

SEPARATE OPINION, PARTLY CONCURRING AND PARTLY
DISSENTING, OF JUDGE *AD HOC* BARKETT

Abuse of rights — Iran seeking to exercise rights conferred on it by the Treaty of Amity “for purposes other than those for which the rights at issue were established”.

Exhaustion of local remedies — Exhaustion of local remedies not futile.

Article XX (1) (d) — United States demonstrated that Executive Order 13599 necessary to protect its essential security interests.

Article III (1) — Court conflates its analysis of Articles III (1) and IV (1) — Unreasonableness cannot be equated to non-recognition of juridical status — Article III (1) only requires that juridical status of companies be recognized, without implicating additional legal rights — United States courts recognized juridical status of Iranian companies — Article III (1) does not require recognition of “separateness”.

Article IV (1) — Court does not consider purpose of compensating victims of terrorist acts or explain why measures were allegedly manifestly excessive — Term “unreasonable” creates a high threshold, but Court has without explanation or support chosen lower threshold — United States statutes apply to specific subset of companies and are tailored precisely.

Article IV (2) — Attachment to obtain satisfaction of lawfully obtained money judgment does not amount to expropriation — Court’s understanding of judicial expropriation is unsupported — no violation of due process in domestic proceedings — Court’s only support for expropriation claim is finding of unreasonableness under Article IV (1).

Article X (1) — United States measures have no connection, or too tenuous a connection, with commercial relations between Parties.

1. I agree with the Court’s determination that Bank Markazi cannot be considered a “company” under the Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the “Treaty”), and with the ultimate conclusion

that the defence of “unclean hands” cannot be upheld in this case. I also agree that the defence under Article XX (1) (c) cannot be upheld, although I reach that conclusion on the ground that the challenged United States measures were not enacted for the purpose of regulating the production or trafficking of items “for the purpose of supplying a military establishment”¹. I also agree with the Court’s partial dismissal of Iran’s claim under Article IV (2), as I believe that the term “most constant protection and security” only requires physical and not legal protection or security, and with the Court’s rejection of Iran’s claims under Articles V (1) and VII (1).

2. On the other hand, I believe the Court erred in denying the United States’ objection based on exhaustion of local remedies and its defences based on abuse of rights and Article XX (1) (d), as well as its resolution of Iran’s claims under Articles III (1), IV (1), IV (2) (as regards expropriation) and X (1). Accordingly, I dissent as to these issues for the reasons discussed below².

I. UNITED STATES DEFENCES

A. Abuse of Rights

3. I agree with the Court that, although the United States’ defence of abuse of rights raises substantially “similar” arguments to those it made in its preliminary objections, the Court’s 2019 Judgment³ does not preclude the United States from invoking an abuse of rights defence on the merits (see paragraph 88 of the present Judgment). I disagree, however, with the Court’s finding that the United States has failed to demonstrate that Iran now seeks to exercise its rights under the Treaty for purposes other than those for which the rights at issue were established to the detriment of the United States.

¹ See Treaty, Article XX (1) (c).

² Although I do not believe that Iran is entitled to any damages in this case, I voted in favour of paragraph 8 of the *dispositif*, as the Court has determined that some damages may be due. In that case, I agree that the Court has jurisdiction to consider those claims at a later time. My affirmative vote on paragraph 9 of the *dispositif* is based on the understanding that this paragraph refers to claims by Iran and not objections or defences of the United States.

³ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 7 (the “2019 Judgment” in the text of the opinion).

4. In its present Judgment, the Court finds that it

“could only accept the abuse of rights defence . . . if it were demonstrated by the Respondent, on the basis of compelling evidence, that the Applicant seeks to exercise rights conferred on it by the Treaty of Amity for purposes other than those for which the rights at issue were established, and that it was doing so to the detriment of the Respondent”⁴.

I believe that this is precisely what the United States has demonstrated. Concluding that Iran is seeking to exercise rights under the Treaty for the purpose for which they were created is inconsistent with the facts of this case. As described below, the underlying circumstances of this case are so far removed from the object, purpose, context and provisions of the Treaty that Iran’s attempt to rely on and apply the Treaty to these circumstances constitutes an abuse of rights.

5. The Treaty’s preamble clearly states that its purpose is to “encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations”⁵. Accepting this purpose, the Court has expressly noted that the object and purpose of the Treaty are not to “regulate peaceful and friendly relations between the two States in a general sense”⁶, but to address “rules providing for freedom of trade and commerce”⁷.

