingdom, Portugal, the Netherlands, Germany and Canada; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, raised by Spain; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, raised by Greece; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, raised by Nicaragua.

835 U.S. Counter-Memorial, p. 54, para. 8.3.

836 *Delimitation of maritime boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Award, 17 September 2007, para. 422.

837 *Glencore Finance (Bermuda) Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, paras. 45-47.

any case, the case-law cited by the United States only suggests that, if at all applicable, the clean hands doctrine would only apply when the conduct alleged against the applicant State is closely related to the obligation whose violation is alleged.[838]

11.15 As Iran had recalled in its Observations and Submissions on the U.S. Preliminary Objections,[839] the case-law of the IUSCT is not more favourable than that of this Court in using the clean hands doctrine. The United States refers to the jurisprudence of that Tribunal in order to show that "Iran itself has relied on the doctrine".[840] It must be noted that the doctrine was relied on by Iran in very different factual contexts; as explained in the next paragraph of the *Aryeh* case on which the United States relies, this concerned specific claims by Iranian nationals who had obtained benefits based on their Iranian nationality and later made claims to recover those benefits based on their U.S. nationality.[841] Moreover, the United States omits to mention that, in all three cases it relies upon, the Tribunal refused to apply the doctrine:

a. In *Aryeh*, the Tribunal stated that no basis supported the Respondent's contentions "that the claim should be barred on the basis of the theories of clean hands, estoppel, misrepresentation, good faith or state responsibility";[842]

b. In *Karubian*, the Tribunal dismissed the claim based on abuse of right (not specifically clean hands) in light of the general limitations applying to claims by Iranian dual nationals. The Tribunal held that "[i]f the Tribunal were to allow [the Claimant] to recover against the Respondent in these circumstances, it would be permitting an abuse of right";[843] and

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838 See below paras. 11.27-11.28.

839 See Iran's Observations and Submission, paras. 8.14. For the convenience of the Court, Iran reiterates below its argument (which it has nothing to change).

840 U.S. Preliminary Objections, p. 58, para. 6.32.

841 *Moussa Aryeh v. The Islamic Republic of Iran*, Award No. 583-266-3, 25 September 1997, 33 *Iran-U.S. C.T.R.* 368, [at] p. 387, para. 62 (U.S. PO, Annex 187).

842 *Moussa Aryeh v. The Islamic Republic of Iran*, Award No. 583-266-3, 25 September 1997, 33 *Iran-U.S. C.T.R.* 368, at p. 387, para. 62 (U.S. PO, Annex 187).

843 *Rouhollah Karubian v. The Government of the Islamic Republic of Iran*, Award No. 569-419-2, 6 March 1996, 32 *Iran-U.S. C.T.R.* 3, para. 161 (U.S. PO, Annex 189).

c. In *Mohtadi* it found that "the issue of the Claimant's enjoyment of real property rights in a manner inconsistent with Iranian Law does not fall to be decided. The Tribunal therefore finds it unnecessary to consider this issue".[844]

11.16 The United States also relies on various other investment cases in which States have raised a clean hands objection. In particular, it places weight on the Final Award of 15 December 2014 of the UNCITRAL tribunal in *Al-Warraq v. Indonesia*. It omits to mention that the tribunal in that case based its use of the clean hands doctrine not on a general principle of law but on the express text of Article 9 of the OIC Agreement,[845] the agreement at issue, to conclude to the application of the clean hands doctrine.[846] As noted by the arbitral Tribunal in *South American Silver Limited v. Bolivia*, in that case:

> "The only exception would seem to be the *Al-Warraq* case where the tribunal majority considered that the clean hands doctrine made the claimant's claims inadmissible. However, in the *dispositif* of its decision, the tribunal referred expressly to Article 9 of the *OIC Agreement* as the basis to conclude that the claimant was not entitled to any damages in respect of the breaches of the fair and equitable treatment standard, and not that its claims were inadmissible due to the clean hands doctrine. Therefore, the *Al-Warraq* tribunal's decision also fails to prove the acceptance and application of the above-mentioned principle under international investments law."[847]

11.17 Similarly, the case of the *Copper Mesa Mining Corporation v. Ecuador*, does not help the United States. In that case, the defendant had invoked the clean hands doctrine;[848] but the tribunal did not address the argument and applied the principle of estoppel (regarding Ecuador's lack of complaints over many years),[849] basing itself on

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844 *Jahangir Mohtadi and Jila Mohtadi v. The Government of the Islamic Republic of Iran,* Award No. 573-271-3, 2 December 1996, 32 *Iran-U.S.C.T.R.* 124, at p. 155, para. 92 (U.S. PO, Annex 188).

845 "The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."

846 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL Case, Award, December 15, 2014, paras. 648 and 683(6).

847 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, para. 449 (footnotes omitted).

848 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-02, Award, 15 March 2016, para. 5.36.

849 *Ibid.*, paras. 5.61 and 5.63

Article 39 of the ILC Articles on contributory fault, not the so-called clean hands doctrine.[850]

B. There is no general principle of law recognising the clean hands doctrine

11.18 The United States considers that the Court should apply the doctrine since this doctrine is applied by domestic jurisdictions, referring to the U.S. Federal Circular of 2018, as well as cases in the United Kingdom, Australia, Canada, Pakistan and South Africa[851] – a list of States significantly limited to common law countries, thus excluding treating the doctrine as a general principle of law under Article 38, paragraph 1(c) of the Court's Statute.

11.19 This defence lies on a pure *petitio principii* and wrongly assumes that because the clean hands doctrine applies in certain domestic systems, it is transposable at the international level. It adds the incorrect allegation that the doctrine can be assimilated to a general principle of law – it cannot.

11.20 As convincingly demonstrated by the arbitral tribunal in *South American Silver Limited (Bermuda) v. Bolivia*, the clean hands "doctrine" – as the word "doctrine" implies – is not a general principle of international law that can be applied in the absence of an express treaty clause.[852]

11.21 In that case, the tribunal did not accept that "the clean hands doctrine is part of international public policy or constitutes a principle of international law applicable to the present case that defeats the jurisdiction of the Tribunal or affects the admissibility

850 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-02, Award, 15 March 2016, para. 6.97.

851 U.S. Counter Memorial, p. 58, para. 8.11.

852 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, para. 471.

of the claims filed by the Claimant".[853] Before reaching this conclusion, the arbitral tribunal convincingly explained at some length that:

> "it is undisputed that general principles of law require certain degree of recognition and consensus.[3] According to the Respondent, the analysis of these principles should principally consider '*the practice of the States.*' […]
>
> Bolivia asserted that the clean hands doctrine is widely recognized in civil law and common law systems, and cites some decisions of the British House of Lords and the French Court of Cassation, as well as scholarly articles on the existence of the principle in the United States and Germany. In the opinion of this Tribunal, these are insufficient and not determinative regarding the alleged status of the clean hands doctrine as a general principle of international law under the terms of article 38(1)(c) of the ICJ Statute.
>
> The Respondent also invoked various international court and tribunal decisions that would confirm that the clean hands doctrine is a principle of international law. In particular, Bolivia cited various opinions by members of the PCIJ and the ICJ that, in its view, defend the 'clean hands' doctrine. However, these are individual or dissenting opinions that do not seem even to reflect the majority position of the respective courts in connection with the application of the clean hands doctrine. In fact, this doctrine was not applied in any of the decisions the Respondent cited as grounds to decline jurisdiction or to declare the inadmissibility of the claims.
>
> Bolivia also referred to various investment arbitration tribunal decisions that, in its view, rejected an investor's claims based on the clean hands doctrine. The Tribunal has reviewed these decisions and finds that they do not support the premise that the clean hands doctrine is a general principle of international law. In fact, the Respondent invoked tribunals that reached their respective conclusions based on the appropriate treaty provisions or the applicable national law without basing their decisions on the clean hands doctrine or advancing it as a general principle of international law.
>
> […]
>
> The Respondent also referred to certain authors who have stated that the clean hands doctrine constitutes a principle of international law. However, as the Claimant notes, those same authors recognize that the existence and application of this doctrine, as a matter of international law, are still controversial."[854]

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853 *Ibid.*, para. 453.

854 *Ibid.*, paras. 445-451 (footnotes omitted). For similar doubts as to the reception of the doctrine of clean hands in international law, see, *e.g.*: *Delimitation of maritime boundary (Guyana v. Suriname)*, PCA Case No. 2004-04, Award, 17 September 2007, paras. 418-421; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, I.C.S.I.D. Case No. ARB/10/11 and No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras. 477-478.

11.22 Similarly, in the *Yukos* case, the arbitral tribunal declared that it was:

> "not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the I.C.J. Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands.'
>
> 1359. General principles of law require a *certain level of recognition and consensus*. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law. […]
>
> 1362. However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.
>
> 1363. The Tribunal therefore concludes that 'unclean hands' does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case." [855]

11.23 In the present case, the United States takes a position which is in all respects similar to that taken by Bolivia in *South American Silver Limited* or by Russia in *Yukos*. That position calls for the same answer: absent an express clause in the treaty, there is no room for the doctrine of clean hands as a general principle of law.

C. The United States does not allege that Iran violated the Treaty of Amity on which its claim is based

11.24 Even if the United States were to establish that the clean hands doctrine is established in public international law, it would have to be acknowledged that it can only be applied with the utmost caution and under strict conditions. The United States tries to neutralise these limitations by asserting that:

> "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."[856]

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855 *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, Final Award, 10 July 2014, pp. 431-432, paras. 1358-1363 (emphasis added).

