INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
CERTAIN IRANIAN ASSETS

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

MEMORIAL

OF THE ISLAMIC REPUBLIC OF IRAN

01 FEBRUARY 2017

IN THE NAME OF GOD

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LIST OF ABBREVIATIONS AND ACRONYMS

AEDPA	Antiterrorism and Effective Death Penalty Act of 1996
a.k.a.	also known as
App.	Appendix
B.Y.B.I.L.	British Yearbook of International Law
Cir.	Circuit
Co.	Company
Cong.	Congress
C.U.P.	Cambridge University Press
D.C.	District of Columbia
D.D.C.	District Court for the District of Columbia
ECtHR	European Court of Human Rights
ed.	edition
E.D.N.Y.	Eastern District of New York
EFT	Electronic Funds Transfer
e.g.	*exempli gratia*
E.O. 13599	Executive Order 13599
et al.	*et alii*
Fed. Reg.	Federal Register
FSIA	Foreign Sovereign Immunities Act of 1976
F. Supp.	Federal Supplement
H. R. Rep.	House of Representative Report
IA	Iran Application
Ibid.	*Ibidem*
I.C.C.	International Chamber of Commerce
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
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
IM	Iran Memorial
Inc.	Incorporated
IRGC	Islamic Revolutionary Guard Corps
ITRSHRA	Iran Threat Reduction and Syria Human Rights Act of 2012
IUSCT	Iran – United States Claims Tribunal
JASTA	Justice Against Sponsors of Terrorism Act of 2016
MOIS	Iranian Ministry of Information and Security
NDAA 2008	National Defense Authorization Act for Fiscal Year 2008

No.	*numero*
OFAC	Office of Foreign Assets Control
O.U.P.	Oxford University Press
p.	page
para.	paragraph
paras.	paragraphs
UNCITRAL	United Nations Commission on International Trade Law
P.C.I.J.	Permanent Court of International Justice
pp.	pages
Pub. L.	Public Law
Rec.	Record
s.	section
S. Ct.	Supreme Court Reporter
S.D.N.Y.	Southern District of New York
Sess	Session
Stat.	Statutes at Large
S. Rep.	Senate Report
TIC	Telecommunication Infrastructure Company of Iran
TRIA	Terrorism Risk Insurance Act of 2002
U.K.	United Kingdom
UKHL	United Kingdom House of Lords
U.N. doc.	United Nations documents
U.N.T.S.	United Nations Treaty Series
U.S.	United States of America
U.S.C.	United States Code
USD	United States dollar
U.S.S.R.	Union of Soviet Socialist Republics
v.	versus
vol.	volume
Y.I.L.C.	Yearbook of the International Law Commission

CHAPTER I.
INTRODUCTION

1.1 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 corporate personality, violates the immunities and property rights of the State of Iran and Iranian entities (including the specific immunity of the Central Bank of Iran – also known as "Bank Markazi Jomhouri Islami Iran" or "Bank Markazi" – in respect of its sovereign bank activities in the United States), and severely impedes trade between Iran and the United States, all in violation of the terms of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ('**1955 Treaty of Amity**').[1] 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 State of Iran in cases which themselves offend against basic principles of international law concerning due process and sovereign immunity.

1.2 This U.S. policy is said to be focused on enabling plaintiffs to recover damages against States that the United States has designated as "State sponsors of terrorism", notably Iran, in so-called 'terrorism' claims. The measures include amendments of U.S. law explicitly aimed at specific cases against Iran, adopted while those cases were pending before the U.S. courts and in order to benefit the U.S. plaintiffs. The measures violate the U.S. commitments and obligations under the 1955 Treaty of Amity, and the present case is concerned with those treaty violations.

1.3 The U.S. policy is 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. In the past two years the harm inflicted by the measures has increased markedly, so that at the time of the filing this Memorial, Iran and Iranian companies face the prospect of having approximately USD 60.4 billion of their

[1] Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, signed at Tehran on 15 August 1955, 284 U.N.T.S. 93 (IM, Annex 1).

assets seized in order to satisfy judgment debts already created by the U.S. courts, with tens of billions of U.S. dollars in further claims pending before the U.S. courts.[2]

1.4 Iranian companies face the risk of losing all of their assets that can be reached by a U.S. court order, or by an order of a court anywhere else in the world that is prepared to assist the U.S. courts under the usual procedures for international judicial co-operation. Assets to a value of about USD 2 billion belonging to Iranian companies have already been seized and have either been turned over to third parties or are currently frozen in accounts in the United States. Other Iranian assets are already targeted for seizure in cases before courts outside the United States.[3]

1.5 These U.S. actions are incompatible with obligations that the United States undertook in the 1955 Treaty of Amity. Throughout years of developing unlawful measures aimed against Iran, the United States has chosen to keep that Treaty in force, despite its flagrant breaches of the Treaty's provisions.

1.6 The unlawful measures adopted by the United States have two main aspects. First, the U.S. legislature has amended certain procedural provisions and defences in U.S. law. 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.

1.7 Second and more specifically, the U.S. legislature has steadily cut down the scope of one of those procedural provisions and defences, State immunity – both immunity from suit and immunity from enforcement. This denies to Iran and to Iranian State-owned companies, including Bank Markazi, the immunity before the U.S. courts that is protected under the 1955 Treaty of Amity and to which they are entitled as a matter of international law and were (formerly) entitled as a matter of U.S. law. All of the measures of which Iran complains violate the 1955 Treaty of Amity.

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2 IM, Attachments 1 & 4; see also *infra* Chapter II, Section (5)(A), pp. 35-39, paras. 2.44-2.56.

3 IM, Attachments 2 & 3; see also *infra* Chapter II, Section (5)(B), pp. 40-43, paras. 2.57-2.64.

1.8 Iran has been the target of U.S. sanctions for many years, to which it has persistently objected. U.S. laws and regulations have prohibited or restricted trade between Iran and the United States in designated commercial sectors, and have been tightened or relaxed from time to time in accordance with U.S. policies. In particular, there was a notable relaxation of some elements of the U.S. sanctions regime directed at Iran in 2016, although as the U.S. National Public Radio observed, "[a]s sanctions on Iran are lifted, many U.S. business restrictions remain."[4] Among those remaining restrictions are the measures complained of here. In this case, Iran accordingly seeks a remedy in respect of the violation by the United States of Iranian rights under the 1955 Treaty of Amity, so far as concerns the measures and procedural steps referred to at paragraph 1.1 above and the interference with commerce between the territories of the two States.

1.9 Since the filing of Iran's Application on 14 June 2016, the U.S. Congress has defied the opposition of the U.S. President and State Department and overridden the Presidential veto in order to force into law the so-called "Justice Against Sponsors of Terrorism Act 2016" ('**JASTA**'). While the JASTA is narrower in scope than the measures directed against Iran, it exposes other States, and in particular bodies such as sovereign wealth funds, to similar treatment before the U.S. courts.[5] The U.S. President himself has criticised the way in which this action "upset[s] longstanding international principles regarding sovereign immunity".[6]

1.10 This case, however, concerns the position of Iran and the protections to which it and Iranian companies are entitled under the 1955 Treaty of Amity; and in recent years Iran has been singled out by the United States for this unlawful treatment at great, and increasing, cost to Iran's economy. The United States is violating the 1955 Treaty of Amity, and in the course of doing so is asserting the right to push aside

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4 H. Mohammed, "As Sanctions on Iran Are Lifted, Many U.S. Business Restrictions Remain", *National Public Radio*, 26 January 2016 (IM, Annex 95).

5 The JASTA aims to expose Saudi Arabia to liability in U.S. courts for sponsoring the 9/11 attacks in New York. A New York federal judge held earlier in 2016 that Iran was responsible for sponsoring those same attacks: see U.S. District Court, Southern District of New York, *In re: Terrorist Attacks on September 11, 2001*, 09 September 2016, 2016 WL 1029552 (S.D.N.Y 2016) (IM, Annex 70). The JASTA removes immunity from suit but does not affect immunity from enforcement.

6 Veto Message from the President – S.2040, 23 September 2016 (IM, Annex 23).

basic principles of international law, long embedded in the daily practice of the community of nations.

SECTION 1.
THE UNLAWFUL MOVES AGAINST IRAN

1.11 In order to appreciate the significance of the U.S. measures it is necessary to consider the way in which they amended U.S. law, and particularly the Foreign Sovereign Immunities Act 1976 ('**FSIA**').[7] Each new measure built upon the measures that preceded it, and for this reason Chapter II of this Memorial explains the legal background and the successive amendments in some detail, in a broadly chronological manner.

1.12 That Chapter will explain that in 1996, the FSIA was amended so as to remove the immunity from suit of certain foreign States designated by the U.S. State Department – without any hearing, reasoned decision, or possibility of appeal – as "State sponsors of terrorism" in respect of a category of so-called 'terrorism claims'.[8] In 2002, the Terrorism Risk Insurance Act ('**TRIA**') was adopted, authorizing the enforcement against 'blocked assets' of the 'terrorist party' of the compensatory element of judgments in respect of 'terrorism claims';[9] and in 2008 a new Section 1605A was written in to the FSIA extending the derogations under U.S. law from sovereign immunity from suit and from enforcement, with retroactive effect.[10] Then, in 2012, Executive Order 13599 ('**E.O. 13599**')[11] 'blocked' "[a]ll property and interests in property" of the Government of Iran[12] and of any Iranian

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7 U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6).

8 U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (IM, Annex 10).

9 U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322 (IM, Annex 13). For the definition of a 'blocked asset' see *infra*, p. 22, footnote 57. Blocked assets may not be transferred, paid, exported, withdrawn or otherwise dealt with.

10 28 U.S. Code, Section 1605 as adopted by Section 1083(a)(1) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

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

12 Widely defined by Section 7(d) of the Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22) to mean "the Government of Iran, any political subdivision, agency, or

financial institution[13] (including the Central Bank of Iran), and of any person determined by the United States to be "owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, [the Government of Iran or any Iranian financial institution]". Such property is 'blocked' if it is in the United States, or is "within the possession or control of any United States person, including any foreign branch".

1.13 Chapter II will explain, too, the provisions of the "Iran Threat Reduction and Syria Human Rights Act of 2012"[14] ('**ITRSHRA**'), adopted later that same year. The ITRSHRA is remarkable as a specifically targeted intervention by the U.S. legislature in the then-ongoing *Peterson* litigation.[15] That litigation involves around 1,000 claims arising out of the 1983 bombing of the U.S. barracks in Beirut and other incidents, which led to a default judgment of more than USD 2.656 billion against Iran. The broad effect of the ITRSHRA is to strip immunity from assets of Bank Markazi, the Central Bank of Iran, and to make them available specifically to the plaintiffs in the *Peterson* litigation. As Chief Justice Roberts put it in his joint dissenting opinion in the U.S. Supreme Court, this was "changing the law … simply to guarantee that [the *Peterson* plaintiffs] win".[16] The seized 'blocked assets',

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instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran".

13 Widely defined by Section 7(f) of the Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22) to mean "a financial institution organized under the laws of Iran or any jurisdiction within Iran (including foreign branches), any financial institution in Iran, any financial institution, wherever located, owned or controlled by the Government of Iran, and any financial institution, wherever located, owned or controlled by any of the foregoing".

14 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).

15 Section 502 (b) of the U.S. Iran Threat Reduction and Syria Human Rights Act of 2012 Pub. L. 112-158, 126 Stat. 1214 (IM, Annex 16) reads:

> "(b) FINANCIAL ASSETS DESCRIBED.—The financial assets described in this section are 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 (BSJ) (GWG), 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 June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order".

16 *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).

amounting to USD 1.895 billion in securities interests belonging to Bank Markazi, were paid over to the private litigants in 2016.