6. However, none of the United States’ measures concern the preamble’s stated purpose of “encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations”. The statutes in question were not concerned with giving advantages to American businesses, or stimulating foreign investments, or increasing trade between the two countries, or opening markets to successful industries, or adding jobs. Their one and only purpose was to assist United States citizens in recovering money damages as a result of injuries and deaths caused by terrorist acts proven in United States courts to have been perpetrated or sponsored by Iran, which Iran refused to pay. The United States did not act for reasons related to trade, commerce, investments or consular relations — it acted for reasons related to national security. The legislation and subsequent judicial decisions at issue were based on extensive investigations into and evidence of bombings,

⁴ Judgment, para. 93.

⁵ Treaty, preamble; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 2019 (I)*, p. 28, para. 57.

⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996 (II)*, p. 814, para. 28.

⁷ *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 (II)*, p. 635, para. 43.

kidnappings and murders. Based on that evidence, the United States concluded that the direct perpetrators of those terrorist acts, Hezbollah and Hamas, were both acting as proxies for Iran⁸. Although this Court is not called upon to rule on Iran's culpability, the factual basis for the United States measures must be part of the Court's analysis regarding whether the measures had any relation to the Treaty at all.

7. I believe the record demonstrates that the United States measures are unrelated to the Treaty's purpose, and that Iran is indeed seeking to exercise rights conferred on it by the Treaty "for purposes other than those for which the rights at issue were established" to the detriment of the United States⁹. Accordingly, I believe the United States' defence of abuse of rights should have been granted.

B. Exhaustion of Local Remedies

8. I first note that the Iranian companies that were given the opportunity to be heard in United States lawsuits seeking attachment of assets did not

⁸ These acts encompassed attacks against American, Argentine, British, French, German, Israeli and Swiss citizens. Specifically, these acts included suicide attacks on the United States Embassy in Beirut, killing 63 people, including 17 Americans, and the bombing of United States Marine Corps barracks in Beirut, Lebanon, killing 241 United States Marines and injuring many others. A simultaneous attack killed 58 French soldiers in a neighbouring location. The results of investigations are summarized in the evidence presented to United States courts, including testimony from experts who studied Iran; senior officials of the Federal Bureau of Investigation and intelligence personnel; and fact witnesses who were either Iranian officials or actual participants in the terrorist attacks and testified that Iran was responsible for the acts committed by Hezbollah and Hamas. The United States submitted statements from Iranian officials and six participants in the Khobar Towers bombing, implicating Iran as having organized, funded, and supported the attack. See e.g. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C., 2003); *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1 (D.D.C., 2005); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40 (D.D.C., 2006); *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C., 2006). The United States also referenced the testimony obtained under oath by French investigators of individuals implicated in the assassination of an American citizen. This testimony was to the effect that the then Iranian Minister of Intelligence and Head of the Ministry of Intelligence and Security, Ayatollah Fallahian, was involved in ordering the killings of Iranian dissidents in Paris. *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D.D.C., 2000). Much other direct testimony of Iran's responsibility for the terrorist attacks can be found in the various opinions of United States courts submitted by the parties in those cases. Iran never contested this evidence in United States courts.

⁹ Judgment, para. 93.

in any way respond to those lawsuits¹⁰ or otherwise respond in United States courts. It is unreasonable to say that the companies in question “had no reasonable possibility of successfully asserting their rights in United States court proceedings”¹¹ when they did not even attempt to do so, and the record indicates that others had prevailed on factually similar claims. Thus, Iran cannot present a claim here in respect of those companies that did not exhaust all local remedies. The Court concludes, however, that exhaustion is not necessary based on Article 15 (a) of the International Law Commission’s (“ILC”) 2006 Draft Articles on Diplomatic Protection. Article 15 (a) provides an exception to the requirement of exhaustion if an injured party had no reasonable possibility of obtaining redress¹². I believe the Court misunderstands the law of the United States and erroneously applies the Article 15 (a) exception to reach an incorrect conclusion on this issue.