856 U.S. Counter-Memorial, p. 55, para. 8.8.

11.25 Equity and good faith cannot be invoked before a court or tribunal in themselves. They must be linked with a violation or violations of the treaty allegedly breached. As the Court explained in the *Land and Maritime Boundary between Cameroon and Nigeria* case:

> "This being so, in bringing proceedings before the Court, *Cameroon did not disregard the legal rules relied on by Nigeria in support of its second objection*. Consequently, Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations. The second branch of Nigeria's objection is not accepted."[857]

Similarly, in the *Louisa* case, the ITLOS found that Article 300 of UNCLOS:[858]

> "cannot be invoked on its own. It becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the Convention are exercised in an abusive manner."[859]

11.26 Recently, in the *Jadhav* case, Pakistan asked the Court to dismiss India's claims on the basis of the clean hands doctrine, as well as the principles *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise) and *ex injuria jus non oritur* (law does not arise from injustice).[860] As it did in *Certain Iranian Assets*, the Court maintained that the clean hands doctrine is not capable of rendering the Application inadmissible:

> "The Court does not consider that an objection based on the 'clean hands' doctrine may by itself render an application based on a valid title of jurisdiction inadmissible. It recalls that in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, it ruled that 'even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the clean hands doctrine' (*Preliminary Objections, Judgment of 13 February 2019*,

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857 *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 304, para. 59 (emphasis added).

858 Article 300 of UNCLOS reads: "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."

859 *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment, 28 May 2013, para. 137; see also ITLOS, *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, paras. 378-401; *The M/V "Norstar" Case (Panama v. Italy)*, Judgment, Preliminary Objections, 4 November 2016, *ITLOS Rep. 2016*, p. 74, para. 131; Annexe VII Tribunal, Award, 5 September 2016, *Duzgit Integrity*, paras. 216-218.

860 *Jadhav Case (India v. Pakistan)*, Judgment, 17 July 2019, p. 18, para. 59.

para. 122). The Court therefore concludes that Pakistan's objection based on the said doctrine must be rejected."[861]

11.27 Strict conditions were also enunciated in the *Niko Resources* case – in which the tribunal expressed doubt as to the positive existence of the principle – and which the United States only refers to in a misleading way:[862]

> "479. Concerning the substantive content of the [clean hands] principle in international law, it has been summarised by Fitzmaurice:
>
> > '*He who comes to equity for relief must come with 'clean hands'. Thus a State which is guilty of illegal conduct may be deprived of the necessary* locus standi in judicio *for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality - in short were provoked by it.*'[863]
>
> 480. As shown by this quotation, the application of the principle requires some form of reciprocity, so much so that, in his Individual Opinion in the *Diversion of Water from the Meuse* case, Hudson assimilated it to the Roman law principle of the *exceptio non adimpleti contractus*.[864] In that case, the claimant State sought to prevent the defendant State from making use of waters from the Meuse which it considered contrary to a treaty; but the claimant State itself was making use of the waters in a similar manner. Similarly, the case of unclean hands to which Judge Schwebel referred in his dissenting opinion in the *Military and Paramilitary Activities* case concerned acts of aggression which he saw on the side of the claimant State in relation to those of the defendant State.[865]
>
> 481. When considering the defendant State's admissibility argument based on clean hands, the UNCLOS Arbitral Tribunal [in *Guyana v. Suriname*], dealing with this doctrine '*to the extent that such a doctrine may exist in international law*', referred to three criteria which it had extracted from those cases in which reference to the doctrine had been made, in particular the developments in the opinion of Judge Hudson: (i) the breach must concern a continuing violation, (ii) the remedy sought must be '*protection against continuance of that violation*

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861 *Ibid.*, p. 18, para. 61.

862 U.S. Counter-Memorial, p. 57, para. 8.10.

863 Fn 321 in the original text: "Fitzmaurice, 'The General Principles of International Law', 92 *Recueil des Cours* (1957) 119 (citations omitted)".

864 Fn 322 in the original text: "The diversion of water from the Meuse (*Netherlands v. Belgium*), (1937) PCIJ, Series A/B, No. 70, Individual Opinion by Mr Hudson, p. 77".

865 Fn 323 in the original text: "*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, Dissenting Opinion of Judge Schwebel, p. 25".

in the future', not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered.[866]»[867]

11.28 Exactly as in the *Niko Resources* case, the U.S. arguments do "not meet the criteria which Judge Hudson and the UNCLOS Arbitral Tribunal identified for the application of the doctrine in international law".[868] In the present case, the violations on which the Respondent relies, which are not accepted by Iran, do not meet any of those criteria and, therefore, are not to be characterised as involving unclean hands.

11.29 Considered in isolation, paragraph 328 of the *Fraport* award of 10 December 2014, which is also invoked by the United States,[869] seems to accept the application of a clean hands doctrine independently of any legality requirement in the treaty.[870] However, in paragraphs 331 and 332, the tribunal applies the legality requirement "at the time the investments were made", which implies that there is a strict condition of relationship between the alleged violation and the alleged unclean hands. It is not the case that any aspect whatsoever of the claimant's behaviour could be cited as the basis for an application of the legality requirement, but only, when the claimant is an investor, its behaviour concerning "the essence of the investment" that it claimed to be protected by the Treaty.

11.30 As shown in the present Section:

a. Even if States have, on occasions, relied on the so-called clean hands doctrine before international courts and tribunals, it has never been applied or recognised by this Court or by any court or tribunal in a State-to-State case;

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866 Fn 324 in the original text: "*Guyana v. Suriname*, Award of 17 September 2007, paragraphs 420-421".

867 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, I.C.S.I.D. Case No. ARB/10/11 and No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras. 479-481.

868 *Ibid.*, para. 483.

869 U.S. Counter-Memorial, p. 57, para. 8.10.

870 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, I.C.S.I.D. Case No. ARB/11/12, Award, 10 December 2014, para. 328.

b. Absent a specific clause in the treaty which is alleged to have been violated, even if it were to be applied, the clean hands doctrine could in any event only be invoked under very strict criteria which are in no way fulfilled in the present case.

SECTION 2.

THE SO-CALLED "ABUSE OF RIGHTS" DEFENCE RAISED BY THE UNITED STATES

11.31 The United States contends, finally that Iran's claims in the current proceedings constitute an "abuse of right", and that Iran should be "precluded from exercising any of its rights under the Treaty in this case on that basis".[871] According to the Respondent:

> "There are two distinct but complementary reasons for which Iran runs afoul of that prohibition [on the abuse of rights]. *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."[872]

11.32 On examination, the U.S. submission regarding Iran's alleged "abuse of rights" appears to be nothing but a relabelling of the Respondent's abuse of process objection, which has already been rejected by the Court at the preliminary objections phase, as demonstrated in subsection A below. This second attempt is no better founded than the previous one: as explained in subsection B below, the very idea that underlies the notion of "abuse of rights" excludes its application in the present case.

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871 U.S. Counter-Memorial, p. 162, para. 18.1.

872 *Ibid.*, p. 162, para. 18.3.

A. The United States merely relabels as "abuse of rights" the "abuse of process" objection already rejected by the Court

11.33 In claiming that Iran claims should be rejected as an abuse of rights, the United States puts forward the same admissibility defence, now relabelled as an "abuse of rights", that it submitted during the preliminary objections phase and that was rejected by the Court in its Judgment of 13 February 2019. But relabelling an "abuse of process" claim into an "abuse of right" claim is a question of form only. The nature of the argument is the same and the United States cannot ignore the clear reasoning of the Court in its Judgment on Preliminary Objections.

11.34 The identity between the two arguments raised by the United States is self-evident from the fact that they were first presented together in exactly same manner. In its Preliminary Objections, the United States contended that:

> "Iran's reliance on the Treaty to found the Court's jurisdiction in this case constitutes an abuse of right",[873]

and developed the very same argument that it now advances in its Counter-Memorial:

a. First, the United States earlier contended that the Iranian claims were outside the intended scope of the 1955 Treaty of Amity since, according to the U.S. preliminary objections, "[t]his dispute has nothing to do with the interests protected by the Treaty".[874] This is now the first aspect of the U.S. claim of abuse of rights, which reads: "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".[875]

b. Secondly, the U.S. preliminary objections claimed that "Iran may wish to regard the Treaty as a vehicle for waging this wider strategic dispute [b]ut to permit Iran to do so in the present case would subvert the purpose of the

873 U.S. Preliminary Objections, p. 4, para. 1.9.

874 *Ibid.*, p. 53, para. 6.17.

875 U.S. Counter-Memorial, p. 165, para. 18.10.

> Treaty".[876] In the same manner, the United States now contends in its Counter-Memorial that Iran is seeking to exercise its rights in the present proceedings for "improper purposes" and should, therefore, not be allowed to benefit from the protection of the Treaty.[877]

11.35 Then, during the oral pleadings on its preliminary objections, the United States had to take into account the recent decision in the *Immunities and Criminal Proceedings* case, in which the Court recalled that a claim of abuse of rights "cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits".[878] But, rather than withdrawing its preliminary objection, the United States decided to relabel it as an "abuse of process" claim, indicating that:

> "this is an abuse of process objection; it is not an abuse of right objection. Iran's case does not come properly within the scope of the Treaty of Amity. Accordingly, Iran's invocation of Article XXI (2) of the Treaty, that is, the compromissory clause, in order to found the jurisdiction of the Court is an abuse of process".[879]

11.36 The Court examined the U.S. defence to the admissibility of the Iranian claims, noted that "there [were no] exceptional circumstances which would warrant rejecting Iran's claim on the ground of abuse of process",[880] and rejected this preliminary objection.

11.37 In its Counter-Memorial, the United States now puts forward the very same claim that "Iran's case does not come properly within the scope of the Treaty of Amity",[881] or as it is now formulated, that Iran is seeking to "stretch the rights under the Treaty of Amity to apply to factual circumstances that the Parties obviously never intended to address" and to invoke these rights "to protect Iran from its unlawful conduct outside

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876 U.S. Preliminary Objections, p. 50, para. 6.10; see also U.S. Preliminary Objections, p. 50, para. 6.12.