1.14 More such claims have been concluded or are pending, with pre- or post-judgment enforcement measures having been taken or being taken against Iranian companies. For example, in the *Bennett* case private litigants are seeking attachment and execution against approximately USD 17.6 million in 'blocked assets' owed by Visa Inc. and Franklin Resources Inc. to the Iranian company, Bank Melli, for the use of Visa credit cards in Iran.[17] In the *Weinstein* case the 'blocked' proceeds of sale (approximately USD 1.6 million) of a building in New York owned by Bank Melli Iran were seized and distributed to private litigants in accordance with TRIA.[18] These are cases where property, lawfully acquired and lawfully held by an Iranian company, has been seized in order to be made over to U.S. plaintiffs in cases to which the Iranian company was not a party, and in respect of claims with which the company did not have, and was not even alleged to have, any connection whatsoever. The company is used simply as a convenient source of funds with which to satisfy debts imposed by the U.S. courts on the State of Iran in actions which themselves violate basic principles of State immunity. These instances illustrate the manner in which the U.S. measures inflict harm upon Iranian companies and the Iranian economy; and Iran's case is concerned with that harm generally, and is not limited to the position of specific companies.

1.15 As at the date of the Memorial, the U.S. courts had awarded total damages of over USD 60 billion (consisting of approximately USD 29 billion in compensatory damages and USD 31 billion in punitive damages) against Iran in respect of its alleged involvement in various 'terrorist' acts, mainly committed outside the territory of the United States.[19] As the table below demonstrates, the number of

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17 *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 *infra* Chapter II, Section (5)(B), p. 43, para. 2.63.

18 *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). See also *infra* Chapter II, Section (5)(B), p. 42, para. 2.61.

19 A list of damages claims and a list of enforcement proceedings determined, or in the course of being determined, by the U.S. courts is attached to this Memorial as respectively Attachments 1, 2 and 4.

judgments and the value of the damages awarded against Iran have increased dramatically over the last years.

	As of 22 Nov. 2002	As of 28 Jan. 2008	As of 10 Aug. 2012	As of 31 Jan. 2017
Total no. of judgments rendered	16	46	77	98
Total value of judgments rendered*	USD 4.8 billion	USD 10.8 billion	USD 20.9 billion	USD 60.4 billion

*including punitive damages awards

1.16 The increase in the number of claims and in the amount claimed in damages against Iran may be illustrated by reference to proceedings concerning the terrorist attacks of 11 September 2001. As at January 2017, the U.S. courts had rendered two judgments and awarded about USD 20 billion against Iran and certain Iranian State-owned companies in respect of Iran's alleged material support for those attacks. There are still six more cases pending in which an amount of USD 9 billion has been claimed, not including the additional punitive damages that may be determined by the U.S. courts. This is despite the fact that the U.S. courts have already found in one case that it is Iraq that carries responsibility for the same terrorist attacks,[20] and despite multiple cases against Saudi Arabia in relation to its alleged responsibility for those attacks.

1.17 In order to satisfy such judgments, claims are directed against the property of a wide range of Iranian companies or of enterprises owned by them, including Bank Sepah International PLC, Iranohind Shipping Company, the Islamic Republic of Iran Shipping Lines (IRISL Benelux NV), Export Development Bank of Iran (EDBI), Bank Melli Iran, Bank Saderat, Behran Oil Company, Iran Marine Industrial Co., Sediran, Iran Air, Bank Melli PLC UK,[21] Bank Markazi and the Telecommunication Infrastructure Company of Iran ('**TIC**').

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[20] *Smith v. The Islamic Republic of Afghanistan, The Taliban, Al Qaidi/Islamic Army, Shiekh Usamah Bin-Muhamed Bin-Laden a/k/a/ Osama Bin Laden, Saddam Hussein, The Republic of Iraq*, U.S. District Court for the Southern District of New York, 7 May 2003, 262 F. Supp. 2d. 217 (S.D.N.Y. 2003).

[21] See, e.g., *The Estate of Michael Heiser et al. v. Mashreqbank*, U.S. District Court, Southern District of New York, 4 May 2012, No. 11 Civ. 01609 (S.D.N.Y. 2012) (IM, Annex 53); *The Estate of Michael Heiser et al. v. The Bank of Tokyo Mitsubishi UFJ, New York Branch.*, U.S. District Court,

1.18 The enforcement cases decided or pending before the U.S. courts are listed in Attachment 2 to the present Memorial.[22] The problem is not confined to courts in the United States. There are at present a total of nine cases pending before courts in Canada, Luxembourg, and the UK concerned with attempts to enforce U.S. judgments against Iran, where the judgment creditors seek the attachment of Iranian assets including real property, bonds belonging to the Central Bank of Iran, and Iranian Embassy bank accounts.[23]

1.19 One effect of these U.S. measures is that trade between Iran and the United States (which continues, albeit at a greatly reduced level, despite the U.S. sanctions),[24] and Iranian trade with or through foreign branches of U.S. companies, is severely impeded. Iran cannot use the U.S. banking system for international payments. It cannot use or dispose of property that it owns in the United States. Nor can any Iranian company that is regarded by the United States as an 'Iranian financial institution' do so. These are unlawful measures targeting Iran that go far beyond the scope of sanctions. The risk of having assets 'blocked' and seized in the United States, or elsewhere in the world by way of the enforcement of U.S. judgments, seriously affects the present volume of trade between the territories of Iran and the United States that continues despite the U.S. sanctions. This is the very opposite of the intended effect of the 1955 Treaty of Amity, whose object and purpose was *inter alia* "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples."[25]

Southern District of New York, 13 February 2013, No. 11 Civ. 1601 (S.D.N.Y. 2013) (IM, Annex 56); *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); *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).

22 IM, Attachment 2.

23 IM, Attachment 3.

24 See U.S. Census Bureau, "Trade in Goods with Iran", available as of 22 January 2017 (IM, Annex 97). There are, indeed, occasional transactions of a very high value, such as the USD 16.6 billion contract between Iran Air and Boeing for the purchase of commercial aircraft. See *infra* Chapter II, Section 5(B), p. 43, para. 2.64.

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

SECTION 2.

VIOLATIONS OF THE 1955 TREATY OF AMITY

1.20 Iran has long protested the persistent violations by the United States of its rights under international law, including under the 1955 Treaty of Amity.[26] Iranian entities whose assets and interests have suddenly become available to satisfy damages awards for which they have never themselves been held liable, have contested them before the U.S. courts,[27] but to no avail. Iran has been ordered to pay tens of billions of dollars in damages in so-called "terrorist" judgments rendered by the U.S. courts.

1.21 The United States' acts are patently inconsistent with its obligations under international law, and specifically with its obligations under the 1955 Treaty of Amity. The most immediately relevant provisions of the Treaty are contained in Articles III, IV, V, VII, and XI(4).

1.22 Article III(1) of the Treaty explicitly obliges the United States to recognise the juridical status of companies constituted under the laws of Iran. That obligation is violated by the United States when it provides in its law for the seizure of property owned by an Iranian company, not in order to satisfy the debts or obligations of that company but in order to satisfy what the United States has, through the judgments of its courts, declared to be debts or obligations of the Iranian State itself.

1.23 The requirement of respect for the separate juridical status of companies is well recognised in international law and was equally well recognised in U.S. law until the adoption of the measures referred to above which specifically target Iranian companies.[28] In these instances, the Iranian State and the Iranian companies are plainly separate juridical entities, none carrying responsibility for the debts of the

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[26] Message from the Ministry of Foreign Affairs of the Islamic Republic of Iran to the United States of America, dated 14 July 1998 (IM, Annex 89); Letter from the Agent of Iran to the Iran-U.S. Claims Tribunal to the Agent of the United States to the Iran-U.S. Claims Tribunal, dated 12 February 2008 (IM, Annex 90); Note verbale of the Iranian Ministry of Foreign Affairs to the U.S. Department of State, dated 3 February 2016 (IM, Annex 91); Note verbale of the Iranian Ministry of Foreign Affairs to the U.S. Department of State, dated 25 April 2016 (IM, Annex 93); e-mail from the Iranian Minister of Foreign Affairs to the U.S. Department of State, dated 15 may 2016 (IM, Annex 92).

[27] See, e.g., *infra* Chapter II, Section (5)(B), pp. 40-43, paras. 2.57-2.64.

[28] See *infra* Chapter III, Section 2(A)(c), pp. 59-61, paras. 3.42–3.46.

others; but the United States has abrogated that juridical distinction, which is an axiomatic consequence of the juridical status of the company.

1.24 This action is aggravated by the fact that the liability of the Iranian State which is pinned on to the Iranian company in such cases is itself a liability imposed in violation of well-established principles of international law concerning the jurisdictional immunities of States, recently reaffirmed by this Court in its judgment in the case concerning *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening).*[29] Furthermore, this liability of the Iranian State results from a purely administrative designation of Iran as a "State sponsor of terrorism" by the Executive arm of the U.S. Government in 1984.[30] The reasons for designation are not published; and no appeal against the designation is provided for.

1.25 The seizure of the property of Bank Markazi is a particularly egregious violation of the 1955 Treaty of Amity. It not only fails to respect Bank Markazi's separate juridical personality, it also disregards the specific entitlement of a central bank to immunity for its assets. Bank Markazi is Iran's Central Bank; and the special position of central banks is well recognised in international law and was equally well recognised in U.S. law until the adoption of the measures referred to above.[31] The 1976 FSIA recognised that special position when it stipulated that "the property of a foreign state shall be immune from attachment and from execution, if … the property is that of a foreign central bank or monetary authority held for its own account …" This was in keeping with basic principles of international law. Yet that immunity is now denied to Bank Markazi.

1.26 Iranian companies are deprived by the relevant U.S. measures of the opportunity to meaningfully defend themselves against these actions, in breach of the obligation in

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29 *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece Intervening*), *Judgment,* I.C.J. Reports 2012, p. 99 at pp. 123-145, paras. 57–108. See *infra* Chapter III, Section 2(A)(a), p. 51, para. 3.21.

30 Two other States, Sudan and Syria, are currently designated as State sponsors of terrorism, the most recent designation being made almost a quarter of a century ago. The designation dates are Iran, 19 January 1984; Sudan, 12 August 1993; Syria, 29 December 1979: see U.S. Department of State, "State Sponsors of Terrorism", as of 20 December 2016 (IM, Annex 25).

31 See *infra* Chapter III, Section 2(A)(b), p. 58, para. 3.40.

Article III(2) of the Treaty to allow them freedom of access to the U.S. courts and administrative agencies in defence and in pursuit of their rights, including any right to immunity (as to which see also Article XI(4)). Furthermore, in this respect Iranian companies are discriminated against, in breach of the non-discrimination obligation that is also set out in Article III(2) of the 1955 Treaty of Amity.

1.27 This treatment of Iranian companies resulting from the U.S. measures is unfair and inequitable, and those measures are unreasonable and discriminatory and impair the companies' legally acquired rights and interests, in breach of the obligations in Article IV(1) of the 1955 Treaty of Amity. To take only one example, the use of legislation to change the law during the course of the *Peterson* litigation, with the specific purpose of altering the outcome of that litigation, is a classic instance of unfair and inequitable treatment, undermining the rights of Iran and Iranian companies and – it may be said without exaggeration – jeopardizing the Rule of Law. The breaches are manifold, and are explained in detail in Chapter V of this Memorial.[32]

1.28 By its exposure to the risk of seizure, and by the fact of its seizure and turning over to various private claimants before the U.S. courts, the property of Iranian companies has plainly not received "the most constant protection and security" within the United States in accordance with the requirement in Article IV(2) of the 1955 Treaty of Amity. Article IV(2) requires that property be protected at least to the level "required by international law", and that it not be taken except for a public purpose and with prompt payment of just compensation.

1.29 The actions of the United States in seizing property of Iranian companies for the benefit of certain private litigants violates both of the requirements in Article IV(2). Stripping Iranian property of procedural safeguards and specifically abrogating the protection resulting from the requirements of international law concerning sovereign immunity violates the duty of 'constant protection and security'; and there have already been outright takings of the property of Iranian companies, as well as

[32] The scope of the measures and their actual or potential impact on Iranian companies is such that Iran does not in its Memorial list out every such impact. However, this is not to be taken as in any way restricting the ambit of its claim.

interferences with property rights (for example, in the *Peterson* litigation) that are so severe as to amount to unlawful takings. The actions of the United States also breach the right of the Iranian owners, guaranteed by Article V(1) of the Treaty, to dispose of their property. Similarly, the restrictions on transactions involving Iranian funds violate the prohibition set out in Article VII(1).