9. The Court says that because later-enacted statutes such as the measures at issue here, take precedence over conflicting provisions of earlier-enacted treaties under United States law, Iranian companies had no reasonable possibility of obtaining redress from United States courts based on the provisions of the Treaty¹³. The first problem with this holding is the underlying and unwarranted assumption that Iranian companies had to be able to prevail in United States courts specifically under the provisions of the Treaty rather than under United States law. But there is no support for the Court’s apparent requirement that, under Article 15 (a), Iran must have been able to prevail on its claim under the Treaty alone, rather than on any other basis¹⁴. International law, as reflected in Article 15 (a), does not say the exception applies only where a *specific* remedy is unavailable. Rather, its language is far broader, providing an exception only where redress is impossible. That scenario is clearly inapplicable to Iranian companies here, where other Iranian parties had

¹⁰ See Clerk’s Certificate of Default, *Heiser v. Islamic Republic of Iran*, 00-2329, 01-2104, (D.D.C., 20 August 2015), Electronic Case Filing (ECF) No. 272; Order Granting Unopposed Motion for Judgment against Garnishees Bank of America, N.A. and Wells Fargo Bank, N.A. for Turnover of Funds, and for Interpleader Relief for Such Garnishees, *Heiser v. Islamic Republic of Iran*, 00-2329, 01-2104 (D.D.C., 9 June 2016), ECF No. 275.

¹¹ Judgment, para. 72.

¹² *Ibid.*, para. 67; see also ILC, Draft Articles on Diplomatic Protection with Commentaries, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, p. 47.

¹³ Judgment, paras. 69 and 72.

¹⁴ *Ibid.*, para. 71.

previously prevailed in United States courts under the very same factual circumstances.

10. For example, in *Rubin v. Islamic Republic of Iran*, the claimants argued that they were entitled to attach property of Iran in the possession of the University of Chicago pursuant to the same United States measures at issue here. The District Court agreed with Iran that the property in question was not subject to attachment and execution based on the court's interpretation of the relevant statutes. Notwithstanding this perfect example where Iran prevailed in United States courts, this Court, without explanation or support, nevertheless dismisses the relevance of *Rubin* because the District Court's decision was based on United States law rather than on the provisions of the Treaty¹⁵. As noted, there is no support for the proposition that Article 15 (a) requires that a company must be able to prevail on a particular theory.

11. Additionally, the Court should not conflate — as it does here — the legitimate consideration and failure of a specific claim with the impossibility of redress¹⁶. The Court cites to the examples in the commentary wherein the Article 15 (a) exception might apply¹⁷, but completely ignores the most relevant part of the commentary, which notes in no uncertain terms that proving the exception imposes a “heavy burden” and explains that,

“[i]n order to meet the requirements of paragraph [15] (a), it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is *not* whether a successful outcome is *likely or possible*, but whether the municipal system of the respondent State *is reasonably capable of providing effective relief*.”¹⁸

¹⁵ *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014); Judgment, para. 71. See also *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C., 1999); *Hegna v. Islamic Republic of Iran*, 2003 WL 25952462 (N.D. Ill. 2003).

¹⁶ Judgment, para. 72.

¹⁷ Of the examples listed in the commentary, only one is relevant to this case. See ILC, Draft Articles on Diplomatic Protection with Commentaries, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, p. 47 (“[T]he 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.”). Only the reference to the existence of “a consistent and well-established line of precedents adverse to the alien” has any possible relevance here.

¹⁸ ILC, Draft Articles on Diplomatic Protection with Commentaries, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, p. 48 (emphasis added).

Notwithstanding the caution of the commentary, this Court improperly bases its conclusion on the possibility that success might be low or unlikely, rather than on whether the municipal legal system of the United States is reasonably capable of providing effective relief.

12. The second problem with the Court's holding is that although the principle that later-enacted legislation supersedes any conflicting provisions of an earlier-enacted treaty is correctly stated, it does not support an excuse for failure to exhaust local remedies because none of the United States cases to which the majority refers held that there was a conflict between the Treaty and subsequent legislation.

13. The Court misreads the holding in *Weinstein et al. v. Islamic Republic of Iran et al.*¹⁹, as the District Court in *Weinstein* expressly held that TRIA did *not* conflict with the Treaty²⁰. After specifically so holding, the court commented, without any analysis, that “[i]n any event, to the extent TRIA . . . may conflict with Article III (1) . . . TRIA would ‘trump’ the Treaty of Amity” (emphasis added)²¹. However, under United States law, that statement constitutes an *obiter dictum* and is not a precedent-setting holding. The holding in *Weinstein* is that there was no conflict with the Treaty, and thus did not concern the temporal relationship between United States legislation and the Treaty. Likewise, in *Bennett et al. v. Islamic Republic of Iran et al.*, the Court of Appeals for the Ninth Circuit held that “[t]here is no conflict between Section 1610 (g) and the 1955 Treaty of Amity between the United States and Iran”²². The Court of Appeals for the Second Circuit held in *Peterson et al. v. Islamic Republic of Iran* that 22 U.S.C. Section 8772 did not conflict with the Treaty²³, while the District Court had held in that case that “[t]he treaty is inapplicable”²⁴. It is completely unwarranted to base a conclusion that Iran had no reasonable possibility of success in United States courts on *obiter dicta* in one or two cases, as such remarks do not constitute precedent.