877 U.S. Counter-Memorial, pp. 166-167, paras. 18.12-18.13.

878 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 337, para. 151.

879 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Hearing of 8 October 2018, CR 2018/28 (Sir Bethlehem), p. 35, para. 2.

880 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 35, paras. 114-115.

881 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Hearing of 8 October 2018, CR 2018/28 (Sir Bethlehem), p. 35, para. 2.

the framework of the Treaty".[882] However, the Respondent attempts to differentiate its present position from the claim of "abuse of process" brought during the preliminary objection phase, on the basis that the earlier defence was rooted in an abuse of procedural rights, while the present "abuse of rights" defence concerns the "exercis[e by Iran of its] substantive rights under the Treaty of Amity".[883] This distinction is, however, disingenuous.

11.38 Indeed, the U.S. so-called "abuse of rights" claim is not concerned with an alleged abuse of substantial rights. The United States does *not* argue that the substantive provisions invoked by Iran – namely, the right to recognition of the juridical status of Iranian companies (Article III(1)), the right of access to domestic courts granted to Iranian nationals and companies (Article III(2)), the right to protection owed to the properties of Iranian nationals and companies (Article IV(1)), the right for Iranian nationals and companies to purchase or lease property within the territory of the United States (Article V(1)), the right not to submit to certain monetary restrictions regarding transfer of funds (Article VII(1)) or the right to enjoy freedom of commerce between the territories of the two parties (Article X(1)) – have been abused by Iran, and that it should be held responsible for such abuse,[884] or even that Iran should be deprived of the benefit of such treaty rights. Incidentally, such a position could hardly have been advanced since the United States has prevented and continues to prevent Iran and Iranian companies from benefiting from these substantive rights.

11.39 Instead, the United States contends that Iran is using its procedural right, under Article XXI(2) of the Treaty of Amity, to bring a dispute before the Court regarding the interpretation or application of these substantive provisions, for purposes that would be beyond the scope of this Treaty and alien to the purposes for which this Treaty was

882 U.S. Counter-Memorial, p. 162, para. 18.3.

883 U.S. Counter-Memorial, title of Section B of Chapter 18, p. 165; the United States uses the terms "substantive rights" or "substantive protection" 18 times in the sole Chapter 18.

884 A. Kiss, "Abuse of Rights", *in Max Planck Encyclopedia of Public International Law*, O.U.P., Dec. 2006, para. 32. As expressed by the WTO Dispute settlement Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case : "[a]n abusive exercise by a member of its own treaty right results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Member so acting" (World Trade Organization Appellate Body, *United States – Import prohibition of certain shrimp and shrimp products*, 12 October 1998, para. 158).

established. Such a claim, which "goes to the procedure before a court or tribunal",[885] is substantially the same as the one brought by the Respondent as a preliminary objection under the label "abuse of process" and rejected by the Court.[886]

11.40 In sum, while at the same time ignoring the Court's rejection of the "abuse of process" objections that it raised during the preliminary phase, the United States is now bringing to the Court a defence:

a. between the exact same parties, with the United States as the claimant to the defence and Iran as the defendant;

b. based on the same legal – and unfounded – grounds that Iran's case falls beyond the scope of the 1955 Treaty and is aimed at achieving improper purposes; and

c. with the same object, namely that Iran should be "precluded" from exercising any of its rights under the Treaty.

Yet, the United States suggests that the Court should not adopt the same reasoning and reach the same conclusion that it did in its Judgment on preliminary objections. Such an assumption is intrinsically defective, all the more since the U.S. so-called "abuse of rights" defence is just as unsubstantiated as its earlier "abuse of process" objection.

B. The U.S. so-called "abuse of right" defence is not founded in law and in facts

11.41 When the Court comes 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", as requested by the United States,[887] it will find that contrary to the U.S. assertion, (1) the

885 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 336, para. 150.

886 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 35, paras. 114-115.

887 U.S. Counter-Memorial, p. 162, para. 18.2.

doctrine of "abuse of rights" in international law, and (2) the facts of the present case lead inevitably to the rejection of the U.S. defence.

i. The doctrine of the abuse of rights has never been upheld in an inter-State dispute

11.42 The doctrine of "abuse of rights" has been defined as follows:

> "In international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State".[888]

11.43 As an application of the general principle of good faith,[889] the doctrine of "abuse of rights" rests on the assumption that it cannot be excluded that a State might act in bad faith and exercise its rights in an abusive manner, to the prejudice of other States. But requests based on this doctrine, in relation to which such abuse cannot be presumed and must be substantiated, have never been upheld in inter-State disputes, notably before the International Court of Justice.

11.44 Indeed, given its nature, the doctrine of "abuse of right" could only have an exceptionally limited application in inter-State disputes. As noted by Georg Schwarzenberger:

> "The suggestion of bad faith is 'highly odious'. Even if a State is reasonably convinced of the bad faith of another State, the presumptions in favour of good faith and law-abidingness impose such a heavy burden of proof on any State which makes such an allegation, that, only on rare occasions, States are likely to choose this line of argument".[890]

Also, as put by an author the United States refers to:

> "International courts and tribunals have to presume that states act in good faith. To do otherwise would call the honour of states into question, risk introducing

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888 A. Kiss, "Abuse of Rights", *in Max Planck Encyclopedia of Public International Law*, O.U.P., Dec. 2006; see also, Michael Byers, "Abuse of Rights: An Old Principle, A New Age", 47 *McGill L.J.* 389, 431 (2002) (U.S. CM, Annex 238).

889 World Trade Organization Appellate Body, *United States – Import prohibition of certain shrimp and shrimp products*, 12 October 1998, at para. 158.

890 G. Schwarzenberger, "The fundamental principles of international law", *RCADI*, 1955, vol. 87, p. 308.

political and diplomatic factors into the judicial process, impede international relations and increase the danger of escalation."[891]

11.45 The World Court itself has frequently recalled that there can be no presumption of an abuse of rights.[892] It has been the case, for instance:

a. In the case of the *Free Zones of Upper Savoy and the District of Gex*, in which the Court emphasised that "an abuse cannot be presumed by the Court";[893]

b. In the *Case concerning Certain German Interests in Polish Upper Silesia (Merits)*, where the P.C.I.J. remarked that "such misuse *cannot be presumed*, and it rests with the party who states that there has been such misuse to prove his statement".[894]

11.46 The Court has also set strict conditions for a claim of abuse of rights to be upheld. In the *Case concerning Certain German Interests in Polish Upper Silesia (Merits)*, the P.C.I.J. rejected the Polish claim of a German abuse of rights after noting that "the act in question does not overstep the limits of the normal administration of public property" and that there were insufficient grounds for regarding the relevant acts as anything "other than a genuine transaction", rather than one "designed to procure […] an illicit advantage and to deprive the other of an advantage to which he was entitled" or "calculated to prejudice Poland's rights".[895] The same test has been applied ever since by the Court and this has led to the dismissal of each of the various abuse of rights claims that were brought before it.[896]

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891 M. Byers, "Abuse of Rights: An Old Principle, A New Age", 47 *McGill L.J.* 389, 431 (2002), p. 412 (U.S. CM, Annex 238).

892 The principle that an abuse cannot be presumed was recently reiterated in *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 335, para. 147.

893 *Case of the Free Zones of the Upper Savoy and the District of Gex, Merits, Judgment of 7 June 1932, P.C.I.J. Series A/B, No. 46*, p. 167.

894 *Ibid.*, p. 30 (emphasis added).

895 *Ibid.*, pp. 37-38.

896 For a partial list of claims of abuse of rights brought before the International Court of Justice, see M. Byers, "Abuse of Rights: An Old Principle, A New Age", 47 *McGill L.J.* 389, 431 (2002), pp. 397-398 (U.S. CM, Annex 238).

11.47 The conclusion to be drawn is that, in inter-State disputes, the Party that invokes an abuse of rights must meet a high threshold. It is for the Party putting forth a claim of abuse of rights to meet the "heavy burden of proof"[897] that such an abuse exists. As a consequence, claims of abuse of rights have never been upheld in inter-State disputes, including before the Court.

11.48 In this respect, the examples of "successful applications of the doctrine [of abuse of rights]"[898] invoked by the United States in its Counter-Memorial, are not only taken from outside the scope of inter-State litigation, but they also do not demonstrate that this doctrine has evolved toward a broader application. Indeed, a closer examination of these examples shows that these are cases where abuse of rights was upheld on the basis that an "investor who is not protected by an investment treaty [had] restructure[ed] its investment in such a fashion as to fall within the scope of protection of a treaty"[899], internationalising a purely internal dispute, in order to benefit from the protection of a treaty giving it access to international arbitration.[900] Such behaviour is "designed to procure […] an illicit advantage and to deprive the other of an advantage to which it was entitled",[901] i.e. the protection of an international arbitration process for the investor, that the state party to the arbitration agreement had excluded for domestic disputes.

11.49 Therefore, in order for its so-called "abuse of rights" defence to be successful, the United States would need to prove that, in this specific case, whereas the Court has

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897 G. Schwarzenberger, "The fundamental principles of international law", *RCADI*, 1955, vol. 87, p. 299.

898 U.S. Counter-Memorial, p. 164, footnote 536.

899 *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), para 539, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, I.C.S.I.D. Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 205 ("the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, "an abusive manipulation of the system of international investment protection under the I.C.S.I.D. convention and the BITs").

900 *Capital Financial Holdings Luxembourg S.A. v Cameroon*, I.C.S.I.D. Case no. ARB/15/18, 22 June 2017, para. 362; see also *Phoenix Action, LTD. v. Czech Republic*, I.C.S.I.D. Case no. ARB/06/5, 15 April 2009.

901 *Case concerning certain German Interests in Polish Upper Silesia, Merits, Judgment of 25 May 1926, P.C.I.J. Series A, No. 7*, pp. 37-38.

have found that Iran has a right to a substantive protection under the different Treaty provisions identified in its Application, there is however clear evidence to overturn the presumption that Iran is acting in good faith when it requests the Court to establish whether or not its rights have been breached.