1.30 The United States has thus violated a whole series of very specific obligations that it undertook towards Iran when it concluded the Treaty of Amity in 1955 and by which it remains bound. Specific rights of Iran and of Iranian companies protected by the 1955 Treaty of Amity have been breached.

1.31 In addition, and no less importantly, the basic object and purpose of the Treaty is being directly undermined by the actions of the United States. The Preamble identifies the encouragement of mutually beneficial trade and investment as an object and purpose of the 1955 Treaty of Amity; and that object and purpose is the subject of the legal commitment in Article X by the United States and Iran that "there shall be freedom of commerce" between the territories of the two States. The impact of the U.S. actions is severely to impede commerce between the two States; and thus Article X(1) is violated, too.

SECTION 3.
PROCEDURAL HISTORY

1.32 This case was initiated by the Application dated 14 June 2016, filed with the Court by the Islamic Republic of Iran. A signed copy of the Application was communicated to the United States of America on the same day.

1.33 Following a meeting held by the President of the Court with representatives of the Parties on 30 June 2016, by Order dated 1 July 2016, the Court fixed 1 February 2017 as the time-limit for the filing by the Islamic Republic of Iran of its Memorial. This Memorial is submitted in accordance with that Order.

SECTION 4.

JURISDICTION

1.34 This case is brought before the Court in accordance with Article 36(1) of the Statute of the Court and Article XXI(2) of the 1955 Treaty of Amity.

1.35 Article 36(1) of the Statute of the Court provides in material part that the Court has jurisdiction over "all cases which the parties refer to it and all matters specifically provided for ... in treaties or conventions in force."

1.36 The 1955 Treaty of Amity came into force on 16 June 1957, one month after the day of exchange of the instruments of ratification at Tehran on 16 May 1957, in accordance with Article XXIII of the Treaty; and it remains in force. Article XXI(2) of the Treaty reads as follows:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

1.37 This dispute concerns the application of the 1955 Treaty of Amity, and in particular of Articles III, IV, V, VII, X and XI, and violations of that Treaty by the United States of America. The dispute has not been satisfactorily adjusted by diplomacy. The High Contracting Parties have not agreed to settlement of the dispute by a means other than submission to the Court.

SECTION 5.

THE STRUCTURE OF THE MEMORIAL

1.38 This Memorial is structured as follows.

1.39 **Chapter II** sets out the facts, essentially in chronological order. It describes the successive amendments made to U.S. law and the steady dismantling of the rights to which Iran is entitled under the Treaty, in particular through the setting aside of the juridical personality of Iranian corporations and amendments to the provisions of

U.S. law concerning immunity from suit, immunity from enforcement, and procedural provisions of U.S. law that had previously supported Iran's rights. It introduces some of the main decided and pending cases before the U.S. courts in which the relevant provisions of U.S. law are applied, and associated developments including actions to enforce U.S. judgments through the courts of third States.

1.40 **Chapter III** analyses the question of the applicable law. It describes the role of the 1955 Treaty, and explains that the provisions of that 1955 Treaty of Amity require reference to relevant rules of international law, and to domestic law, in the interpretation and application of the Treaty.

1.41 **Chapter IV** explains the rights of Iran and Iranian companies under Article III(1) of the Treaty, and sets out the breaches by the United States of this provision. **Chapter V** explains the rights of Iran and Iranian companies under Articles III(2), IV(2), V(1) and XI(4) of the Treaty, and shows how the United States has been, and is, in breach of the Treaty by virtue of its violations of rights accorded to Iranian companies. **Chapter VI** considers Articles VII(1) and X(1) of the Treaty and explains how the United States has violated the rights of Iran itself under the 1955 Treaty of Amity.

1.42 **Chapter VII** explains Iran's claims to remedies in relation to the breaches of the 1955 Treaty of Amity by the United States. The Memorial concludes with **Chapter VIII,** which sets out Iran's formal request for relief.

CHAPTER II.
THE FACTUAL BACKGROUND

2.1 In this Chapter, Iran describes in some detail the United States' measures that constitute the factual background to the dispute.

2.2 These measures have unfolded in a series of steps, pursuant to which the protections previously afforded to Iran and to Iranian companies under international law and U.S. law have been increasingly abrogated. Such measures comprise four principal developments, which will be addressed in turn:

- First, since 1996, the jurisdictional immunity to which the State of Iran is entitled in the United States under international law has been removed by the United States under what it calls the "terrorism exception", thus enabling U.S. nationals to sue the State of Iran in the U.S. courts and to obtain default judgments and significant financial damages awards against the Iranian State (Section 1);

- Secondly, since 2002, the enforcement of such damages awards against the State of Iran has been facilitated by permitting plaintiffs to attach the property of Iran and Iranian State-owned companies notwithstanding their juridical status as separate from the State of Iran (Section 2);

- Thirdly, since 2008, the United States has made it easier to obtain in the U.S. courts significant damages awards against the State of Iran, and enlarged the range of assets available for attachment or aid in execution of these awards, thus creating a regime "extraordinarily advantageous to plaintiffs"[33] (Section 3);

- Fourthly, in 2012, the United States decided to 'block' all property and interests in property of the Government of Iran and of all Iranian financial

[33] *In re Islamic Republic of Iran Terrorism Litigation*, U.S. District Court, District of Columbia, 30 September 2009, 659 F. Supp. 2d 31, 58 (D.D.C. 2009), at p. 158 (IM, Annex 44).

institutions, including the Central Bank of Iran, within U.S. territory or within the possession or control of U.S. persons wherever they might be, and abrogated, in respect of one specific case pending before the U.S. courts, the immunity of the Central Bank of Iran, thus enabling the execution of judgments in that case against Iran by direct action against the Iranian Central Bank's property (Section 4).

2.3 The current situation is characterized by a constant increase in the judgments against the State of Iran, as well as many instances of attachments of assets belonging to the State of Iran or to Iranian State-owned companies, including Bank Markazi (Section 5).

SECTION 1.

THE ABROGATION OF THE SOVEREIGN JURISDICTIONAL IMMUNITY OF IRAN (1996)

2.4 The abrogation in the United States of the sovereign immunities of Iran follows the adoption by the U.S. Congress of the so-called "terrorism exception" inserted in Title 28 of the U.S. Code by the Antiterrorism and Effective Death Penalty Act (the '**AEDPA**') enacted in 1996.[34] Until then, under the FSIA,[35] the sovereign immunities of Iran and of its agencies and instrumentalities[36] were clearly recognised by the U.S. courts.[37]

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[34] Section 221 of the U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (IM, Annex 10).

[35] 28 U.S. Code, Sections 1602 to 1611, as adopted by U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6).

[36] 28 U.S. Code, Section 1603(a) & (b), as adopted by the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6), defines the terms "foreign state" as follows:

> "(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

2.5 The "terrorism exception" was codified in a new paragraph, at that time numbered Section 1605(a)(7) of Title 28 of the U.S. Code, providing that jurisdictional immunity would *not* apply in respect of 'terrorism' claims except in certain specified circumstances in which the U.S. courts shall decline to exercise jurisdiction. Thus, immunity does not apply in cases:

> "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources … for such an act if such act or provision of material support is engaged by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph–
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 … or section 620A of the Foreign Assistance Act of 1961 … at the time the act occurred, unless later so designated as a result of such act; and
>
> (B) even if the foreign state is or was so designated, if
>
> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) the claimant or victim was not a national of the United States … when the act upon which the claim is based occurred …".[38]

2.6 The effect of the provision is accordingly that U.S. federal courts possess jurisdiction over suits against a foreign State under three conditions:

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(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country."

[37] The only exceptions to jurisdictional immunity were (a) waiver, (b) cases involving commercial activity in the United States, (c) what may be termed a 'territorial property exception', (d) a so-called 'territorial tort exception', (e) a so-called 'arbitration exception' and (f) counterclaim by foreign state; see 28 U.S. Code, Sections 1605 and 1607, as adopted by the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6).

[38] 28 U.S. Code, Section 1605(a)(7), as adopted by Section 221 of the U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (IM, Annex 10). This Act also amended the exceptions to immunity from attachment or execution, adding to the existing exceptions, new sub-sections 1610(a)(7) and 1610(b)(3) of the U.S. Code, pursuant to which the property in the United States of a foreign State, and of its agencies or instrumentalities, used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment which related to a claim for which the foreign State is not immune under Section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

- First, the claim has to seek "money damages" "against a foreign state" for "personal injury or death" that "was caused" "by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act";

- Secondly, the foreign State must have been designated as "state sponsor of terrorism"[39] by the U.S. Executive "at the time" of the act or because of such act; and

- Thirdly, the plaintiff must have been a U.S. national when the act occurred.

2.7 The so-called "terrorism exception" thus entails a sweeping abrogation of jurisdictional immunities of any State unilaterally qualified by the U.S. Executive as a State "sponsor of terrorism", triggered by mere private allegations that purported "material support"[40] were provided in relation to the commission,[41] outside the United States,[42] of acts that have caused personal injury or death.

2.8 This "exception" to immunity was directed against Iran. Indeed, at the time of its adoption, Iran had already been on the U.S. list of States deemed to be "sponsors of terrorism" (a designation which Iran strongly contests) since 19 January 1984.[43] Consequently, immediately after the adoption of the AEDPA, plaintiffs began to bring actions against Iran before the U.S. courts for damages arising from deaths and

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39 Section 6(i)(1) of the U.S. Export Administration Act of 1979, Pub. L. 96-72, Sept. 29, 1979, 93 Stat. 503 (IM, Annex 8) defines a "State sponsor of terrorism" as a State that has "repeatedly provided support for acts of international terrorism".

40 The notion of material support is particularly broadly interpreted by U.S. courts; see on this point the U.S. Supreme Court decision in *Holder et al. v. Humanitarian Law Project et al.*, 21 June 2010, 561 U.S. 1, 130 S. Ct. 2705 (2010).

41 U.S. courts have applied a particularly low standard of causation, as requiring only showing a "proximate cause", which exists "so long as there is some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered*";* see, e.g., *Valore et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 31 March 2010, 700 F. Supp. 2d 52 5 (D.D.C. 2010) (IM, Annex 46).

42 The only limitation to this universal jurisdiction concerns acts occurred within the territory of the foreign State against which the case has been brought and only if arbitral remedies have not compensated the claim in a satisfactory manner (former 28 U.S. Code Section 1605(a)(7)(A)(1) as inserted by Section 221 of the U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (IM, Annex 10)).

43 See U.S. Department of State, Determination Pursuant to Section 6(I) of the Export Administration Act of 1979 – Iran, 23 January 1984, 49 Fed. Reg. 2836 (IM, Annex 21).

injuries caused by acts for which the plaintiffs alleged that Iran had provided "material support". Iran declined to appear in any of these lawsuits, on the ground that the new U.S. legislation:

> "is itself a clear violation of recognized principles of international law … It neither relieves the U.S. government of its international legal responsibilities, nor can it require the Islamic Republic of Iran to appear before a foreign court even in order to challenge its jurisdiction."[44]

The U.S. designation of Iran as State sponsor of terrorism left no jurisdictional defence for Iran including the immunity to plead before the U.S. courts. The U.S. courts asserted and exercised jurisdiction over multiple claims against Iran and entered many default judgments holding Iran liable and awarding damages against it.[45]

SECTION 2.