¹⁹ Judgment, para. 71.

²⁰ *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272, 275 (United States District Court, Eastern District of New York, 2009).

²¹ *Ibid.*

²² *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, as amended 825 F.3d 949 (9th Cir. 2016).

²³ *Peterson v. Islamic Republic of Iran*, 758 F.3d 185 (2nd Cir. 2014).

²⁴ *Peterson et al. v. Islamic Republic of Iran et al.*, 2013 U.S. Dist. LEXIS 40470 (United States District Court, Southern District of New York, 2013). I note, however, that the *Peterson* litigation involved the question of a conflict between 28 U.S.C. Section 8772 and the Treaty. Section 8772 is no longer at issue in the current proceedings, since the Court held that it has no jurisdiction over Iran's claims under Articles III, IV, and V of the Treaty to the extent they concern Bank Markazi.

14. Likewise, Iran's assertion that the negative outcomes in the three cases of *Peterson*, *Bennett* and *Weinstein* constitute a "well-established line of precedent" precluding any reasonable possibility of success also plainly misunderstands the United States legal system. Three cases can hardly be considered a "consistent and well-established line of precedent" in a country containing numerous district courts and circuit courts of appeal that often reach differing conclusions on the very same issues. The United States Supreme Court itself can reverse a prior position and has done so. To fairly decide that there is a consistent and well-established line of precedent precluding any relief, a court would have to be certain that no alternative outcome could be reached, which could only be achieved after analysing the nature of the claim and all possible defences available to the parties. Certainly, that has not occurred here.

15. In short, the principle of United States law providing that the latest in time between a statute and a treaty prevails has no application here. Moreover, a fair reading of the totality of the commentary of the exception in Article 15 (a) indicates that it is meant to apply to an entire judicial system and not to the result of a few cases²⁵. To conclude that there is no possibility of redress for Iranian companies in the United States based on the result of a few cases in which Iranian companies did not even appear to defend themselves (despite the success other Iranian companies had enjoyed before United States courts²⁶) is, in my view, an erroneous reading of Article 15 (a).

16. Ultimately, the record indicates that Iranian companies have exhausted local remedies in only two cases, *Bennett* and *Weinstein*, in which only Banks Melli, Saderat and Sepah were involved²⁷. Those cases were considered by United States district and appeals courts, before being appealed to the Supreme Court, but denied certiorari. For that reason, all claims relating

²⁵ See e.g. Chittharanjan F. Amerasinghe, *Diplomatic Protection*, pp. 153-154 (domestic courts lacking jurisdiction); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, p. 692 (domestic judiciary notoriously under the influence of the executive).

²⁶ See e.g. *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill., 2014); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732 (2009). See also *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44-45 (D.D.C., 2007) (some family members of the Marines and other servicemen who were killed in the 1983 terrorist bombing were barred from asserting intentional infliction of emotional distress claims, because they lacked standing under the applicable State tort law).

²⁷ While Bank Markazi did litigate the constitutional separation of powers issue to the Supreme Court in the *Peterson* case, it has not exhausted all remedies, as the case was remanded to the district court. In addition, Bank Markazi is not a "company" within the meaning of the Treaty, as held by this Court.

to the remaining cases, in which local remedies were not exhausted, should be dismissed as inadmissible.

C. Article XX (1) (d)

17. I agree with the Court that the defence regarding Article XX (1) (c) is unavailing, albeit on a different basis. However, the resolution of the Article XX (1) (d) issue is a different matter. There, the Court finds that “it was for the United States to show that Executive Order 13599 was a measure necessary to protect its essential security interests, and that it has not convincingly demonstrated that this was so”²⁸. The Court bases its conclusion only on its view that Executive Order 13599 focuses on financial matters rather than matters of national security²⁹. The problem with the Court’s decision is that it has considered Executive Order 13599 in a vacuum as a stand-alone measure, without considering the totality of the evidence and arguments presented by the United States.