11.50 Such evidence is patently absent in the present case.

ii. Abuse of rights must be rejected in the instant case for lack of any basis

11.51 It is striking that although the United States accepts that the Party alleging an abuse of rights must present "clear evidence in support of any underlying factual allegations" and that there needs to be "exceptional circumstances justifying the application of the doctrine",[902] it fails to meet either criteria in relation to both of the two "aspects" it raises.

11.52 The first argument of the United States is that:

> "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. […]
>
> However, Iran does not seek to invoke its substantive rights for the purposes of commerce or consular relations. … [because] 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."[903]

11.53 This is inconsistent and irrelevant. There are three points.

11.54 First, it is inconsistent because this argument is not an abuse of rights defence, but, rather, an objection to the Court's jurisdiction *ratione materiae*. Indeed, it is identical to the claim sustained by the United States in the *Oil Platforms* case according to which Iran's case was not a "dispute 'as to the interpretation or application' of the

902 U.S. Counter-Memorial, pp. 164-165, para. 18.5; see also *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, I.C.S.I.D. Case No. ARB/11/17, Award, 9 January 2015, para. 186 and footnote 219; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

903 U.S. Counter-Memorial, pp. 165-166, paras. 18.10-18.11.

Treaty of 1955",[904] because, allegedly, it "b[ore] no relation to the Treaty of 1955".[905] In its judgment of 12 December 1996, the Court explained how it had to address such an argument and, notably, held that it could not "limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it" but that it had to "ascertain whether the violations of the Treaty of 1955 pleaded by Iran *do or do not fall within the provision of the Treaty*".[906]

11.55 In the instant case, the Court has already ascertained that, with the limitations upheld in its judgment of 13 February 2019, the acts of which Iran complains fall within the provision of the Treaty of Amity.[907] This finding deprives the first U.S. argument of its very substance.

11.56 Second, the U.S. accusation that "Iran does not seek to invoke its substantive rights for the purposes of commerce" is also inconsistent. It is a fact that most of the substantive rights in question exist for the purpose of protecting, *inter alia*, one Party's companies, and that Iran plainly invokes the benefit of the Treaty protection with respect to the treatment by the United States of Iranian companies under Articles III(1), III(2), IV(1), IV(2) and VI(1). It cannot be correct that, by putting this claim before the Court, Iran's purpose is alien to what the Treaty envisaged in terms of commercial relations since, as recalled and discussed above,[908] the Court has defined "companies" for the purposes of the Treaty specifically in relation with their commercial and business activities.[909] Likewise, the accusation is equally manifestly wrong concerning the invocation by Iran of a breach of Article VII(1) because the U.S. measures have restricted payments or transfers of funds. Payments and transfers

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904 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 810, para. 16.

905 *Ibid.*, p. 809, para. 14.

906 *Ibid.*, p. 810, para. 16 (emphasis added).

907 See notably, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019,* p. 33, para. 99.

908 See Chapter III, Section 2.

909 In fact, the U.S. argument could be construed as claiming that the Iranian companies relevant to the present case are not "companies" for the purposes of the Treaty, for lack of "commercial activities". But, as demonstrated above, the Iranian entities relevant to the present case plainly qualify as companies under the Treaty.

of funds are obviously crucial for any sort of commerce. Finally, Iran cannot be accused of invoking its substantive rights for purposes that bear no relation with commerce when it refers to Article X of the Treaty for the reason that "commerce between the two States is severely impeded".[910]

11.57 Thus, contrary to what the United States claims, in this case Iran invokes its rights under the Treaty in the exact way intended by the Parties: Iran challenges certain measures adopted by the United States to the extent that they removed and breached the Treaty protections granted to Iranian companies, restricted transfers of funds and payments and impeded commerce between the two States.

11.58 Third, as for the U.S. contention that Iran abuses its Treaty rights because "the challenged U.S. measures [are] directed at providing a meaningful forum for U.S. victims to obtain reparation for acts of terrorism that Iran itself has sponsored",[911] this is irrelevant to the question of whether Iran's claims are to be characterised as abusive. It could be relevant – *quod non* – as a defence on the merits if Article XX of the Treaty contained an exception concerning such measures, but it is plainly not the case. The United States cannot escape this conclusion by stretching the exceptions contained in Article XX by a broad invocation of alleged abuse of rights.

11.59 The second argument of the United States is related to what, according to the United States, Iran "seeks" in this case. It is as follows:

> "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".[912]

11.60 According to the United States, Iran's *purpose* in invoking its Treaty rights would not be the application of the Treaty in that it grants rights to Iran and Iranian nationals and companies, but to use these rights "as a shield against its accountability for those wrongful acts".[913] This argument is in no way better founded than the first.

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910 Iran's Memorial, p. 117, para. 6.20.

911 U.S. Counter-Memorial, p. 166, para. 18.11.

912 *Ibid.*, p. 166, para. 18.12.

913 *Ibid.*

11.61 First, what Iran seeks in this case is nothing but to invoke and benefit from the Treaty rights and protections that the United States has agreed to in the 1955 Treaty of Amity. Strikingly, the U.S courts which have been seised by Iranian companies never suggested that their intent was to circumvent Iran's obligations vis-à-vis the United States. What is true, in sharp contrast, is that the very aim of the challenged U.S. measures is to circumvent by all means each and every legal protection that were available to Iranian companies, whether under U.S. laws or under the Treaty, in order for private persons to have access to the assets of those Iranian companies. It is thus quite remarkable to hear the United States now turning the situation to its advantage by claiming that it is Iran which tries to circumvent the law.

11.62 Secondly, and leaving apart the fact that the United States cannot expect the Court to take for granted its allegations regarding Iran's involvement in sponsoring terrorism, the second U.S. argument (which the Court will read with a sense of *déjà-vu* given the preliminary objections phase) is plagued with the same inconsistencies as the first U.S. argument. This case can is not about Iran allegedly "shielding against its accountability for [its] wrongful acts".[914] Iran's claims concern the protections granted under the Treaty to Iranian companies as separate juridical entities. The judgments of the U.S. courts that authorised the attachment of assets owned by Iranian companies and entities or in which they held an interest, considered their proximity with the State of Iran only and never (with the sole exception of the absurd allegations levelled against Iranian companies in relation to the involvement of Iranian companies in the attacks of 11 September 2001)[915] their accountability in the terrorist acts for which reparation was sought. It is therefore hard to see how, by claiming that these Iranian entities should have benefited from the protections granted to them by the Treaty, Iran would be "shielding against *its* accountability".

11.63 Finally, while Iran invokes its Treaty rights as established by the Treaty of Amity, it is the United States which seeks, under the guise of the doctrine of abuse of rights, to circumvent its Treaty obligations and the Court's decision with *res judicata* effect. The sole purpose and intent of the United States in invoking the doctrine of 'abuse of

914 *Ibid.*

915 See above, para. 1.16 and paras. 2.41-2.54.

rights' is to have the Court excuse its multiple breaches of the Treaty as if it could benefit from some sort of circumstance precluding wrongfulness. But there is no basis in international law for such a claim. The United States cannot rely on the doctrine of abuse of rights as "a shield against its accountability for [its] wrongful acts"[916].

11.64 Iran submits therefore that the Court should reject the U.S. so-called "abuse of rights" claim, applying the same reasoning that justified its rejection of the U.S. "abuse of process" objection, and because such a claim is in any event unfounded.

916 *Ibid.*, p. 166, para 18.12.

APPENDIX A.
THE U.S. ALLEGATIONS OF TERRORISM ARE INAPPROPRIATE AND UNFOUNDED

A.1 As explained above,[917] the United States continues the approach it adopted in the preliminary objections phase of the case and seeks to tarnish the image of Iran and distract attention away from the actual dispute at issue, which Iran has submitted to the Court. Iran categorically denies all the U.S. allegations and does not intend to carry the case to the detour the United States designed and set with the purpose of deviating the proceeding from its main path. A few general points on these allegations, however, will be made in the present Appendix.

A.2 First, as a general matter, the U.S. allegations emanate from the hostile policy that the United States adopted soon after the overthrow in 1979 of the Shah's regime. That regime had been brought to power by the U.S. planned and backed coup against the national Iranian government in 1953,[918] and was one of the closest allies of the United States in the region. This new policy led the United States to make every effort to coerce and intimidate the new Iranian Government by any direct or indirect means.

A.3 In line with this policy, in January 1984 the United States placed Iran on the State Department's list of States "sponsoring terrorism", at a time when the new Iranian Government had been defending its country against numerous bombings and assassinations by U.S. sponsored terrorist groups, as well as against aggression from Saddam Hussein with U.S. extensive diplomatic, financial, intelligence and training support, during Iraq's war against Iran.

A.4 In the past four decades, the United States has employed every means at its disposal to weaken and slander Iran, falsely depicting Iran as a "State sponsoring terrorism" and engaging in other destabilising acts. For many years, there has been a concerted misinformation campaign in the political vocabulary of U.S. officials, and

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917 See para. 11.63.

918 See the documents recently declassified by the CIA in August 2013 (*National Security Archive*, CIA Confirms Role in 1953 Iran Coup, 19 August 2013 – IOS, Annex 34) and June 2017 (*National Security Archive*, Iran 1953: State Department Finally Releases Updated, 15 June 2017 – IOS, Annex 54).

consequently in the U.S. media, to make the name of Iran synonymous with terrorism, with Iranian leaders being portrayed as sponsors of terrorism. This misinformation has become so deeply engrained that no matter where terrorism is committed, as far as the United States is concerned, Iran will be portrayed as responsible. For instance, in 1996 the then U.S. Secretary of Defence accused Iran of being involved in the Khobar Tower bombing;[919] but later the Saudi Arabian Government, after completing its investigation, concluded that "there was no foreign role in this explosion" and that the bombing "took place at Saudi hands".[920] As identified in Chapter II above,[921] precisely the same pattern can be seen with respect to terrorist incident of 11 September 2001, with absurd allegations and findings being made against Iran in *Heiser* and other cases, but U.S. officials later accepting the obvious fact that Iran had no responsibility for this appalling terrorist attack.