THE ATTACHMENT OF 'BLOCKED ASSETS' OF IRAN AND IRANIAN STATE-OWNED COMPANIES TO SATISFY JUDGMENT CREDITORS OF IRAN (2002)

2.9 After the jurisdictional immunity of Iran was removed and certain judgments had been rendered against Iran,[46] the U.S. Congress sought to address the question of how to satisfy the judgment creditors. Iranian property, when located in the United States, was usually already 'regulated' or 'blocked' by the U.S. Government under various Executive Orders issued against Iran and was therefore unavailable for judgment creditors.[47] Moreover, judgment creditors who tried to attach such assets

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44 Message from the Ministry of Foreign Affairs of I. R. Iran to the United States of America, dated 14 July 1998 (IM, Annex 89).

45 See *infra*, Chapter II, Section 5(A), paras. 2.45-2.56, pp. 35-39.

46 *Ibid.*

47 Mr. Goodlatte explained in a Report to the House of Representatives on "Clarifying Amendment to Provide Terrorism Victims Equity Act" in 2016, that before the adoption of the TRIA, there was "a usual requirement that a litigant first obtain a license from the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury in order to attach blocked assets" (referring to "e.g., 31 C.F.R. Sections 515.201 to 515.310 (CACR) (requiring a license for attachment); id. Sections 535.201 to 535.310 (Iran Assets Control Regulations) (same); id. Sections 594.201 to 594.312 (GTSR) (same)"). According to Mr. Goodlatte, the TRIA "permits victims to bypass" this requirement. See U.S. House of Representatives, Report on the Clarifying Amendment to Provide Terrorism Victims Equity Act, 12 July 2016, H. R. Rep. 1114-685 (IM, Annex 18).

held by the U.S. Government, and specifically by the U.S. Treasury, were typically barred by the sovereign immunity of the United States itself.[48]

2.10 Judgment creditors were also barred from attaching assets of Iranian State-owned companies for execution or aid in execution of judgments entered against the Iranian State by the principle of the separate juridical status of corporate entities.[49] Indeed, until 2002, the U.S. courts interpreted the FSIA as not disturbing the legal principle that "an agency or instrumentality of a foreign state could not automatically be liable for the debts of its associated foreign state".[50] This principle had been firmly recognised as applicable in U.S. law by the Supreme Court of the United States in the 1983 *Bancec* decision,[51] which held that there is a "presumption" that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated" as separate from the State. In that decision, the Supreme Court explicitly limited the exceptions to the presumption of separateness to only two situations: (i) where the concerned entity acted as an *alter ego* or agent of the sovereign State, and (ii) where the sovereign abused the corporate form to work a "fraud or injustice." The *Bancec* presumption was plainly applicable to Iranian State-owned companies and the U.S. courts regularly referred to it in their judgments, refusing to attach properties of those companies for execution or aid in execution of judgments rendered against the State of Iran.[52]

2.11 In defiance of this well-established principle of distinct juridical personality – a principle expressly secured in the 1955 Treaty of Amity and recognised as a general principle of international law –, and with a view to override other legal hurdles, the

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48 *Flatow v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 15 November 1999, 74 F. Supp. 2d 18 (D.D.C. 1999) (IM, Annex 29).

49 *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).

50 *Weininger v. Castro et al.*, U.S. District Court, District of Columbia, 17 November 2006, 462 F. Supp. 2d 457 (S.D.N.Y. 2006); for the definition of an 'agency or instrumentality' of a foreign State under the FSIA, see *supra* p. 16, footnote 36.

51 *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, U.S. Supreme Court, 17 June 1983, 462 U.S. 611 (1983) (IM, Annex 28).

52 See, e.g., *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).

U.S. Congress initiated, with the enactment in 2002 of the TRIA,[53] a policy aimed at permitting the attachment of property and interests of Iran and Iranian companies in order to secure the execution of judgments against the State of Iran.

A. The attachment of 'blocked assets' of Iran

2.12 As mentioned above, assets of the State of Iran were until 2002 typically unavailable for attachment in execution of judgments of the U.S. courts against Iran if they were assets that had been 'blocked' by the U.S. Government. The TRIA reversed this situation. This Act authorises the enforcement of judgments obtained under (what was in 2002) Section 1605(a)(7) of the 28 U.S. Code (later amended and re-enacted as Section 1605A of the 28 U.S. Code[54]), against the "blocked assets" of a "terrorist party"– i.e., a foreign State designated by the United States as a State sponsor of terrorism, such as Iran.[55]

B. The attachment of 'blocked assets' of Iranian State-owned companies to satisfy judgment creditors of Iran

2.13 The TRIA also extends the range of the assets available for seizure in order to satisfy judgments in favour of plaintiffs, by including not only the assets of the foreign State party to the case but also the 'blocked assets' of any "agency" or "instrumentality" of that "terrorist party". In this regard, Section 201(a) of the TRIA provides:

> "Notwithstanding any other provision of law, (…) in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) 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

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53 U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322 (IM, Annex 13).

54 See *infra*, Chapter II, Section 3(A), pp. 24-27, paras. 2.18-2.26.

55 The term "terrorist party" is defined in Section 201(d)(4) TRIA as including "a foreign state designated a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979…or Section 620A of the Foreign Assistance Act of 1961" (IM, Annex 13).

in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable."[56]

2.14 Section 201 of the TRIA is considered by the U.S. courts to have two significant effects in relation to claims based on the application of what was then Section 1605(a)(7) of the 28 U.S. Code:

- First, the stipulation that this section is to be enforced "[n]otwithstanding any other provision of law" prevents any sovereign immunity from execution or attachment in aid of execution from barring the attachment of the "blocked assets"[57] of a "terrorist party" in execution of a judgment based on the application of Section 1605(a)(7) of the 28 U.S. Code; and

- Secondly, the stipulation in Section 201 that the blocked assets of a "terrorist party" are to include the blocked assets of its "agenc[ies] or instrumentalit[ies]" overrides the presumption of separateness of juridical persons recognised by the Supreme Court in the *Bancec* judgment,[58] making

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[56] Section 201(a) of the U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322 (IM, Annex 13); this section was amended by Section 502(e)(2) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (see *infra* Section 4(B), p. 32, para. 2.38); the amendment only inserts "1605A or 1605(a)(7) (as such section was in effect on January 27, 2008)" in replacement of "1605(a)(7)".

[57] Pursuant to Section 201(d)(2) of the U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322 (IM, Annex 13):

> "the term "blocked asset", means –
>
> (A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50U.S.C. 1701; 1702); and
>
> (B) does not include property that—
>
> (i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or
>
> (ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes."

[58] *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 p. 14 (IM, Annex 47).

possible the attachment of the assets of Iranian State-owned companies for the satisfaction of judgments against the State of Iran itself.

2.15 As a consequence, the "blocked assets" owned not only by Iran, but also by Iranian State-owned companies that were not party to the judgment in respect of which enforcement was sought, and were not even alleged to have had any connection with the facts underlying the claim that resulted in the judgment, have become subject to enforcement proceedings in various cases in the United States.[59]

SECTION 3.

THE TOUGHENING OF THE REGIME APPLICABLE TO IRAN (2008)

2.16 Twelve years after the creation in 1996 of the "terrorism exception" to jurisdictional immunity, the U.S. Congress considered that its application by the U.S. courts to so-called "state sponsors of terrorism" was too narrow and did not sufficiently permit successful claims. As explained in subsection A below, a revised regime was established in 2008 with the adoption of a new Section 1605A of the U.S. Code which makes the "terrorism exception" broader and more freely available to plaintiffs in their cases against the State of Iran.

2.17 Similarly, in relation to the enforcement of judgments based on the application of Section 1605(a)(7) of the 28 U.S. Code, the "blocked assets" which became available to satisfy judgment creditors after the enactment of the TRIA were considered insufficient by the U.S. Congress. As observed by one U.S. court, "very few blocked assets [of Iran or Iranian entities] exist"[60] in the United States. As explained in subsection B below, the U.S. Congress accordingly amended Section 1610 of the 28 U.S. Code in 2008 in order to enlarge the range of assets available for attachment or in aid of execution of judgments.

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[59] See *infra* Chapter II, Section 5(B), pp. 40-43, paras. 2.57-2.64.

[60] *In re Islamic Republic of Iran Terrorism Litigation*, U.S. District Court, District of Columbia, 30 September 2009, 659 F. Supp. 2d 31 (D.D.C. 2009), at p. 42 (IM, Annex 44).

A. The "terrorism exception" to jurisdictional immunity under the new Section 1605A of the 28 U.S. Code

2.18 The new Section 1605A does not amend the scope of the so-called "terrorism exception" to the jurisdictional immunity of foreign States designed by the Executive as State sponsors of terrorism. The provision establishing that exception still reads as follows:

> "NO IMMUNITY – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[61]

2.19 But the new Section 1605A "is more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under" the previous law.[62] Indeed, (a) it creates a private right of action against foreign States, and (b) it allows judges the right to award punitive damages against so-called "State sponsors of terrorism", and (c) this provision applies retroactively.

(a) The creation of a private right of action against foreign States

2.20 The FSIA, as amended in 1996, was not initially interpreted as actually creating a substantive cause of action against a sovereign State, even under the "terrorism exception".[63] This meant that the lawsuits against a "State sponsor of terrorism" still

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61 28 U.S. Code, Section 1605A(a)(1) as adopted by Section 1083(a)(1) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

62 *In re Islamic Republic of Iran Terrorism Litigation*, U.S. District Court, District of Columbia, 30 September 2009, 659 F. Supp. 2d 31 (D.D.C. 2009) at p. 44 (IM, Annex 44).

63 *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) (IM, Annex 34).

had to be based on causes of action already established elsewhere in the law,[64] and in particular in the law of tort which is generally enacted by the different individual states within the United States, and in ways that vary from state to state.

2.21 The 2008 amendment to the FSIA sought to change this situation by establishing a specific private right of action at the federal level, for the benefit of U.S. nationals (and certain others) against any State designated by the U.S. Executive as a "sponsor of terrorism", in respect of "terrorism" claims. This private right of action was inserted in 28 U.S. Code Section 1605A, as subsection (c).[65]

(b) The authorization to award punitive and additional damages

2.22 Punitive damages are in principle not available against States under the FSIA. By contrast, they may be awarded against State-owned companies in cases where they are held to have acted unlawfully.[66]

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64 *Bodoff et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 29 March 2006, 424 F. Supp. 2d 74 (D.D.C. 2006) (IM, Annex 36).

65 U.S. Code, Section 1605A(c), inserted by the Section 1083 of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15) reads:

> "(c) Private Right of Action.—
>
> A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to-
>
> (1) a national of the United States,
>
> (2) a member of the armed forces,
>
> (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or
>
> (4) the legal representative of a person described in paragraph (1), (2), or (3),
>
> for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents."

66 Section 1606 of the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6). For an application to Iran, see, e.g, *Prevatt v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 27 March 2006, 421 F. Supp. 2d 152 (D.D.C. 2006) (IM, Annex 35).

2.23 In 1996, the U.S. Congress passed a bill known as the "Flatow Amendment" to amend the FSIA,[67] enabling the U.S. courts to award punitive damages in claims against an "*official, employee or agent of a foreign state*", but not against the foreign State itself.[68]

2.24 The National Defense Authorization Act for Fiscal Year 2008 ('**NDAA 2008**') overcomes these limitations by amending the FSIA and abrogating the traditional prohibition of punitive damages against sovereign States. It specifies that in the context of an action against a so-called "State sponsor of terrorism":

> "damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents."[69]

Thus, the enactment of the NDAA 2008 enabled plaintiffs to seek not only compensatory damages but also punitive damages against the State of Iran.

2.25 The new Section 1605A of Title 28 of the U.S. Code also opens the possibility for plaintiffs to claim for "reasonably foreseeable property loss", as specified in subsection (d), which reads:

> "(d) Additional Damages.—
>
> After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based".[70]

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67 Section 589 of the U.S. Omnibus Consolidated Appropriations Act for 1997, a.k.a the "Flatow Amendment", 30 September 1996, Pub. L. No. 104-208, 110 Stat. 3009-172 (IM, Annex 11).

68 *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) (IM, Annex 34).