18. First, the Court ignores the opening sentence of Executive Order 13599, which specifically references and incorporates a prior executive order³⁰, the historical purpose of which was to enact measures “necessary to protect [the United States’] essential security interests”. These measures begin with Executive Order 12957 in 1995, which was enacted “in response to the actions and policies of the Government of Iran, including support for international terrorism, efforts to undermine the Middle East peace process, and the acquisition of weapons of mass destruction and the means to deliver them”³¹. In 2001, Executive Order 13224 blocked property of and prohibited transactions with persons who commit, threaten to commit or support terrorism. In 2005, Executive Order 13382 blocked the property of those who engage in or support the proliferation of weapons of mass destruction or their means of delivery. Thus, while these Executive Orders may have had an impact on the financial sector, their purpose was firmly and explicitly rooted in ensuring United States national security, and, as Executive Order 13599 itself states, it constituted an “additional step[] with respect to the national emergency declared in Executive Order 12957 of March 15, 1995”.

²⁸ Judgment, para. 108.

²⁹ *Ibid.*

³⁰ Executive Order 13599, 77 Fed. Reg. 6659 (5 February 2012).

³¹ President William J. Clinton, Message to the Congress on Iran, *Weekly Compilation of Presidential Documents*, Vol. 34, p. 447 (16 March 1998).

19. Moreover, in 2008, the United Nations Security Council adopted resolution 1803 — also ignored by the majority — calling upon *all* States to “exercise vigilance” over all transactions with banks domiciled in Iran and their branches and subsidiaries abroad, “in order to avoid such activities contributing to the proliferation [of] sensitive nuclear activities, or to the development of nuclear weapon delivery systems”³².

20. On 22 November 2011, the United States Under Secretary of the Treasury for Terrorism and Financial Intelligence wrote that the “Treasury is calling out . . . the Central Bank of Iran, as posing terrorist financing, proliferation financing, and money laundering risks for the global financial system”³³.

21. Given that this Court has acknowledged that “the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past”³⁴, and in consideration of the totality of the evidence in this record — in particular the preceding measures to which Executive Order 13599 refers and of which it is an extension — I believe the United States has adequately demonstrated that Executive Order 13599 was necessary to protect its essential security interests in preventing the financing of terrorist activities by Iran. The United States’ defence based on Article XX (1) (*d*) of the Treaty should thus, in my view, have been granted.

II. ALLEGED VIOLATIONS OF THE TREATY

22. Although, as noted above, I do not believe that the Treaty applies to the challenged United States measures, I nevertheless address the Court’s decision with regard to specific articles below.

A. Article III (1)

23. The Court conflates its analysis of Articles III (1) and IV (1). It finds that because the challenged United States measures violated Article IV (1) as “manifestly excessive” and thus “unreasonable”, they automatically “also” violated Article III (1)³⁵. But neither the language nor the context of Article III supports this conclusion. Article III (1) only calls for a simple recognition of juridical status, that is, legal existence enabling Iranian companies to operate within the territory of the United States. Why exactly unreasonableness is equated to non-recognition of juridical status is left

³² United Nations Security Council resolutions 1803 (2008), UN doc. S/RES/1803, para. 10.

³³ National Defense Authorization Act for Fiscal Year 2012, Sec. 1245 (*a*) (3).

³⁴ See *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.

³⁵ Judgment, paras. 156-157 and 163.

entirely unexplained. And whether a measure is manifestly excessive has no bearing on whether its juridical status has been recognized.

24. Moreover, examining these claims under the rubric of the Vienna Convention on the Law of Treaties requires first that the Court should accord the terms of a treaty their ordinary meaning. The plain meaning of Article III (1), as noted above, suggests a simple acknowledgment that the juridical status of “companies” be recognized, without implicating additional legal rights. This is made clear by the provision’s explicit limitation that “recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized”. Although the majority mentions this explicit limitation as part of the language of Article III (1), it treats that passage as inconsequential³⁶. Moreover, the Court ignores the Treaty’s negotiating history, to which we must turn in the absence of a definition in the Treaty itself. As noted by the United States on the second day of the hearing on 21 September 2022, the instructions to United States State Department negotiators at the time explained that Article III (1) “merely provides their [i.e. Iranian companies’] recognition as corporate entities principally in order [that] they may prosecute or defend their rights in court as corporate entities”. The instructions continue to state: “Corporate status should be recognized [to] assure [the] right [of] foreign corporate entities . . . [to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc.”³⁷. Throughout, the United States has taken the position that the provision in Article III (1) requires each country to simply acknowledge that a corporation is existent and endowed with legal being.

25. These communications, which Iran did not challenge, were unambiguous and contradict any alleged requirement that Iranian companies be treated in all cases as entities separate from the Iranian State. Accordingly, they do not preclude the piercing of the corporate veil of these companies to reach assets of Iranian-owned companies.

26. The Court finds in regard to Article IV (1) that,

³⁶ *Ibid.*, para. 124.