A.5 Following the hideous terrorist attacks in Tehran on 7 June 2017, U.S. President Donald Trump went as far as suggesting that Iran brought them upon itself.[922] The very same day that Iran was struck by these deadly terrorist attacks, the U.S. Senate voted new sanctions against Iran because of an alleged support of terrorism.[923]

A.6 The accusation made by the United States against other States concerning the "sponsoring of terrorism" is likewise made in order to advance U.S. foreign policy goals. The reality is that the United States uses the word "terrorism" as a convenient label to attack its opponents. Iran rejects categorically the U.S. accusation of sponsoring terrorism. It considers the designation of Iran as a sponsor of terrorism to be unfounded and internationally wrong.

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919 S. Robinson, "Gingrich in call to arms against Iran terror bases", *The Daily Telegraph*, 5 August 1996 (IOS, Annex 22).

920 "Riyadh accepts for first time that bombers of US base were Saudi", *Agence France Press*, 21 May 1998 (IOS, Annex 25).

921 See Chap. II above 2.41-2.56.

922 See e.g. J. Cook, "Trump Suggests Iran Brought Deadly Terrorist Attacks Upon Itself", *Huffingtonpost.com*, 7 June 2017 (IOS, Annex 46) or I. Tharoor, "Terror in Iran reveals the hypocrisy of Trump and his allies", *Washington Post*, 8 June 2017 (IOS, Annex 48).

923 See Z. Jilani, R. Grim, "Bucking Bernie Sanders, Democrats Move Forward on Iran Sanctions After Terror Attack in Tehran", *The Intercept*, 7 June 2017 (IOS, Annex 47) or R. Shabad, "Senate passes measure to expand sanctions on Iran and Russia", *www.cbsnews.com*, 15 June 2017 (IOS, Annex 55).

A.7 Second, and related to the above, the process of unilaterally designating countries as "State-sponsors of terrorism" is opaque, applying double standards driven by U.S. political and financial interests even in cases where there is evidence clearly pointing to the "clandestine financial and logistic support" by allies to the United States.[924]

A.8 It is interesting to note that Cuba has been recently removed from the list of "State-sponsors of terrorism" after it resumed its diplomatic relations with the United States. This was also the case of Iraq, when the United States established relation with Saddam Hussein's regime in 1984. The recent crisis between the Arab States in the Persian Gulf also provides a telling example of the United States' double-standards when it comes to those it chooses to qualify as responsible for terrorism. Two weeks after the U.S. President came to Saudi Arabia, this State and other countries in the region accused Qatar of being a supporter of terrorism; and this was endorsed by the U.S. President who declared that "[t]he nation of Qatar, unfortunately, has historically been a funder of terrorism at a very high level."[925] A few days later, this did not prevent the United States selling weapons, including jet fighters, to Qatar, while U.S. diplomacy was seeking to retract these accusations.[926]

A.9 In another flagrant illustration of the deficiency and lack of merit in the designation of States as "State-sponsor of terrorism", the U.S. President has openly preferred the U.S. massive arms deals and financial ties with Saudi Arabia ahead of the protection of the most fundamental human rights, and has decided to turn a blind eye to the murder of Jamal Khashoggi in the Saudi consulate in Istanbul.[927] The same is true

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924 F. Zakaria, "How Saudi Arabia Played Donald Trump", *Washington Post*, 25 May 2017 (IOS, Annex 45).

925 See e.g. N. Gaouette, D. Merica & R. Browne, "Trump: Qatar must stop funding terrorism", *CNN*, 10 June 2017 (IOS, Annex 51) or D. Smith & S. Siddiqui, "Gulf crisis: Trump escalates row by accusing Qatar of sponsoring terror", *The Guardian*, 9 June 2017 (IOS, Annex 49).

926 See e.g. P. Beaumont, "US signs deal to supply F-15 jets to Qatar after Trump terror claims", *The Guardian*, 15 June 2017 (IOS, Annex 52) or R. Browne, "Amid diplomatic crisis Pentagon agrees $12 billion jet deal with Qatar", *CNN*, 15 June 2017 (IOS, Annex 53).

927 See W. Blitzer, CNN Aired 17 October 2018 - 13:00 ET, available at archives.cnn.com/TRANSCRIPTS/1810/17/wolf.01.html ("PRESIDENT OF THE UNITED STATES: Saudi Arabia's been a very important ally of ours in the Middle East. We are stopping Iran. We're not trying to stop. We're stopping Iran. […] We have other very good allies in the Middle East. But if you look at Saudi Arabia, they're an ally and they're a tremendous purchaser of not only military equipment but other things. When I went there, they committed to purchase $450 billion worth of things

with respect to the Yemen crisis, where the United States has supported[928] politically and militarily its allies in their aggression and also crimes with impunity against civilians and in particular innocent children,[929] but the United States justifies its support as a fight against terrorism.[930] According to U.N. reports, over 7,500 Yemenis children have so far been killed or wounded, [931] 12.24 million children are in need of humanitarian assistance and over 368,000 children under 5 are suffering severe malnutrition.[932]

A.10 In short, it is financial and political considerations that dictate U.S. decisions to designate (or not) States as so-called "State-sponsors of terrorism".

A.11 Third, and again following from the above, the United States has failed to provide any evidence to establish, in accordance with any internationally recognised standards or procedures, the attributability to Iran of the actions referred to in its Counter-Memorial, including the alleged actions attributed to groups such as Hezbollah or Hamas. Furthermore, contrary to the U.S. claims, these organisations are not the proxies of Iran or any other governments which support them. Rather, they are groups which have been defending their country against foreign invasion and occupation.

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and $110 billion worth of military. Those are the biggest orders in the history of this country, probably in the history of the world. I don't think there's ever been any order for $450 billion. And you remember that day in Saudi Arabia where that commitment was made. So they're an important ally."); NBC News, President Trump's full, unedited interview with Meet the Press, 23 June 2019 ("But I'm not like a fool that says, 'We don't want to do business with them.' And by the way, if they don't do business with us, you know what they do? They'll do business with the Russians or with the Chinese. They will buy -- We make the best equipment in the world, but they will buy great equipment from Russia and from China.") available at www.nbcnews.com/politics/meet-the-press/president-trump-s-full-unedited-interview-meet-press-n1020731; See also, "White House Digs Itself in Deeper on Khashoggi", *Foreign Policy*, 4 December 2018 (IR, Annex 120); "Saudi Arabia is America's No. 1 weapons customer", *CBS News*, 12 October 2018 (IR, Annex 119).

928 The U.S. President has used his veto power four times denying withdrawal US military support and ending weapons sales to Saudi Arabia and its allies. See, VETO—S.J. RES. 7 (PM 10) (IR, Annex 11); VETO—S.J. RES. 38 (PM 25) (IR, Annex 12); VETO—S.J. RES. 37 (PM 24) (IR, Annex 13) and VETO—S.J. RES. 36 (PM 23) (IR, Annex 14).

929 See M. Bazzi, "America is likely complicit in war crimes in Yemen. It's time to hold the US to account", *The Guardian*, 3 October 2019 (IR, Annex 131).

930 See L. Hartig, "Full Accounting Needed of US-UAE Counterterrorism Partnership in Yemen", *justsecurity.org*, 7 December 2018 (IR, Annex 121).

931 See "Over 7,500 children killed or wounded in Yemen since 2013, U.N. report says", *CBS News*, 29 June 2019 (IR, Annex 126).

932 See UNICEF, "Humanitarian Action for Children in Yemen", 2020 (IR, Annex 115).

Hezbollah is a highly popular and independent political party in Lebanon, with a number of seats in the cabinet of ministers and parliament. Hamas, too, is a political party in occupied Palestine, which was elected by Gaza's people to run the government.

A.12 In keeping with the U.N. Charter and General Assembly resolutions reflecting customary international law, Iran believes that, unlike the United States which recognises annexation of Palestinian's occupied territories in violation of international law, supporting the National Liberation Movements ('NLMs') who are subject to alien subjugation, domination or exploitation in the exercise of their right to self-determination[933] or national militant groups defending their country and people against foreign occupiers is not prohibited under international law and in the former case is even "a right *erga omnes*".[934]

A.13 Under the U.S. approach to designating these groups as 'terrorists', the U.S. Government itself can be considered as a 'State sponsor of terrorism' because it has been involved in the creation or support of militant groups – for example in the 1980s, when it supported groups which fought against the Soviet Union's occupation in Afghanistan.[935] It has been admitted that the United States supported the foundation of terrorist organisations such as Al-Qaeda and ISIS (the so called Islamic State of Iraq and Sham). Ms. Hillary Clinton, former U.S. Secretary of State, testified before the Congress that: "[t]he people we are fighting today we founded 20 years ago".[936]

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933 See, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 436, para. 79. See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 171-172, para. 88.

934 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 171-172, para. 88.

935 See S. Galster, "The September 11th Sourcebooks – Vol. II: Afghanistan: Lessons from the Last War – Afghanistan: The Making of U.S. Policy, 1973-1990", *The National Security Archive*, 9 October 2001 (IOS, Annex 26).

936 See "Hillary Clinton speaks out about US links with Taliban", *SouthAsiaNews* available at www.youtube.com/watch?v=X2CE0fyz4ys (last visited 16 August 2017).