69 28 U.S. Code, Section 1605A(c) as adopted by Section 1083(a)(1) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

70 28 U.S. Code, Section 1605A(d) as adopted by Section 1083(a)(1) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

(c) The retroactivity of the new Section 1605A

2.26 The provisions of Section 1605A apply not only to cases arising after its enactment but also with respect to past actions, already decided by the courts, and in many cases without regard to defences such as *res judicata*, limitation of actions and collateral estoppel.[71] Section 1083(c) of the NDAA 2008 enables plaintiffs who have already filed actions based on the old Section 1605(a)(7) or on certain other provisions to claim the benefit of the provisions of the new Section 1605A. For instance, in the *Heiser* case, while an initial decision had awarded compensatory damages of USD 250 million, a new decision was entered in 2009 to award plaintiffs a further USD 36 million in compensatory damages and USD 300 million in punitive damages.[72]

B. Amendments relating to attachment or execution

2.27 The remedies for enforcement of judgments were considerably extended by the amendments made to the FSIA in 2008 by the NDAA 2008, which (a) created a preventive lien against the foreign State's property and the property of its agencies and instrumentalities, (b) explicitly abrogated the *Bancec* presumption in the context of the "terrorism exception", and thereby (c) enlarged the category of assets available for attachment for the satisfaction of judgment creditors.

(a) Preventive lien against defendant's properties

2.28 One of the amendments introduced by the NDAA 2008 was subsection (g) of the new Section 1605A of the 28 U.S. Code. This subsection (g) allows plaintiffs in cases based on Section 1605A to secure the assets of a defendant from the onset of any proceeding. According to this subsection:

''(g) PROPERTY DISPOSITION.—

[71] Section 1083(c) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

[72] *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 30 September 2009, 659 F.Supp.2d 20 (D.D.C. 2009) (IM, Annex 45).

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.— A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title."[73]

2.29 Pursuant to this new subsection, the filing of a notice of pending action against a so-called "State sponsor of terrorism", or against any State-owned company of that State, has the effect of establishing a lien of *lis pendens* over any property owned either by that State or by any State-owned company, or by any company controlled by that State or by that State-owned company.

(b) The explicit abrogation of the Bancec *presumption*

2.30 Section 1083 of the NDAA 2008 also modified the law concerning execution or attachment in relation to judgments based on Section 1605A, with the introduction of a new Section 1610(g)(1) into the 28 U.S. Code providing that:

> "… 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

[73] 28 U.S. Code, Section 1605A(g) as adopted by Section 1083(a)(1) of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (IM, Annex 15).

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."[74]

2.31 These five factors were not chosen arbitrarily. They address the five conditions that certain U.S. courts had considered in deciding whether an instrumentality or an agency of a foreign State was to benefit from a presumption of separateness under the Supreme Court's *Bancec* presumption.[75] The listed factors were clearly aimed at the abrogation of the *Bancec* presumption in cases involving claims based on the application of Section 1605A.[76]

(c) The enlargement of assets available for enforcement

2.32 The new Section 1610(g) applies without regard to the limitation in the TRIA, which had limited execution to the "blocked assets" of a so-called "terrorist party" and its agencies and instrumentalities. Under Section 1610(g)(1), *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. The U.S. Congress enacted this provision to overcome the effect of the

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74 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).

75 See, *e.g.*, *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).

76 The TRIA already implicitly abrogated the *Bancec* presumption; see *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 p. 14 (IM, Annex 47).

case-law of the U.S. Supreme Court in its decision *Dole Food Co. v. Patrickson*,[77] which held that an entity owned indirectly by a foreign state, through another wholly-owned entity, was not an 'agency or instrumentality' of the foreign State."[78]

2.33 The new Section 1610(g)(2) provides that the sovereign immunity of the United States itself, the normal effect of which would be to bar the attachment of property of a foreign state, or an agency or instrumentality of a foreign state, regulated by the U.S. Government by reason of action taken against that foreign State, is inapplicable to property defined in Section 1610(g)(1).[79]

SECTION 4.

THE 'BLOCKING' AND ATTACHMENT OF THE ASSETS OF BANK MARKAZI (2012)

2.34 The FSIA ascribed to the property of a central bank a special immunity from execution, regardless of the status that the central bank has under its municipal law.[80] This immunity was recognised in relation to the Central Bank of Iran, until 2012. It has since been specifically abrogated (a) by an Executive Order freezing the assets of Bank Markazi, then (b) by the Legislative branch of the United States

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77 *Dole Food Co. v. Patrickson*, U.S. Supreme Court, 22 April 2003, 538 U.S. 468 (2003).

78 *Calderon-Cardona et al. v. JP Morgan et al.*, U.S. District Court, Southern District of New-York, 7 December 2011, 867 F.Supp.2d 389 (S.D.N.Y. 2011).

79 28 U.S. Code, Section 1610(g)(2) 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) reads:

> "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."

80 28 U.S. Code, Section 1611(b)(1) as adopted by the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6) reads:

> "Notwithstanding the provisions of section 1610 of this Chapter [which specifies the exceptions to immunity from execution], the property of a foreign state shall be immune from attachment and from execution if
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> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the term of the waiver."

Government which enacted an Act permitting execution against the assets of Bank Markazi in aid of execution of judgments rendered against the State of Iran.

A. The Executive Order 13599

2.35 On 5 February 2012, the President of the United States issued E.O. 13599 "Blocking Property of the Government of Iran and Iranian Financial Institutions."[81] Sections 1(a) and (b) of E.O. 13599 read as follows:

> "(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."[82]

2.36 The effect of E.O. 13599 is that the pre-condition specified in Section 201 of the TRIA – that there be relevant "blocked assets" of the alleged "terrorist party", including the blocked assets of any agency or instrumentality of that "terrorist party" – is to be considered met not only with respect to property and interests in property of Iran itself but also with respect to *all* property and interests of *any* Iranian financial institution, including property of Bank Markazi, that come within the United States or that are or hereafter come within the possession or control of

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81 U.S. Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22). This Executive Order implements the subsection (c) of Section 1245 of the U.S. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-239, 126 Stat. 2006 (IM, Annex 17), which provides:

> "The President shall, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person".

82 *Ibid.* for the definition of the terms "Government of Iran" under the E.O. 13599, see *supra*, p. 4, footnote 12.

any United States person wherever that person is located, unless one of the narrow exceptions under E.O. 13599 applies.

2.37 The Office of Foreign Assets Control ('**OFAC**'), a department of the United States Department of the Treasury, asserts that the "Executive Order requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC."[83] According to the U.S. District Court for the Southern District of New York, this meant that:

> "E.O. 13599 had the effect of turning any restrained assets owned by the Iranian Government (or any agency or instrumentality thereof) into "Blocked Assets". As Bank Markazi is the Central Bank of Iran, any of its assets located in the United States as of February 5, 2012, became "Blocked Assets" pursuant to E.O. 13599."[84]

B. The Iran Threat Reduction and Syria Human Rights Act of 2012

2.38 On 1st August 2012, the U.S. Congress enacted the ITRSHRA. Section 502 of this Act (codified as Section 8772 of Title 22 of the U.S. Code) was specifically designed to expand the scope of assets that can be subject to execution or attachment in aid of execution in order to satisfy judgments against Iran. Its subsection 502(a)(1) reads:

> "(…) [n]othwithstanding 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
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> (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,

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83 U.S. Department of the Treasury, OFAC Frequently Asked Questions: Iran Sanctions, as of 30 December 2016 (IM, Annex 24).

84 *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), at p. 12 (IM, Annex 58).

> 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."[85]

2.39 This definition of a "financial asset" subject to execution or attachment was, however, applicable only to certain specific Iranian assets. The reference in subsection 502(a)(1)(B) to "property described in subsection (b)" is to the following subsection of the Act. This subsection describes the said property 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 June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order."[86]

2.40 The combined effect of Sections 502(a) and (b) was that the specific property which was the subject of enforcement proceedings in the *Peterson v. Iran* case, namely the property of Bank Markazi, became subject to execution in order to satisfy the plaintiffs' default judgments against Iran rendered by the U.S. courts.

2.41 Indeed, as the U.S. Supreme Court observed in its judgment in the *Peterson* case, upholding the constitutionality of Section 502 of the ITRSHRA 2012, the purpose and effect of that provision was "[t]o place beyond dispute the availability of some of the E.O. 13599-blocked assets for the satisfaction of judgments rendered in terrorism cases".[87] In a passage approved by the U.S. Supreme Court, the District Court for the Southern District of New York had recognised that:

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85 Section 502(a)(1) of the U.S. Iran Threat Reduction and Syria Human Rights Act of 2012 Pub. L. 112-158, 126 Stat. 1214 (IM, Annex 16). The phrase "financial asset of Iran" in Section 502(a)(1)(C) is defined in Section 502(d)(3) as encompassing such assets owned by the State of Iran, by the central bank or monetary authority of that Government and by any agency or instrumentality of that Government.

86 Section 502(b) of the U.S. Iran Threat Reduction and Syria Human Rights Act of 2012 Pub. L. 112-158, 126 Stat. 1214 (IM, Annex 16, emphasis added).

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

> "On its face, the statute sweeps away the FSIA provision setting forth a central bank immunity, 28 U.S.C. § 1611(b)(1); it also *eliminates* any *other* federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made…the 2012 Act therefore provides a separate basis – in addition to the FSIA and TRIA – for execution."[88]

2.42 In their joint dissenting opinion in the U.S. Supreme Court judgment in the *Peterson* case, Chief Justice Roberts and Justice Sotomayor, referring to instances of unconstitutional interferences with the judicial function, where Congress assumes the role of judge and decides a pending case at first instance, described the effect of Section 502 (there referred to as Section 8772 of Title 22 of the U.S. Code) as follows:

> "Section 8772 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. … In the District Court, Bank Markazi had invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1611(b)(1). … Section 8772(a)(1) eliminates that immunity. Bank Markazi had argued that its status as a separate juridical entity under federal common law and international law freed it from liability for Iran's debts. See First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U. S. 611, 624–627 (1983); Brief for Petitioner 27–28. Section 8772(d)(3) ensures that the Bank is liable. Bank Markazi had argued that New York law did not allow respondents to execute their judgments against the Bank's assets… Section 8772(a)(1) makes those assets subject to execution."[89]

2.43 The practical impact of the new Section 8772 was therefore to deprive the Central Bank of Iran of the immunity from execution to which it was entitled under the 1976 FSIA and under the 1955 Treaty of Amity, and also to deny its separate juridical status. In the U.S. courts, Bank Markazi attempted to rely upon not only the immunities and defences which existed under the FSIA, but also those provided by the 1955 Treaty of Amity (including the requirement of recognition of the separate juridical status of Iranian companies). These defences were rejected by the courts in

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88 *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), at p. 21 (IM, Annex 58, emphasis added); cited in *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), at p. 10 (IM, Annex 66).

89 *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), at p. 34 (IM, Annex 66).

the *Peterson* proceedings. According to the U.S. District Court, with the adoption of the ITRSHRA, "Congress has abrogated any application of the [1955] Treaty [of Amity] in the FSIA context" and "TRIA § 201(a), E.O. 13599, and 22 U.S.C. § 8772 expressly pre-empt any immunity" from enforcement.[90] This view was confirmed by the Court of Appeals for the Second Circuit holding that the ITRSHRA "ha[d] changed the law governing this case […] abrogat[ing] any inconsistent provisions in the [1955] Treaty [of Amity]."[91]

SECTION 5.

THE CURRENT SITUATION

2.44 The practical impact of the measures mentioned above is that (a) many default judgments and substantial damages awards have been entered by the U.S. courts against the State of Iran and, in some cases, against Iranian State-owned companies, and (b) that assets and interests of Iran and Iranian State-owned companies, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors, even though such assets or interests are owned by separate juridical entities that are not even alleged to have any connection with the facts underlying the claim, and were not party to the judgment on liability in respect of which enforcement has been sought.

A. The constant increase in the number of judgments against the State of Iran

2.45 At the date of the Memorial, the U.S. courts have already awarded damages totalling over USD 60 billion against Iran. Among the many decisions rendered by the U.S.