³⁷ CR 2022/17, p. 60, para. 5 (Daley), citing Telegram No. 936 from the US Department of State to the US Embassy in Tehran, dated 9 November 1954.

“[i]n the present case, the rights of Iranian companies to appear before the courts in the United States, to make legal submissions and to lodge appeals, have not been curtailed. The enactment of legislative provisions removing legal defences based on separate legal personality, and their application by the courts, do not in themselves constitute a serious failure in the administration of justice amounting to a denial of justice.”³⁸

In other words, United States courts recognized the juridical status of Iranian companies, and they participated freely in the United States’ legal process. Yet, the Court finds — without support and in direct contradiction of its earlier statement that the requirement to recognize juridical status is not absolute — that recognition of juridical status means that Iranian companies must absolutely be treated as separate and independent legal entities, thereby precluding the ability of the United States to pierce the corporate veil in the interests of justice³⁹. Nowhere does Article III (1) require the recognition of the companies’ legal “separateness”, and this alleged requirement, which was a critical point in dispute between the Parties, is neither explained by the majority nor supported by the language of Article III (1) or its negotiating history.

27. Because I believe the majority errs in failing to adequately consider the defences posed to an alleged breach of Article III (1), as well as in its conclusion with respect to Article III (1), I dissent.

B. Article IV (1)

28. In addition to disagreeing with the Court’s erroneous conflation of Articles III (1) and IV (1), I also disagree with the Court’s holding that the United States breached Article IV (1).

29. The Court finds that Article IV (1) is comprised of three distinct obligations and discusses the first two. The first obligation requires each State to treat the Parties fairly and equitably, including protection against the denial of justice, which the Court correctly finds did not occur here⁴⁰. The second obligation prohibits the application of “unreasonable or discriminatory measures”. Here, the majority finds the United States measures “unreasonable” and does not address whether the measures were discriminatory.

³⁸ Judgment, para. 143.

³⁹ The possibility of piercing the corporate veil is recognized in international law. See *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, *Second Phase, Judgment*, *I.C.J. Reports 1970*, pp. 38-39, para. 56.

⁴⁰ Judgment, paras. 142-143.

30. The Court's finding that the United States measures were unreasonable is both convoluted and, I believe, incorrect. First, the Court says that "unreasonable" means "lacking in justification based on rational grounds"⁴¹. It then adds that "a measure is unreasonable within the meaning of the Treaty of Amity if it does not meet certain conditions"⁴². A measure is thus unreasonable where it (1) does not have "a legitimate public purpose"; (2) does not contain an "appropriate relationship between the purpose pursued and the measure adopted"; or (3) has an "adverse impact [that] is manifestly excessive in relation to the purpose pursued"⁴³.

31. The Court's treatment of "reasonableness" ultimately focuses exclusively on the third condition of its definition, finding that the alleged adverse impact of the United States measures was manifestly excessive in relation to the protection afforded to the purposes invoked and, consequently, unreasonable⁴⁴. Presumably, the allegedly adverse impact of the measures was the attachment of assets that were in the possession of companies entirely or majority owned by Iran (the United States legislation in question applies only to companies in which Iran has full or a majority ownership), while the "purpose pursued" by the United States was enabling compensation for victims of terrorist acts. But the Court does not consider this purpose or explain why measures invoked for such a legitimate purpose were "manifestly excessive" in relation to the impact on Iranian companies that were wholly or primarily owned by Iran.

32. The catalysts for the United States measures were cases involving more than 1,300 individuals who were victims or family members of victims who had won legitimate judgments in separate cases against Iran for its role in several severe bombing incidents, including the 1983 Beirut barracks bombings and the 1996 Khobar Towers bombing, as well as in assassinations and kidnappings⁴⁵. The Court does not answer the question of why discouraging or impeding these terrorist bombings, murders or kidnappings is manifestly excessive compared to the attachment of assets held by companies wholly or majority owned by Iran. The Court's failure to engage in any comparison at all between the United States' reasons for implementing the challenged measures and their impact on Iran and Iranian companies is itself unreasonable.

33. Reasonableness is typically not defined in freedom of commerce and navigation treaties or in investment protection treaties, but certain

⁴¹ *Ibid.*, para. 146.

⁴² *Ibid.*, para. 147.

⁴³ *Ibid.*, paras. 147-149.

⁴⁴ *Ibid.*, paras. 156-157.