The current U.S. President pointed out several times during his presidential campaign that "Obama and Hillary Clinton created ISIS".[937]

A.14 Contrary to the U.S. accusations, the United States' intervention policy in the Middle East for decades is the real cause of destabilization and, threat to the security of the region as manifested on many occasions. Indeed, Iran has been ensuring regional stability and security and has countered any disruptive efforts by foreign powers in light of its national interests and foreign policy objectives. This is evidenced by Iran's efforts to strengthen peace and stability in Iraq, Syria and Yemen. The most recent initiative for ensuring peace and security in the region has been proposed by Iranian President at the 74th session on the U.N. General Assembly in New York. Addressing the U.N. General Debate, the Iranian President proposed the Hormuz Peace Endeavour ('HOPE') calling "on all eight countries in the Persian Gulf region to join in an attempt to bring peace through dialogue."[938]

A.15 The war crimes and crimes against humanity committed by the U.S. military or through its proxies *inter alia* in Iraq, Afghanistan, Syria and Yemen have fomented violence and extremism and destabilised the region;[939] U.S. indiscriminate attacks through artillery and airstrikes in the Coalition's military campaign took the lives of more than 1600 civilians in the Syrian city of Ragga from June to October 2017.[940] The United States has also supplied the coalition forces in Yemen with weapons specifically the laser-guided bomb manufactured by the U.S. company Raytheon which have been used in deadly airstrike on civilians.[941] The United States has

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937 See R. LoBianco & E. Landers, "Trump: Clinton, Obama 'created ISIS'", *CNN*, 3 January 2016 (IOS, Annex 38) or K. Ng, "Donald Trump says Barack Obama and Hillary Clinton 'created Isis'", *The Independent*, 3 January 2016 (IOS, Annex 39).

938 See "Zarif terms presence of U.S. in region a 'failed experience'", *IRNA*, 12 October 2019 (IR, Annex 132).

939 *Ibid*.

940 See Amnesty International, "Syria: Unprecedented investigation reveals US-led Coalition killed more than 1,600 civilians in Raqqa 'death trap'", 25 April 2019 (IR, Annex 124).

941 See Amnesty International, "Yemen: US-made bomb used in deadly air strike on civilians", 26 September 2019 (IR, Annex 130).

reportedly killed 115 to 149 civilians in Yemen by drone strikes.[942] U.S. drone strikes in Afghanistan also killed many civilians, most recently in September 2019 the strike in Nangarhar province killed at least 30 innocent farmers and labourers and injured forty.[943] The U.S. Government has also conducted some 330 to 374 drone attacks in Pakistan between 2004 and September 2013 as a result of which between 400 and 900 civilians have been killed and at least 600 people seriously injured.[944]

A.16 Fourth, not only has Iran always condemned terrorism in all its forms and manifestations and has done so at the highest level,[945] but Iran has been itself been a victim of terrorist activities, conducted by groups supported mainly by the United States after the revolution. By way of example more than 17,000 Iranian civilians and officials have been killed by the Mujahedin Khalgh Organization of Iran ('MKO') and the National Council of Resistance ('NCR'), through bombings and assassinations. Members and supporters of MKO and NCR have been very active in the United States and had access to U.S. officials. Representatives of those groups have continuously contacted U.S. Senators and Congressmen and met with U.S. Executive officials.[946] The current U.S. Secretary of State is even willing to embrace MKO (or 'MEK') and

942 See "The War in Yemen, New America¸ Live statistics", *New America* (available at www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-war-in-yemen, last consulted on 3 August 2020).

943 See "US drone strike intended for Isis hideout kills 30 pine nut workers in Afghanistan", *The Guardian*, 19 September 2019 (IR, Annex 128).

944 See Amnesty International, "Will I Be Next?" Us Drone Strikes in Pakistan", available at www.amnestyusa.org/files/asa330132013en.pdf

945 See G. A. Nader, "Interview with President Ali Akbar Hashemi Rafsanjani", *Middle East Insight*, July-August 1995, Vol. XI, No.5, p. 10 (IOS, Annex 19); "Transcript of interview with Mohammad Khatami, Former President of the Islamic Republic of Iran", *CNN*, 7 January 1998, p. 8 (IOS, Annex 23). See also Statement by H.E. Seyed Mohammad Khatami, Former President of the Islamic Republic of Iran, 21 September 1988 (IOS, Annex 8); Statement by H.E. Dr. Kamal Kharrazi, Minister for Foreign Affairs of the Islamic Republic of Iran, before the Fifty-Second Session of the United Nations General Assembly, New York, 22 September 1997 (IOS, Annex 9); Statement by H.E. Dr. Hassan Rohani, President of the Islamic Republic of Iran, before the Sixty-Eight Session of the United Nations General Assembly, New York, 24 September 2013, p. 3 (IOS, Annex 10).

946 See e.g., *Mojahed, MKO Bulletin*, Issue No. 295, Feb-March 1993 (IOS, Annex 15); *Mojahed, MKO Bulletin*, issue No. 294, Dec. 1992 (IOS, Annex 14); *Mojahed, MKO Bulletin*, Issue No. 298, May 1993 (IOS, Annex 18); *Mojahed, MKO Bulletin*, Exclusive Issue, Autumn 1991 (IOS, Annex 12); *Mojahed, MKO Bulletin*, Issue No. 297, April 1993 (IOS, Annex 17); see also S. M. Hersh, "Our Men in Iran", *The New Yorker*, 5 April 2012 (IOS, Annex 32); Daniel Chaitin, "Sen. John McCain meets with Iranian dissidents relocated to Albania", *Washington Examiner*, 15 April 2017 (IOS, Annex 44).

take part in a meeting linked to that terrorist group as a featured speaker making false accusation against Iran.[947]

A.17 As to further examples, in 1998, the Taliban killed ten Iranian diplomats in Afghanistan at the siege of the Iranian consulate in Mazar-i-Sharif. Between 2010 and 2012, five Iranian nuclear scientists were assassinated by terrorist groups. During the past several years, terrorist groups have killed many civilians and security personnel in one south-eastern Iranian province (Sistan and Baluchistan) alone. More recently, the terrorist attack in Tehran of 7 June 2017 (claimed by ISIS) killed 18 and injured over 45 civilians.

A.18 Fifth, the United States also accuses Iran of engaging proliferation of sensitive nuclear activities and pursuing nuclear weapons. The U.S. description of the issue is disingenuous and fails to take into account many other intervening issues with respect to Iran's peaceful nuclear program (which are not however relevant in the current context). Indeed, all Iran's nuclear installations and all nuclear materials have been under the IAEA's constant and strict inspections. The U.N. Security Council has never declared Iran to be in violation of the NPT, and the IAEA has never reported that nuclear materials were used for non-peaceful purposes.

A.19 The main underlying reason for the dispute over alleged proliferation – which is not before the Court – was the United States' policy after 1979 with respect to Iran's peaceful program, seeking to cut off the supply of enriched uranium fuel and other materials by IAEA's members for Iran's nuclear research reactors and to deprive Iran of its rights under the NPT and IAEA agreements.[948] The dispute was resolved through the JCPOA, which *inter alia* reaffirmed Iran's rights under the said agreements. The United States, however, decided to withdraw the agreement and carry on with its hostile policy of imposing sanctions against Iran or Iranian nationals and companies.

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947 See "Iran hawks cement ties to former US-designated terrorist group", *Al Monitor*, 24 September 2019 (IR, Annex 129).

948 The U.S. officials were publicly questioning Iran's need for nuclear power since it has so much oil whereas the United States had encouraged Iran in 1970th to develop nuclear energy because Iran would eventually run out of oil (R. Erlich, "U.S. Tells Iran: Become a Nuclear Power", *Foreign Policy in Focus*, 28 November 2007 – IOS, Annex 27).

It is regrettable that these matters have been placed before the Court for inappropriate, prejudicial purposes.

A.20 Sixth, with respect to the U.S. false accusations and mischaracterisation of Iran's missile program it is to be emphasised that as Iran has always reiterated, in line with its defence doctrine, its missile program is only for deterrence and defence purposes. This defensive program should be considered in the context of threats caused by advanced offensive weaponries including long-range missiles that the U.S. and its allies have continually provided to Iran's neighbouring countries in the region and also against the background of targeting Iranian civilians and areas by missiles during the 1980s war against Iran by Saddam Hossein's regime which received substantial intelligence, material and financial support from the U.S. Government at the time.

A.21 Furthermore, nothing in the Security Council resolution 2231 bars Iran from conduction activities related to missiles which are not designed for delivering nuclear weapons. Indeed, "the issue of missiles has never been subject to negotiations and nothing has been approved or ratified about its prohibition for the Islamic Republic of Iran in [U.N.] resolution 2231.[949]

A.22 The alleged concerns over Iran's missile activities are exaggerated and politically motivated. In fact, the United States' own missile activities and its approach towards relevant existing treaties pose a great threat to the international peace and security. On 1 February 2019 the U.S. Government suspended its obligations under the Intermediate-Range Nuclear Forces ('INF') Treaty and announced its intention to withdraw from the treaty in 180 days which was effected on 20 August 2019. A day after the U.S. withdrawal, "The U.S. Secretary of Defense said that he was in favor of placing ground-launched, intermediate-range missiles in Asia relatively soon."[950] The United States' activities are indeed in breach of Article VI of the NPT which requires the United States "[…] to pursue negotiations in good faith on effective measures

949 "UNSC Resolution 2231 enforces no ban on Iran's missile program: FM Zarif", *Press TV*, 11 December 2018 (IR, Annex 122).