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[90] *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), at p. 52 (IM, Annex 58).

[91] *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), at p. 7 (IM, Annex 62).

courts against Iran and Iranian State-owned companies,[92] reference may be made to the following notable instances.

2.46 In *Peterson et al. v. Islamic Republic of Iran*, nearly one thousand plaintiffs in a consolidated action brought in 2001 under Section 1605(a)(7) of Title 28 of the U.S. Code (the so-called "terrorism exception" to immunity), alleged that Iran was liable for damages arising from a 1983 suicide bombing of a U.S. marine barracks in Lebanon. In a default judgment entered in 2003, Iran was held responsible for the losses on the basis that it had supposedly provided material support to Hezbollah, the body found by the U.S. court to have immediate responsibility for the bombing.[93] A final default judgment was entered in 2007, awarding the plaintiffs USD 2,656,944,877 in damages.[94]

2.47 A default judgment was entered on 21 December 2011 in the case of *Steven Bland et al. v. Islamic Republic of Iran*, which had been brought by different plaintiffs but based on the same facts as the *Peterson* case. The *Bland* action was founded upon Section 1605A. In this case, the nearly 100 plaintiffs obtained a total award against Iran of USD 1,233,458,232 including USD 955,652,324 in punitive damages.[95]

2.48 In *Levin v. Islamic Republic of Iran*, Iran was sued under Section 1605(a)(7) for the damages suffered by Mr. Levin and his wife arising from the capture and holding hostage of Mr. Levin, allegedly by Hezbollah, in 1984. A default judgment entered in 2007 held Iran liable for having provided material support to Hezbollah, and awarded more than USD 28 million in damages to the plaintiffs.[96]

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92 IM, Attachment 1.

93 *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 30 May 2003, 264 F. Supp. 2d 46, 61 (D.D.C. 2003) (IM, Annex 32).

94 *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 7 September 2007, 515 F.Supp.2d 25 (D.D.C. 2007) (IM, Annex 40).

95 *Bland et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 21 December 2011, 831 F.Supp.2d 150 (D.D.C. 2011) (IM, Annex 51).

96 *Levin et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 31 December 2007, 529 F. Supp.2d 1 (D.D.C. 2007) (IM, Annex 41).

2.49 The *Acosta v. Islamic Republic of Iran* case was related to the assassination of Rabbi Meir Kahane and the shooting of Irving Franklin and Carlos Acosta by El Sayyid Nosair, a member of Gam'aa Islamiyah, in New York in 1990. Iran was initially sued by the plaintiffs under Section 1605(a)(7), but the complaint was amended in 2008 pursuant to the new Section 1605A, which permitted the award of punitive damages against sovereign States. A default judgment entered in 2008 held Iran liable for the damages resulting from the assassination on the basis that it had provided material support to Gam'aa Islamiya, and ordered Iran to pay more than USD 350 million to the plaintiffs, including USD 300 million in punitive damages.[97]

2.50 In *Weinstein v. Islamic Republic of Iran*, Iran was sued under Section 1605(a)(7) following the death in 1996 of a U.S. citizen in Jerusalem, killed in the suicide bombing of a bus for which Hamas claimed responsibility. By a default judgment of 2002, Iran was held liable on the basis that it had provided "material support" to Hamas, and ordered to pay more than USD 192 million to the plaintiffs, including USD 150 million in punitive damages[98]. Similarly, in *Campuzano v. Islamic Republic of Iran* and *Rubin and others v. Islamic Republic of Iran*, Iran was held liable for damages arising from Hamas bombings in 1997 in Jerusalem, and the plaintiffs obtained a default judgment awarding them USD 71.5 million[99].

2.51 In *Heiser v. Islamic Republic of Iran*, the plaintiffs – family members and estates of servicemen killed in the 1996 bombing at Khobar Towers, a residence on a U.S. military base in Saudi Arabia – contended that Iran was liable for damages because it allegedly provided "material support" and assistance to Hezbollah. The action was based on Section 1605(a)(7) of the 28 U.S. Code. A default judgment in 2006 ordered Iran to pay plaintiffs more than USD 254 million in compensatory damages.[100] The plaintiffs subsequently filed a new application in the same case, this

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97 *Acosta et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 26 August 2008, 574 F.Supp.2d 15 (D.D.C. 2008) (IM, Annex 43).

98 *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).

99 *Campuzano et al. v. The Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 September 2003, 281 F. Supp. 2d 258 (D.D.C. 2003) (IM, Annex 33).

100 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 22 December 2006, 466 F. Supp.2d 229 (D.D.C. 2006) (IM, Annex 38).

time founded upon Section 1605A of the 28 U.S. Code (which entered into force in 2008 but which applies retroactively), in order to obtain a new judgment awarding additional compensatory damages and also punitive damages. A default judgment entered in 2009 awarded the plaintiffs more than USD 336 million in additional damages, including USD 300 million in punitive damages.[101]

2.52 In *Greenbaum v. Islamic Republic of Iran*, Iran was sued for having allegedly provided "material support" to Hamas, which was responsible for a suicide bombing in a restaurant in Jerusalem in 2001 which had caused the death of a woman. The action was brought pursuant to Section 1605(a)(7). A default judgment was entered in 2006 against Iran, awarding almost USD 20 million in damages to the plaintiffs.[102]

2.53 In *Havlish v. Bin Laden*, a District Court held that Iran has provided material support to Al Qaeda, and on 22 December 2011 entered a default judgment holding that, among others, the State of Iran, and also several State-owned companies, namely National Iranian Oil Company, National Iranian Gas Company, National Iranian Petrochemical Company, Iran Airlines, and the Central Bank of Iran, are liable to the plaintiffs for the damages resulting from the 11 September 2001 terrorist attacks.[103] The court considered that all of these entities were agents of Iran for the purpose of liability under the "terrorism exception" to sovereign immunity codified in Section 1605A, on the broad premise that "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." The court

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101 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 30 September 2009, 659 F.Supp.2d 20 (D.D.C. 2009) (IM, Annex 45).

102 *Greenbaum et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2006, 451 F. Supp.2d 90 (D.D.C. 2006) (IM, Annex 37).

103 *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).

denied immunity to all of these entities.[104] A subsequent judgment followed on October 2012, awarding the *Havlish* plaintiffs damages in excess of USD 6 billion. Other similar cases against the State of Iran and/or Iranian entities related to the 11 September 2001 terrorist attacks have been filed and decided since then.

2.54 In *Bennett v. Islamic Republic of Iran*, Iran was sued under Section 1605(a)(7) for allegedly having provided "material support" to Hamas, which was said to have organised the bombing of a cafeteria on the campus of the Hebrew University in Jerusalem in 2002. By a default judgment of 2008, Iran was held liable for the damages suffered by the victims and ordered to pay compensatory damages of nearly USD 13 million to the plaintiffs.[105]

2.55 Similarly, in *Harry Beer et al. v. Islamic Republic of Iran*, Iran was held liable for the damages suffered by plaintiffs as a result of the bombing of a bus in Jerusalem in 2003. In a default judgment, the court found, once again, that Iran had provided material support to Hamas. The plaintiffs obtained a first award in 2008, granting them USD 13 million in compensatory damages, but denying their request for punitive damages (punitive damages were not available against States under U.S. law as it was at this time). The plaintiffs filed a new action in 2008 after the enactment of the new Section 1605A, which applies with retroactive effect, and obtained a second judgment awarding them an additional USD 300 million in punitive damages.[106]

2.56 The U.S. courts have rendered many more cases similar to those specifically mentioned above. The following graph captures the ongoing situation created by the United States' acts referred to in this Chapter.

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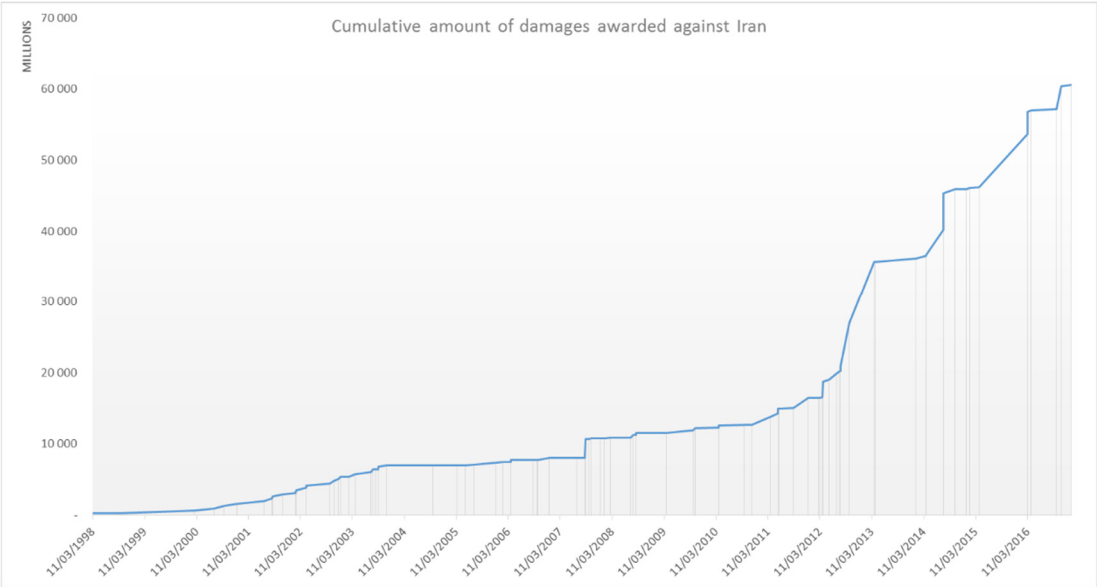
104 *Ibid.*, at paras. 38 and 44, pp. 11 and 12.

105 *Bennett v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, 30 August 2007, 507 F. Supp. 2d 117 (D.D.C. 2007) (IM, Annex 39).

106 *Beer, et al. v. Islamic Republic of Iran, et al.*, U.S. District Court, District of Columbia, 19 May 2011, 789 F.Supp.2d 14, (D.D.C. 2011) (IM, Annex 49).



B. The attachment of the assets of Iran and Iranian State-owned Companies, including Bank Markazi, in execution of judgments rendered under Sections 1605 and 1605A of 28 U.S. Code

2.57 The judgments against the Iranian State and Iranian State-owned companies, awarding billions of dollars of damages to thousands of plaintiffs, together with the U.S. law provisions which permit the enforcement of these judgments through the attachment of assets of Iranian State-owned companies, have created a situation in which an enormous body of important Iranian assets are currently under threat of seizure, or have already been seized and distributed. The following examples are illustrative of the ongoing situation.

2.58 In *Peterson v. Islamic Republic of Iran,* the plaintiffs obtained in 2008 restraint orders from the District Court for the Southern District of New York in respect of transfers of assets belonging to Bank Markazi held with Citibank in New York. The plaintiffs initiated proceedings against Bank Markazi in 2010 to obtain turnover of these assets under Section 201(a) TRIA. The assets were later "blocked" pursuant to E.O. 13599 issued in 2012. In 2012, the Congress also passed the ITRSHRA specifically in order to authorise the turnover of the said financial assets to the plaintiffs in satisfaction of their judgments. Deciding the case in 2013, the U.S. District Court accordingly ordered turnover of the assets, under both Section 201 of

the TRIA and Section 8772 of the U.S Code.[107] This judgment was subsequently confirmed by the Court of Appeals[108] as well as by the Supreme Court of the United States.[109] Distribution to the plaintiffs of about USD 1.895 billion plus interest, belonging to Bank Markazi, was authorised by an order of the District Court dated 6 June 2016.[110]

2.59 The multiplicity of judgment creditors has created a situation where they may compete for obtaining payment of their judgments. For instance, the judgment creditors in *Levin*, *Greenbaum, Heiser,* and *Acosta* disputed priority for the attachment of funds belonging to certain Iranian banks and National Iranian Oil Company, held with certain U.S. financial institutions (although some agreement on priority and the manner of distributing assets was subsequently reached).[111] A judgment of 28 January 2011 ordered the turnover of some assets to the Acosta and Greenbaum judgment creditors.[112] In a second phase of the proceedings, the court ordered the U.S. financial institutions to turn over more than USD 4 million of the funds belonging to certain Iranian entities to the Levin, Acosta, Greenbaum and Heiser judgment creditors.[113] In a Joint Amended Judgment filed on 1 November 2016, the court directed the turnover of one of the assets excepted from the phase 2 turnover order – the proceeds of an electronic funds transfer by Citibank – to the Levin, Acosta, Greenbaum and Heiser judgment creditors.[114] In a third phase, the court ordered the turnover of more than USD 4 million of MasterCard's debt

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107 *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).