⁴⁵ This is a normal and usual mechanism of federal courts to consolidate cases with the same issue to assist judicial efficiency.

international tribunals have attempted to give more specific content to the term. The prevailing view is that no matter what the exact definition, the term creates a high threshold. In *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, for example, the tribunal held by majority with respect to the term “unreasonable or discriminatory measures” in Article 4 (1) of the Colombia-Switzerland bilateral investment treaty that the threshold for showing that a measure is unreasonable is a high one⁴⁶. It then added:

“Investment arbitration tribunals are not called to adjudicate appeals against measures adopted by States or their agencies. Their task is to establish whether the state’s conduct *vis-à-vis* protected foreign investors is tainted by prejudice, preference or bias or is so totally incompatible with reason that it constitutes an international wrong.”⁴⁷

The Court, without any explanation or support, simply chooses a much lower threshold.

34. Finally, it is incorrect to say that both the FSIA and TRIA “employ very broad terms, which are capable of encompassing any legal entity, regardless of Iran’s type or degree of control over them”⁴⁸. Rather, these statutes apply to a specific subset of companies and are tailored precisely. Section 201 of TRIA, for example, applies explicitly to “agencies and instrumentalities” of a terrorist party. The reference in the statute to “agencies and instrumentalities” is not an open-ended provision applying to any agency or company within a State’s jurisdiction, but is qualified by the phrase “of that terrorist party” and, most importantly, the fact that, by specific legislative definition (as explained further below), an entity must be owned in whole or in the majority by Iran in order to qualify as an agency or instrumentality of Iran.

35. In this connection, the majority also ignores or overlooks relevant provisions of the FSIA that limit its scope, including Section 1603 (b), which defines “agency or instrumentality of a foreign state” as any entity “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”. In the specific context of collecting a liability judgment against a State-sponsor of terrorism, enforcing that judgment

⁴⁶ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award of 27 August 2019, paras. 1455-1456.

⁴⁷ *Ibid.*, para. 1457.

⁴⁸ *Ibid.*, para. 150.

against the assets of an agency or instrumentality, thus defined, is justified through the accepted doctrine of piercing the corporate veil. In addition, Section 1610 (g) (3) provides that, for third-party joint property holders,

“[n]othing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment”.

In other words, United States courts had the authority to prevent the impairment of interests held by Iranian companies not liable in a given action, that is, an Iranian company that is owned in whole or in the majority by a third party, or that is not an agency or instrumentality of Iran. Among other defences, Iranian companies could have sought such protection of available rights. These companies should not now be rewarded for their failure to appear in the enforcement proceedings brought against them, or for their failure to raise defences and exhaust local remedies.

36. For the foregoing reasons, I dissent.

C. Article IV (2)

37. While I agree with the Court’s conclusion that the most constant security and protection provision in Article IV (2) only requires physical and not legal protection and security, I disagree with its finding that the challenged executive, legislative or judicial acts in question constitute a taking, and are thereby expropriatory.

38. It is extremely difficult to see how attachment to obtain satisfaction of a money judgment, lawfully obtained, can amount to an expropriation. The Court’s observation that it is not “disputed that the Iranian companies concerned did not receive any payment”⁴⁹, encapsulates the difficulty of finding expropriation in this case. Iran has never disputed in United States courts that it owed the money in question by virtue of liability judgments. Nor has it disputed, in the present proceedings, that the United States liability judgments created a debt. If the money was owed, it seems absurd to require the

⁴⁹ *Ibid.*, para. 178.

United States Government to pay it back. In that case, the United States would simply be compensating the victims itself for wrongs for which Iran is responsible. The money that was in the possession of the agencies and instrumentalities of Iran was essentially Iran's money. Assets that were attached in legal proceedings exclusively against companies wholly or majority owned by Iran to pay Iran's undisputed debt cannot constitute a taking by the State. Moreover, the effect of paying a judgment debt is economically neutral and legally required, not expropriatory⁵⁰.

39. The Court correctly states in relation to judicial decisions ordering the attachment and execution of property that these do not by themselves amount to expropriations. It then says that a judicial decision does amount to an expropriation if it applies legislative or executive measures that infringe international law and thereby causes a deprivation of property⁵¹. I find no support for such a stark and extraordinarily broad pronouncement that recasts the notion of judicial expropriation. Recall that, in the Court's own view, the rights of Iranian companies to appear before United States courts and make submissions or lodge appeals had not been curtailed. It also found specifically that enacting legislative provisions removing legal defences, and the United States courts' application of these provisions, did not in themselves constitute a failure in the administration of justice amounting to a denial of justice⁵². Considering that there was also no violation of due process in these domestic proceedings, it is difficult to accept that a violation of international law occurred in this regard, even if the Court's unusual and expansive definition of judicial expropriation were to be acceptable.