950 See Arms Control Association, "The Intermediate-Range Nuclear Forces (INF) Treaty at a Glance", August 2019 (IR, Annex 127); See also, "Pompeo announces suspension of nuclear arms treaty with Russia", *CNN*, 1 February 2019 (IR, Annex 133).

relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[951] The recently published document by Chairman of the Joint Chiefs of Staff entitled "Nuclear Operations" which sets forth a U.S. nuclear doctrine has openly incited reliance on nuclear weapons. The document reads in part as follows: "Using nuclear weapons could create conditions for decisive results and the restoration of strategic stability. Specifically, the use of a nuclear weapon will fundamentally change the scope of a battle and create conditions that affect how commanders will prevail in conflict."[952] It is quite telling that the most recent U.S. nuclear doctrine with the proposed approach has been released shortly after the U.S. withdrawal from the INF Treaty. Thus, given the United States' violation of its international obligations and Security Council Resolution 2231, it is difficult to credit the United States' allegations over Iran's defensive missile program as a threat to U.S. regional and international security.

A.23 The United States' other accusations against Iran emanate either from a U.S. hostile approach toward Iran or are taken out of their appropriate context. Iran does not intend to belabour the Court with these issues, which are irrelevant to Iran's dispute. It is sufficient here to emphasise that it is Iran's view that it is the United States that has destabilised the Middle East by its inappropriate policies and actions which has caused tragic human loss and suffering since 1950s through a policy of terror, violence and intimidation. This *inter alia* includes occupation of Iraq in 2003 which destabilised that country and paved the way for emerging terrorist groups such as ISIS, to which Iran has been fighting ever since.[953]

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951 Treaty on the Non-Proliferation of Nuclear Weapons ('NPT'), entered into force 5 March 1970, available at www.un.org/disarmament/wmd/nuclear/npt/text.

952 See Joint Publication 3-72, "Nuclear Operations", 11 June 2019, available at fas.org/irp/doddir/dod/jp3_72.pdf. According to *The Guardian*, the "document was taken down from the Pentagon online site after a week, and is now only available through a restricted access electronic library. But before it was withdrawn it was downloaded by Steven Aftergood, who directs the project on government secrecy for the Federation of American Scientists." See, J. Borger, "Nuclear weapons: experts alarmed by new Pentagon 'war-fighting' doctrine", *The Guardian*, 19 June 2019 (IR, Annex 125).

953 I. Tharoor, "Iraq's Crisis: Don't Forget the 2003 U.S. Invasion", *The Washington Post*, 5 April 2014 (IOS, Annex 36); D. Rohde, "The Iraq Takeaway: American Ground Invasions Destabilize the Middle East", *The Atlantic*, 20 March 2013 (IOS, Annex 33); D. Hussain, "ISIS: The 'Unintended Consequences' of the US-led War on Iraq", *Foreign Policy Journal*, 23 March 2015 (IOS, Annex 37).

A.24 Finally, to put matters in a proper context, Iran should also refer briefly here to a number of other hostile actions that the United States has taken against Iran after the overthrow of the U.S. backed Shah's regime in 1979 including: (a) General Robert E. Hyser's mission to Iran in January 1979 for a last-resort coup d'état prior to the revolution; (b) the U.S. unsuccessful military operation in Tabas desert on 24 April 1980 (the so-called 'Operation Eagle Claw'); (c) the Nojeh coup plot on 9 July 1980 to overthrow the newly established Islamic Republic of Iran; (d) the support of Saddam Hussein's aggression against Iran by different means;[954] (e) the attack and destruction of certain Iranian Naval units and several offshore oil installations in the Persian Gulf;[955] (f) the shooting down of an Iranian civil aircraft over the Persian Gulf, killing all 300 passengers on board;[956] (g) the interfering in Iran by allocating funds for covert operations, *threatening Iran with military attack, and stating publicly its support for a regime change in Iran*[957] and (h) horrific terror attack of top Iranian commander Major General Qassem Soleimani by drone attack in Baghdad International Airport, who had played a significant role in fighting against terrorism in the region, and was on an official visit to Iraq.[958]

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954 This included restricting flow of arms to Iran, replacing Iraq with Iran on the State sponsor of terrorism list in 1984, supplying Iraq with materials and data in its illicit chemical and ballistic missile attacks against Iranian military and civil targets, providing Iraq with financial, intelligence and diplomatic help. See e.g., Congressional record, House of Representatives, H 860, 2 March 1992 (IOS, Annex 1); C. W. Weinberger, *Fighting for Peace*, Warner Books, 1990, p. 358; H. Kissinger, "Clinton and the World", *News Week*, 1 February 1993, p. 12 (IOS, Annex 16); K. R. Timmerman, "Europe's Arms Pipeline to Iran", *The Nation*, Vol. 245, 18 July 1987, p. 47 (IOS, Annex 11); CRS Report for Congress, "Terrorism: Middle Eastern Groups and State Sponsors", 9 August 1995 (IOS, Annex 20); M. Waas & D. Frantz, "Abuses in US Aid to Iraqis Ignored", *Los Angeles Times*, 22 March 1992 (IOS, Annex 13); M. Phythian, *Arming Iraq: How the US and Britain Secretly Built Saddam's War Machine*, North Western University Press, Boston, p. 37; E. Sciolino, *The Outlaw State: Saddam Hossein's Quest for Power and the Gulf Crises*, John Wiley & Sons, New York 1991, p. 166; R. Wright, "Some See Hypocrisy in U.S. Stand on Iraq Arms Mideast: Officials say American intelligence aided Baghdad's use of chemical weapons against Iran in 80s", *Los Angeles Times*, 16 February 1998 (IOS, Annex 24).

955 See *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161.

956 See *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Iran's Application instituting proceedings before the International Court of Justice, 17 May 1989 and Iran's Memorial, 24 July 1990.

957 See, *e.g.*, R. Smith & T. Lippman, "White House Agrees to Bill Allowing Covert Action Against Iran", *The Washington Post*, 22 December 1995 (IOS, Annex 21); "Obama says on Iran all options on the table", *Reuters*, 21 April 2009 (IOS, Annex 28).

958 See "Iran's Qassem Soleimani killed in US air raid at Baghdad airport", *Al Jazeera*, 3 January 2020 (IR, Annex 133); See also, the letter of Iran's ambassador and permanent representative to the United Nations to UN Secretary- General and President of the Security Council in "Envoy terms IRGC commander's terror as 'terrorist, criminal act'", *IRNA*, 4 January 2020 (IR, Annex 134).

PART III.

CONCLUSIONS

CHAPTER XII.
SUMMARY OF IRAN'S CASE AND SUBMISSIONS

SECTION 1.
SUMMARY OF IRAN'S CASE

12.1 As stated in Iran's Memorial, this case arises from the implementation of a policy of the United States that strips Iranian companies of respect for their rights, including respect for their separate juridical status, violates the property rights of the State of Iran and Iranian entities, and places numerous obstacles to commerce between Iran and the United States, all in violation of the terms of the Treaty of Amity. One result of this U.S. policy is that assets are being taken from Iranian companies to satisfy judgments of the U.S. courts against the Islamic Republic of Iran in cases which themselves offend basic principles of international law concerning due process.[959]

12.2 Pursuant to its policy, the United States has undertaken measures that have inflicted, and continue to inflict, serious harm upon the Iranian economy and the Iranian nationals and companies who make up and depend on that economy. Since Iran filed its Application and Memorial, and addressed the preliminary objections made by the United States, the harm caused to Iran and Iranian companies by the U.S. measures has continued to escalate. Iran and Iranian companies face the prospect of having over USD 50 billion of their assets seized in order to satisfy judgment debts already created by the U.S. courts, with tens of billions of U.S. dollars in pending claims in courts in the United States and in attempts to enforce U.S. court judgments abroad.[960]

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959 Iran's Memorial, p. 1, para. 1.1.

960 Attachments 1, 2, 3 and 4 to this Reply.

12.3 Invoking incoherent and spurious allegations of terrorism against the State of Iran, the U.S. Congress has amended U.S. law to construct a discriminatory scheme that targets Iran and Iranian companies and deprives them of the possibility of properly defending their legal rights before U.S. courts. This has been done for the specific purpose of enabling plaintiffs to satisfy judgment debts in cases against the Iranian State by seizing assets of juridically separate Iranian companies. Most prominently, the assets of Iran's Central Bank, Bank Markazi, have been the subject of the *Peterson* litigation, with the outcome of the judicial proceedings and the seizure and disposition of USD 1,895 billion pre-determined by the U.S. Congress directly intervening in a pending case before the U.S. courts so as to ensure that Bank Markazi loses, in a flagrant disregard of Bank Markazi's entitlement to meaningful access to judicial process in the United States.

12.4 The U.S. measures have violated multiple provisions of the Treaty of Amity and undermined its object and purpose. Article III(1) provides for the U.S. obligation to give legal effect within its territories to the juridical status of Iranian companies, including the obligation to their legal separateness from the State of Iran. In its legislation and judicial practice, the United States has disregarded the distinction between the Iranian companies, as independent legal entities, and the State of Iran. The abrogation of the rights of Iranian companies to recognition of their separate juridical status also violates the unqualified obligation to afford a meaningful freedom of access to courts to the end that impartial justice be done contained in Article III(2). This provision has been also been breached by legislation establishing the liability of Iranian companies for judgments rendered against the State of Iran in proceedings to which those companies were not parties, and the enactment and implementation of retroactive legislation enabling the seizure of such companies' property including through the stripping of legal rights which would otherwise be available under U.S. law and predetermining the outcome of ongoing legal proceedings.

12.5 Three freestanding elements of Article IV(1) – fair and equitable treatment, the prohibition on unreasonable or discriminatory measures that would impair legally acquired rights, and effective means of enforcement for lawful contractual rights – have been breached by U.S. legislative, executive and judicial acts. Similarly, Iran's entitlements to the most constant protection and security for its companies and

nationals and freedom from expropriation of the property (including interests in property) of its companies and nationals under Article IV(2) have been violated by the United States. Iranian companies have been deprived of the use and enjoyment of their property by, among other acts, Executive Order 13599, which 'blocks' or 'freezes' all property of the relevant Iranian companies located in the territory of the United States.