108 *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).

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

110 *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).

111 *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).

112 *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).

113 *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).

114 *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).

contractually owed to Bank Melli and Bank Saderat to the Levin, Greenbaum and Heiser judgment creditors.[115]

2.60 Again in *Heiser v. Islamic Republic of Iran*, a sum of approximately USD 616,500 owing to the TIC, a State-owned company, was seized and turned over to the Heiser judgment creditors in 2011.[116]

2.61 In *Weinstein v. Islamic Republic of Iran*, the Court of Appeals acknowledged that "Bank Melli was not itself a defendant in the underlying action" but, 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", and confirmed the attachment of property of Bank Melli in partial satisfaction of the liability of the State of Iran.[117]

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115 *Levin et al. v. Bank of New York et al.*, U.S. District Court, Southern District of New York, 31 October 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013) (IM, Annex 60).

116 *Estate of Michael Heiser v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, 10 August 2011, 807 F. Supp. 2d 9 (IM, Annex 50). In the same case, the Court ordered Mashreqbank on 4 May 2012 to turnover to Heiser judgment creditors an amount of USD 123,202.32 belonging to Iranian State-owned companies; see *The Estate of Michael Heiser et al. v. Mashreqbank*, U.S. District Court, Southern District of New York, 4 May 2012, No. 11 Civ. 01609 (S.D.N.Y. 2012) (IM, Annex 53). On 13 February 2013, the Court ordered Bank of Tokyo to turnover to Heiser judgment creditors the following properties belonging to Iranian State-owned companies, which were electronic funds transfers blocked by OFAC and maintained in interest-bearing accounts held by the Bank of Tokyo: i) Bank Sepah International PLC: USD 92,058.08; ii) Iranohind Shipping Company: USD 4,740; Islamic Republic of Iran Shipping Lines (IRISL Benelux NV): USD 62,216.80; iii) IRISL Benelux NV: USD 100,365.63; iv) Export Development Bank of Iran (EDBI): USD 98,127.36; v) Bank Melli Iran: USD 2,181.88; see *The Estate of Michael Heiser et al. v. The 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). On 19 February 2013, the court ordered Bank of Baroda, New York Branch to turnover the following Iranian properties to the judgment creditors: i) Bank Saderat: USD 2,180; ii) Bank Saderat & Behran Oil Company: USD 11,160; iii) Export Development Bank of Iran (EDBI): USD 12,647.68; USD 13,000; USD 13,020; iv) Bank Melli: USD 19,000; v) Bank Melli: USD 49,000; see *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). On 9 June 2016, the Court ordered the turnover of the following Iranian properties to Heiser judgment creditors: i) Iranian Marine & Industrial: USD 37,543.59; ii) Sediran: USD 11,744.80; iii) Iran Air, and Bank Melli PLC UK: USD 9,743.53; iv) Iranian Navy: USD 249,365; see *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). All these decisions have been entered pursuant to Section 1610(g) of the Title 28 of the U.S. Code and Section 201 of the U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, 116 Stat. 2322 (IM, Annex 13).

117 *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).

The judgment creditors were therefore held entitled to the proceeds of the sale of a building in New York owned by Bank Melli for a sale price of approximately USD 1.6 million.[118] The sale proceeds of the building were ultimately distributed among the plaintiffs.

2.62 In *Ministry of Defense of Iran et al. v. Cubic Defense System*, the *Rubin* plaintiffs, among others, succeeded in attaching the so-called "*Cubic* Judgment" – a judgment confirming an I.C.C. arbitral award in favour of the Iranian Ministry of Defense in the amount of USD 9,462,750 – to satisfy a portion of their default judgments against Iran.[119] On 29 April 2016, following denial of Iran's petition for a writ of certiorari,[120] the U.S. District Court ordered the turnover of the said judgment money to the plaintiffs.[121]

2.63 In *Bennett v. Islamic Republic of Iran*, the blocked assets that the plaintiffs sought to attach are approximately USD 17.6 million contractually owed to Bank Melli by two U.S. companies, Visa Inc. and Franklin Resources Inc.[122] The debt is owed to Bank Melli as a result of arrangements between Visa and Bank Melli under which Bank Melli agreed to honour Visa cards at its branches in Iran. The case is pending before the Supreme Court and no distributions has yet occurred.

2.64 Among the latest developments, it should be noted that the *Havlish* judgment creditors are now seeking to attach the assets of several Iranian State-owned companies, including Bank Markazi, which are detained in the accounts of Clearstream Banking S.A. in Luxembourg.[123] Also, in relation to the sale by Boeing of aircraft to Iran Air, which has been duly authorised by the OFAC, the *Leibovitch*

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118 *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).

119 *Ministry of Defense of Iran et al. v. Cubic Defense Systems et al.*, U.S. District Court, Southern District of California, 27 November 2013, 984 F. Supp. 2d 1070 (S.D. Cal. 2013) (IM, Annex 61).

120 *Ministry of Defense of Iran et al. v. Frym et al.*, U.S. Court of Appeals, Ninth Circuit, Opinion, 26 February 2016, No. 13-57182 (9th Cir. 2016) (IM, Annex 65).

121 *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).

122 *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).

123 *Havlish et al.*, Dénonciation de saisie-arrêt, 21 January 2016 (IM, Annex 63).

judgment creditors, who were awarded more than USD 66 million in damages by default judgments entered in 2011 and 2014, are currently seeking to attach Iranian property in the hands of Boeing and its subsidiaries or affiliates. The press has also reported a request filed by the *Leibovitch* plaintiffs with the Illinois courts asking "a U.S. federal court to block aerospace giant Boeing Co.'s planned USD 16.6 billion deal with Iran Air, saying the Tehran government must first pay off billions of dollars in damages to families of people killed or wounded by Iranian-backed militant groups" and threatening to seize all 100 airplanes.[124]

[124] I. Kushkush, "Israeli group asks U.S. court to block Boeing deal with Iran", *Associated Press*, 16 December 2016 (IM, Annex 96).

CHAPTER III.
APPLICABLE LAW

3.1 The principal sources of law to be applied in resolving the dispute comprise the 1955 Treaty of Amity (section 1) and, as secondary sources applicable in the interpretation and application of the 1955 Treaty of Amity, certain rules of customary international law (section 2).

SECTION 1.
THE TREATY OF AMITY

3.2 The rights and duties that are in issue in the present case arise from the 1955 Treaty of Amity. The present section provides an overview of the 1955 Treaty of Amity, and explains the sources of law relevant to its interpretation and application generally. The interpretation and application of the specific provisions of the 1955 Treaty of Amity in respect of which breach is alleged are addressed in Chapters IV to VI below.

3.3 The 1955 Treaty of Amity entered into force on 16 June 1957. It is undisputed that the 1955 Treaty of Amity was in force at the date of the filing of Iran's Application, and that it is still in force today. The 1955 Treaty of Amity has never been terminated, whether according to its terms or otherwise.[125] As the Court recognised in the *United States Diplomatic and Consular Staff in Tehran* case, the provisions of the 1955 Treaty of Amity "remain part of the corpus of law applicable between the United States and Iran".[126] That remains the case today.

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[125] Pursuant to Article XXIII(3) of the 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): "Either High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter." No such notice has been given by either Party.

[126] *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 3 at p. 28, para. 54.

3.4 The United States is, of course, required to comply with its obligations under the 1955 Treaty of Amity in good faith. Further, as the Court observed in the *United States Diplomatic and Consular Staff in Tehran* case:

> "The very purpose of a treaty of amity…is to promote friendly relations between the two countries concerned, and between their two people, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance."[127]

3.5 The Court has previously determined two disputes between the Parties as to the interpretation or application of the 1955 Treaty of Amity: *United States Diplomatic and Consular Staff in Tehran* and *Oil Platforms*.[128]

3.6 In its 1996 decision on Preliminary Objections in the *Oil Platforms* case, the Court summarised the content of the 1955 Treaty of Amity as follows:

> "[The 1955 Treaty is] a treaty of "Amity, Economic Relations and Consular Rights" whose object is, according to the terms of the Preamble, the "encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally" as well as "regulating consular relations" between the two States. The Treaty regulates the conditions of residence of nationals of one of the parties on the territory of the other (Art. II), the status of companies and access to the courts and arbitration (Art. III), safeguards for the nationals and companies of each of the contracting parties as well as their property and enterprises (Art. IV), the conditions for the purchase and sale of real property and protection of intellectual property (Art. V), the tax system (Art. VI), the system of transfers (Art. VII), customs duties and other import restrictions (Arts. VIII and IX), freedom of commerce and navigation (Arts. X and XI), and the rights and duties of Consuls (Arts. XII-XIX)."[129]

3.7 As is clear from the above summary, like other similar treaties concluded by the United States during the same period, the 1955 Treaty of Amity imposes a range of obligations on Iran and the United States. Whereas certain provisions of the 1955 Treaty of Amity secure protections for "nationals" and "companies" and their "property" (including "interests in property"), other provisions concern transactions

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127 *Ibid.*

128 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 813.

129 *Ibid*, at p. 813, para. 27.

and other activities between the territories of the Contracting Parties. The present dispute concerns the interpretation and application of both types of provisions.

3.8 The interpretation and application of the 1955 Treaty of Amity are questions for the law of treaties. Since neither Party has ratified the Vienna Convention on the Law of Treaties of 1969 ('**Vienna Convention**'), those questions are governed by the requirements of the 1955 Treaty of Amity and by customary international law.

3.9 As to the applicable principles of treaty interpretation, it is well-established that Articles 31 and 32 of the Vienna Convention reflect rules of customary international law.[130] The Court has applied Article 31 in its previous judgments in cases between the Parties.[131] Pursuant to the general rule of treaty interpretation reflected in Article 31(1) of the Vienna Convention, "A treaty shall be 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."

3.10 The present case concerns the 1955 Treaty of Amity, the object and purpose of which have already been the subject of the Court's consideration. As the Court recognised in the *Oil Platforms* case, according to the terms of the Preamble, the object and purpose of the Treaty is "the 'encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally' as well as 'regulating consular relations' between the two States".[132] More generally, as the Court stated in the *Nicaragua* case, the object and purpose of a treaty such as the 1955 Treaty of

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130 See e.g. *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment,* I.C.J. Reports 2004, p. 12 at p. 48, para. 83; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment,* I.C.J. Reports 1999, p. 1045 at p. 1059, para. 18; *LaGrand (Germany v. United States of America) Judgment,* I.C.J. Reports 2001, p. 466 at p. 501, para. 99; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136 at p. 174, para. 94; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* I.C.J. Reports 2007, p. 43 at p. 60, para. 160.

131 See *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment*, I.C.J. Reports 1996, p. 803 at p. 812, para. 23; and *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment*, I.C.J. Reports 2003, p. 161 at p. 182, para. 41.

132 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 813, para. 27. See also at p. 815, para. 31: "the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions".

Amity is "the effective implementation of friendship in the specific fields provided for in the Treaty".[133]

3.11 The 1955 Treaty of Amity also requires that certain provisions be applied with reference to: (a) the practice of the Parties, including any treaties concluded between the United States and third states, and (b) rules of customary international law.