40. Again, the only rationale offered by the majority to demonstrate a violation of international law is that it has found, in relation to Iran's Article IV (1) claim, that the United States measures were unreasonable⁵³. How can the concept of unreasonableness, which appears only in that one provision, be read into two additional, yet totally different contexts? The Court applies unreasonableness, easily the most nebulous of the three standards under Article IV (1), to thereby find breaches of Article III (1) and now also Article IV (2). I cannot imagine that the parties to the Treaty would have intended for the entirely imprecise concept of "unreasonableness" to have

⁵⁰ Counter-Memorial of the United States of America, para. 14.95.

⁵¹ Judgment, para. 184.

⁵² *Ibid.*, para. 143.

⁵³ *Ibid.*, para. 186.

such cascading effects, dispensing even with the requirement to apply the ordinary criteria of expropriation. The relevant obligations under Articles III (1), IV (1) and IV (2) appear in separate Treaty provisions setting out separate rules that are subject to separate standards.

41. The United States measures constituted a bona fide, non-discriminatory use of the United States' regulatory powers for the protection of a legitimate public interest: namely, compensating victims of terrorist acts with property owned by agencies and instrumentalities of the State of Iran, proven in United States courts of law to have caused the relevant harm. The effect of these measures simply made it possible to enforce liability judgments arising out of judicial determinations based on an impartial and due-process-based application of the law.

42. Likewise, the judicial application of these measures cannot amount to an expropriation of the assets of Iranian companies. Decisions by domestic courts, when they are lawfully acting as neutral and independent arbiters of legal rights, do not give rise to a claim for expropriation. I do not find the cases Iran cites to the contrary analogous. The majority of international tribunals have held that only egregious judicial misconduct, i.e. wrongfulness attaching to the judicial process itself, has been held by international tribunals in cases affecting property rights to constitute a judicial expropriation, such as a denial of justice or acting without jurisdiction⁵⁴.

43. I thus dissent from the Court's finding that the United States breached Article IV (2).

D. Article X (1)

44. While I agree with the Court's finding that "commerce" in this provision is not limited to maritime commerce or to trade in goods and associated transactions⁵⁵, I disagree with the Court's holding that the United States measures limited Iranian companies' freedom of commerce and navigation.

⁵⁴ See e.g. *OOO Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award of 22 June 2021, para. 591; *Swisslion DOO Skopje v. the former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, para. 314.

⁵⁵ Judgment, paras. 212 and 214.

45. Article X (1) and the obligations it establishes are general and lack specificity. In its 2019 Judgment, in the context of its discussion concerning sovereign immunity, the Court confirmed its holding in *Oil Platforms* that the term referred to “commercial exchanges in general” and was “not limited to the mere acts of purchase and sale”⁵⁶. Nonetheless, the Court added that “even if understood in this sense, freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty”⁵⁷.

46. But this is precisely what the United States’ measures cover. They cover matters “that have no connection, or too tenuous a connection, with the commercial relations between the State Parties to the Treaty”. While a blocking order, the enforcement of a judgment, or a measure of constraint could conceivably have an effect on commerce, any government measure could if that approach is taken be regarded as having such an effect. I find it impossible to read Article X (1) as prohibiting any such measure whatsoever, and an interpretation that would result in a nearly limitless interpretation of the phrase “freedom of commerce” is not logical. I find no correlation between the United States’ measures and Article X (1), and no textual support for the view that the Parties intended to prohibit the payment of any judgment debt when they entered into the Treaty. “Commerce” has many features, and one of these features is commercial disputes. Litigation between commercial parties results in the creation of judgment debts with frequency. To say that this core aspect of commerce is prohibited under the Treaty on the basis that it impedes freedom of commerce — the very thing of which it forms part — is ironic.

47. More generally, the majority’s conclusion that commerce existed between the territories of the two Parties strikes me as peculiar for two reasons. First, in *Oil Platforms*, the Court referred to the “important territorial limitation” in Article X (1), stating that “[i]n order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran”⁵⁸. Here, it is not clear that any affected “commerce” was “between the territories” of the two Parties, as all

⁵⁶ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 34, para. 78, citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), pp. 818-819, paras. 45-46.

⁵⁷ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 34, para. 79.

⁵⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, pp. 214-215, para. 119 (emphasis in original).

transactions occurred via intermediaries based outside of the United States. Second, there was and is very little commerce between these two States, and it is difficult to see how those low levels of commerce could have meaningfully been disrupted. For these reasons, I would also dismiss this claim.

(Signed) Rosemary BARKETT.