12.6 Iran's entitlement for its companies and nationals to be permitted to lease, acquire and dispose of property is contained in Article V(1) of the Treaty of Amity. The intended effect of U.S. legislative and executive measures as implemented by the U.S. courts has been precisely to deprive Iranian companies of their right to dispose of their property as they wish. Further, the general prohibition on restrictions on the making of payments, remittances, and other transfers of funds to or from the territory of the United States and/or Iran in Article VII(1) has also been violated by the United States.

12.7 Stepping back from the detail of U.S. legislative, executive and judicial action that singles out Iran, the United States has created an environment that renders practically impossible commerce between the territories of the two Parties, contrary to Article X(1) of the Treaty of Amity. The treatment afforded to Iran, Bank Markazi and other Iranian companies and their respective property, radically interferes with freedom of commerce.

12.8 Although the United States has purported to withdraw from the Treaty of Amity in order to limit its exposure to claims, Iran naturally maintains its case against the United States. It is a case founded on already-acquired rights under the Treaty of Amity, adjusted in the light of the Court's Judgment on Preliminary Objections.

SECTION 2.

IRAN'S REQUEST FOR RELIEF

12.9 In paragraph 33 of its Application, Iran requested the following relief:

> *(a)* That the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by Iran;

(b) That by its acts, including the acts referred to above and in particular its *(a)* failure to recognize the separate juridical status (including the separate legal personality) of all Iranian companies including Bank Markazi, and *(b)* unfair and discriminatory treatment of such entities, and their property, which impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, and *(c)* failure to accord to such entities and their property the most constant protection and security that is in no case less than that required by international law, *(d)* expropriation of the property of such entities, and *(e)* failure to accord to such entities freedom of access to the US courts, including the abrogation of the immunities to which Iran and Iranian State-owned companies, including Bank Markazi, and their property, are entitled under customary international law and as required by the Treaty of Amity, and *(f)* failure to respect the right of such entities to acquire and dispose of property, and *(g)* application of restrictions to such entities on the making of payments and other transfers of funds to or from the USA, and *(h)* interference with the freedom of commerce, the USA has breached its obligations to Iran, inter alia, under Articles III (1), III (2), IV (1), IV (2), V (1), VII (1) and X (1) of the Treaty of Amity;

(c) That the USA shall ensure that no steps shall be taken based on the executive, legislative and judicial acts (as referred to above) at issue in this case which are, to the extent determined by the Court, inconsistent with the obligations of the USA to Iran under the Treaty of Amity;

(d) That Iran and Iranian State-owned companies are entitled to immunity from the jurisdiction of the US courts and in respect of enforcement proceedings in the USA, and that such immunity must be respected by the USA (including US courts), to the extent established as a matter of customary international law and required by the Treaty of Amity;

(e) That the USA (including the US courts) is obliged to respect the juridical status (including the separate legal personality), and to ensure freedom of access to the US courts, of all Iranian companies, including State-owned companies such as Bank Markazi, and that no steps based on the executive, legislative and judicial acts (as referred to above), which involve or imply the recognition or enforcement of such acts shall be taken against the assets or interests of Iran or any Iranian entity or national;

(f) That the USA is under an obligation to make full reparations to Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the USA; and

(g) Any other remedy the Court may deem appropriate.

12.10 Iran recognises that the Court's judgment of 13 February 2019 on Preliminary Objections in this case, means that there must be some adjustment in the relief requested.

12.11 The jurisdiction of the Court to entertain the dispute and to rule upon the claims submitted by Iran has been established, and the Court has decided, in upholding the second of the United States' preliminary objections, that its jurisdiction does not encompass claims that are predicated on the United States' failure to accord customary international law immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities. Those elements are accordingly removed from Iran's request for relief.

12.12 The remaining claims, which all concern obligations imposed by the Treaty of Amity, are maintained. It is axiomatic that, to the extent that the Court finds the United States to have breached its obligations owed to Iran under the Treaty, certain legal consequences follow automatically.[961] In the words of the International Law Commission,

> "[t]he core legal consequences of an internationally wrongful act set out in Part Two [of the ILC Articles on State Responsibility] are the obligations of the responsible State to cease the wrongful conduct (article 30) and to make full reparation for the injury caused by the internationally wrongful act (article 31)."[962]

Iran maintains its requests based on those two core obligations.

12.13 The U.S. measures and decisions of which Iran complains were adopted unlawfully, and in breach of the United States' obligations under the 1955 Treaty of Amity. That wrong must cease: the United States must undo the unlawful measures. That obligation is unaffected by any termination of the Treaty: the unlawful act is not retrospectively cured by the termination of the Treaty.[963]

12.14 The injuries caused by the unlawful measures also remain unaffected by any termination of the Treaty; and Iran has sustained very great material and moral injury as a result of those measures, for which it is entitled to reparation. The United States

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961 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*, U.N. Doc. A/56/10, Article 28, and Commentary on 'Part Two – Content of the International Responsibility of a State', paragraph 2.

962 *Ibid.*

963 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*, U.N. Doc. A/56/10, Article 30 and Commentary thereon.

is obliged to make restitution, and to the extent that restitution is materially impossible, to compensate Iran for the damage caused by the unlawful U.S. acts.[964]

12.15 There is, moreover, a great moral injury done to Iran that cannot be made good by restitution or compensation. For that, Iran is entitled to satisfaction in accordance with international law.[965]

12.16 As was stated in paragraph 33(f) of Iran's Application, Iran has reserved the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States. This follows inevitably as a matter of practicality, as the damage inflicted on Iran continues to mount. It is also a matter of efficiency in the conduct of this litigation, as a detailed claim for reparation is better presented once the full extent of the unlawful acts of the United States has been determined by the Court.

12.17 Accordingly, Iran presents here its request for declarations by the Court that the United States has acted in breach of its obligations under the Treaty of Amity, and for an Order from the Court that the United States must forthwith put an end to the situation brought about by its unlawful acts, and afford Iran satisfaction. Iran reserves for a later stage in these proceedings the presentation of its claim for reparation.

964 *Ibid.*, Articles 34, 35, 36 and 38 and the Commentary thereon.

965 *Ibid.*, Article 37 and Commentary thereon.

SECTION 3.
SUBMISSIONS

12.18 On the basis of the foregoing, and reserving its right to supplement, amend or modify the present request for relief in the course of the proceedings in this case, Iran respectfully requests the Court to adjudge, order and declare:

a. That the United States has violated its obligations under the Treaty of Amity, as follows:

i. That by its acts, including the acts referred to above and in particular its failure to recognise the separate juridical status (including the separate legal personality) of all Iranian companies including Bank Markazi, the United States has breached its obligations to Iran, *inter alia*, under Article III(1) of the Treaty of Amity;

ii. That by its acts, including the acts referred to above and in particular its (a) unfair and inequitable treatment of such companies and their property (including interests in property); and (b) unreasonable and discriminatory treatment of such companies, and their property, which impairs the legally acquired rights and interests; and (c) failure to assure that the lawful contractual rights of such companies are afforded effective means of enforcement, and (d) failure to accord to such companies and their property the most constant protection and security that is in no case less than that required by international law, and (e) expropriation of the property of such companies, and its failure to accord to such entities freedom of access to the U.S. courts to the end that justice be done, as required by the 1955 Treaty of Amity, and (f) failure to respect the right of such companies to acquire and dispose of property, the United States has breached its obligations to Iran, *inter alia*, under Articles III(2), IV(1), IV(2), and V(1) of the Treaty of Amity;

iii. That by its acts, including the acts referred to above and in particular its (a) application of restrictions to such entities on the making of payments

and other transfers of funds to or from the United States, and (b) interference with the freedom of commerce, the United States has breached its obligations to Iran, *inter alia*, under Articles VII(1) and X(1) of the Treaty of Amity;

b. That the aforementioned violations of international law entail the international responsibility of the United States;

c. That the United States is consequently obliged to put an end to the situation brought about by the aforementioned violations of international law, by (a) ceasing those acts and (b) making full reparation for the injury caused by those acts, in an amount to be determined in a later phase of these proceedings, and (c) offering a formal apology to the Islamic Republic of Iran for those wrongful acts and injuries;

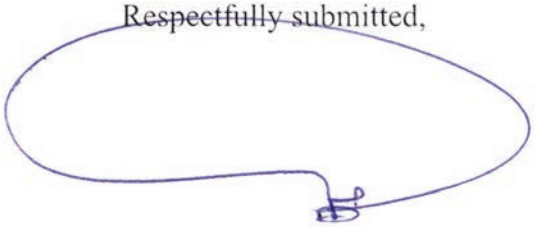
d. That the United States shall, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the measures adopted by its Legislature and its Executive, and the decisions of its courts and those of other authorities infringing the rights of Iran and of Iranian companies, cease to have effect in so far as they were each adopted or taken in violation of the obligations owed by the United States to Iran under the Treaty of Amity, and that no steps are taken against the assets or interests of Iran or any Iranian entity or national that involve or imply the recognition or enforcement of such acts;

e. That Iran present to the Court, by a date to be fixed by the Court, a precise evaluation of the reparations due for injuries caused by the unlawful acts of the United States in breach of the Treaty of Amity;

f. That the United States shall pay the costs incurred by Iran in the presentation of this case and the defence of its legal rights under the Treaty of Amity, with the details thereof to be presented by Iran to the Court, by a date to be fixed by the Court;

g. Any other remedy the Court may deem appropriate.

Respectfully submitted,



M. H. Zahedin Labbaf
Co-Agent of the Government of the
Islamic Republic of Iran

CERTIFICATION

I, the undersigned, M. H. Zahedin Labbaf, Co-Agent of the Islamic Republic of Iran, hereby certify that the copies of this Reply and the documents annexed in the Volumes of Annexes I to IV are true copies and conform to the original documents and that the translations into English are accurate translations.

The Hague, 17 August 2020

M. H. Zahedin Labbaf
Co-Agent of the Government of the
Islamic Republic of Iran

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