3.12 As to (a), the 1955 Treaty of Amity contains 'most favoured nation' provisions, which may require reference to the practice of the Parties in relation to matters covered by such provisions, and to any other relevant treaties concluded between the United States and third states.[134] For example, and as considered further in Chapter V below, Article III(2) expressly provides that the right of nationals and companies to freedom of access to the courts "shall be allowed…upon terms no less favourable than those applicable to nationals and companies of such other High Contracting Party of any third country".

3.13 As to (b) above, as the Court explained in the *Nicaragua* case, the "actual text" of a treaty may "itself refer[] to…customary international law", and this is the case with the 1955 Treaty of Amity.[135] As developed further in Chapter V below, the ordinary meaning of Article IV(2) of the 1955 Treaty of Amity expressly refers to, and requires reference to, rules of customary international law, as they exist from time to time, by way of a *renvoi*:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and

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133 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* I.C.J. Reports 1986, p. 14 at p. 137, para. 273. See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 814, para. 28.

134 Pursuant to the customary international law rule, which is reflected in Article 31(3)(b) of the Vienna Convention on the Law of Treaties of 1969, 1155 U.N.T.S. 331, the provisions of the 1955 Treaty of Amity should be interpreted taking into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its implementation.".

135 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, I.C.J. Reports 1986, p. 14 at p. 94, para. 176.

security within the territories of the other High Contracting Party, *in no case less than that required by international law*."[136]

3.14 Further, pursuant to the customary international law rule, which is reflected in Article 31(3)(c) of the Vienna Convention, the provisions of the 1955 Treaty of Amity must be interpreted in light of other "relevant rules of international law applicable in the relations between the parties".[137] Accordingly, the provisions of the 1955 Treaty of Amity must be interpreted taking into account relevant treaty obligations, rules of customary international law and general principles of international law.

3.15 In the present case, particular rules of customary international law are relevant to the interpretation of certain provisions of the 1955 Treaty of Amity in two further respects. First, Article III(1) of the Treaty requires reference to the rules of customary international law governing the identification of corporate entities and respect for the separate juridical status of such entities.[138] Secondly, Articles III(2) ('freedom of access to justice') and X ('freedom of commerce') of the Treaty require consideration of the law of immunities.[139]

3.16 As follows from the above, rules of customary international law are relevant both by way of direct application (see e.g. Article IV(2) of the 1955 Treaty of Amity), and pursuant to general rules on the interpretation and application of treaties, for example in establishing what is entailed by the requirement of "access to justice" pursuant to Article III(2) of the Treaty. In *Amoco International Finance Corporation v. Iran*, the Iran-U.S. Claims Tribunal explained the relationship between the 1955 Treaty of Amity and customary international law in the following terms:

> "As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the

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136 Article IV(2) of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, signed at Tehran on 15 August 1955, 284 U.N.T.S. 93 (IM, Annex 1, emphasis added).

137 See, e.g. *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161 at p. 182, para. 41.

138 See *infra* Chapter IV(1), p. 69, para. 4.17.

139 See *infra* Chapter V(1), pp. 79-81 paras. 5.5-5.9 and Chapter VI(2), p. 115, para. 6.19.

> contrary, the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions."[140]

3.17 Accordingly the Iran-U.S. Claims Tribunal held, for instance, that the protection from expropriation conferred by Article IV(2) of the 1955 Treaty of Amity "must be read against [the] background [of customary international law], since the negotiation of the Treaty must be presumed to have taken place in this context."[141]

3.18 To similar effect, by the very nature of the protections they establish, certain of the provisions of the Treaty require consideration of relevant rules of international law when it comes to their application. For example, the question whether one of the Treaty Parties is being accorded fair and equitable treatment in accordance with Article IV(1) of the Treaty, or is being subjected to unreasonable and discriminatory measures contrary to the same provision, may entail consideration of concepts that have developed or find a degree of definition as a matter of customary international law, for example, denial of justice.

SECTION 2.
OTHER SOURCES OF INTERNATIONAL LAW

3.19 As already noted, certain provisions of the 1955 Treaty of Amity are to be interpreted with reference to (and applied in consideration of) relevant rules of customary international law. In addition, application of the Treaty may also require reference to domestic law.

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[140] *Amoco International Finance Corporation v. The Government of the Islamic republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited,* IUSCT Award No. 310-56-3, *I.L.M.* vol. 27, issue 5, p. 1320, at p. 1343, para. 112. See also *Short v. Iran*, IUSCT Award No 312-11135-3, (1987) 16 IUSCT Rep. 76; (1990) 82 *I.L.R.* 148, Dissenting Opinion of Judge Brower, at 16 IUSCT Rep. 89; 82 *I.L.R.* 164, finding that the principles regarding expulsion of aliens are "provided by the Treaty of Amity … supplemented as necessary by resort to customary international law."

[141] *Amoco v. Iran, ibid*, at p. 1344, para. 115.

A. Customary international law

(a) Jurisdictional Immunities

(i) General principles

3.20 Certain provisions of the 1955 Treaty of Amity – notably Articles III(2), IV(2) and X(1) – are to be interpreted in light of (and applied in consideration of) the rules of customary international law concerning the immunities to which States, central banks and other State-owned companies are entitled in the context of civil proceedings – both with respect to jurisdiction and enforcement. It is useful to set out the basic rules here.

3.21 In the *Jurisdictional Immunities* case, the Court reiterated five essential features of State immunity.

(a) State immunity is a "general rule of customary international law solidly rooted in the current practice of States".[142] It "derives from the principle of sovereign equality of States" and "occupies an important place in international law and international relations".[143] State immunity is "governed by international law and is not a mere matter of comity".[144] The grant of immunity does not, and must not, depend on political considerations or diplomatic relations.

(b) The law of State immunity is "essentially procedural in nature".[145] It is "entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful".

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142 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at p. 123, para. 56. See also the first preambular paragraph of the United Nations Convention on Jurisdictional Immunities of State and Their Property of 2004, U.N. doc. A/59/508, p. 4 records:

> "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law.".

143 *Ibid*, at p. 123, para. 57.

144 *Ibid*, at p. 122, para. 53.

145 *Ibid*, at p. 124, para. 58. See also at p. 140, para. 93.

(c) The development and general acceptance of the restrictive theory of State immunity during the 20th century gave rise to distinction between those acts of States which attract immunity and those which do not.[146]

(d) "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality".[147] A respondent state is entitled to immunity from the jurisdiction of the forum State unless it is established that the claim falls within a specific exception to immunity established under customary international law.

(e) The Court established that there is no limitation upon jurisdictional immunities in the context of cases before domestic courts concerning alleged serious violations of human rights or norms of a *jus cogens* character under customary international law.[148] The absence of such a limitation under the United Nations Convention on the Jurisdictional Immunities of States and their Property of 2004 (the '**UN Convention**') was regarded as "particularly significant".[149]

3.22 The UN Convention has not yet entered into force.[150] However, certain of its provisions have been relied on by national and international courts as evidence of customary international law.[151] Article 5 of the UN Convention sets out the general

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146 *Ibid*, at pp. 124-125, para. 59. While the distinction between acts *jure imperii* and acts *jure gestionis* may be simply stated, the application of a so-called 'commercial exception' "is so diverse and the criterion by which it is determined so differently formulated as to prevent the articulation of the exception in terms acceptable to all.": see H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. revised, New York: O.U.P., 2015), at p. 399.

147 *Ibid*, at p. 124, paras. 57.

148 *Ibid,* at p. 139, para. 91: "The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the law of armed conflict." See also p. 137-138, paras. 84-89.

149 *Ibid*, at p. 138, para. 89.

150 As of 31 December 2016, the United Nations Convention on Jurisdictional Immunities of States and Their Property had 21 ratifications. Whereas Iran ratified the UN Convention in 2008, the United States is not a signatory.

151 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at p. 128, para. 66. See also: *Jones v. Saudi Arabia*, UK House of Lords, [2006] UKHL 26; [2007] 1 A.C. 270 per Lord Bingham at para. 26 referring to the UN Convention as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases"; *Oleynikov v. Russia,* ECtHR Application no. 36703/04, Judgment, para. 66; *Cudak v. Lithuania,* ECtHR Application no. 15869/02, Judgment, para. 66; *Sabeh el Leil v. France,* ECtHR Application no. 34869/05, Judgment, para. 58. See also R. O'Keefe, C. Tams and A. Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and their*

principle that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the current Convention". Article 6 then provides:

> *"Modalities for giving effect to State immunity*
>
> (1) A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.
>
> (2) A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
>
> (a) is named as a party to that proceeding; or
>
> (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

3.23 As a separate matter relevant to the facts of this case, foreign central banks (whether separate juridical entities or not) are also entitled to immunity from the jurisdiction of municipal courts under international law.

3.24 The essential duty of a central bank is to serve as the guardian and regulator of the monetary system and currency of that State both internally and internationally. Central banks therefore play a key role in the exercise of a State's monetary sovereignty.[152]

Property: A Commentary (Oxford: O.U.P., 2013), at XII, para. 2.5: "The Convention's significance, however, extends beyond the instrument's quality as a treaty. There can be little doubt that the process of the Convention's elaboration has, though the close involvement of States, revealed, and where not simply revealed then crystallized, the content of the contemporary customary international law of state immunity. That is not to say that each and every substantive provision in its entirety is necessarily consonant with custom. But far more than simply the essence of each is, and, as the following chapters show, both national and international courts have already looked to the Convention as persuasive evidence of today's customary rules on point."

[152] See e.g. *Gold Looted by Germany from Rome in 1943 (USA/France/UK/Italy),* Award of 20 February 1953, 20 *I.L.R.* 441, at p. 474: "Even when they take the form of purely private financial establishments, or semi-private, the banks invested with the exclusive privilege of issuing bank-notes recognized as legal tender and valid for payments, discharge a function which affects the economic prosperity of the entire community, since they have to regularize all money transactions. When creating them, the State aimed less at drawing profits from their activity than at making the whole national community share the advantages of monetary stability."

3.25 Both the I.L.C. commentary[153] and leading scholars[154] recognise that, for the purposes of Article 2(1)(b)(iii) of the UN Convention, the concept of "agencies or instrumentalities of the State or other entities" include central banks (and may include State-owned enterprises), and that those entities are entitled to immunity from jurisdiction in international law. The immunity of a central bank persists regardless of whether it is a separate juridical person from the State.

(ii) The so-called 'terrorism exception' under U.S. law is without basis in international law

3.26 A State is entitled to immunity from the jurisdiction of the forum State unless it is established that the claim falls within a specific exception which is recognised under international law.[155] The United States bears the burden of establishing that any alleged exception upon which it relies to the principle of the immunity of foreign States is supported by sufficient evidence of both State practice and *opinio juris*, as the I.L.C. Draft Conclusions on Identification of Customary International Law reaffirm.[156] This is a high threshold.

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153 See I.L.C., *Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, in* Y.I.L.C., 1991, vol. II, Part Two, commentary to Article 2, para.15: "The concept of "agencies or instrumentalities of the State or other entities" could theoretically include State enterprises or other entities established by the State performing commercial transactions". See also I.L.C., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* in Y.I.L.C., 2001, vol. II, Part Two, commentary to Article 4, para. 12: "[t]he term "entity" is used in a similar sense in the draft articles on jurisdictional immunities of States and their property adopted in 1991".

154 R. O'Keefe, C. Tams and A. Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (Oxford: O.U.P., 2013), at p. 50: "…it is undoubtedly the case that, in appropriate circumstances, what are known as 'State enterprises', *viz* corporate entities with legal personality separate from the State and established by it usually with a view to commercial activity, are one category of the agencies or instrumentalities that Article 2(1)(b)(iii) has in mind. The provision would also embrace, in certain circumstances, central banks…". See also at pp. 180-181: "a classic example of the sort of 'agencies', 'instrumentalities', and 'other entities' mentioned in Article 2(1)(b)(iii) is what, in common parlance, would be called a State enterprise—that is, an entity established by a State for commercial purposes, endowed with independent legal personality and capable of suing or being sued and of acquiring, owning or possessing, and disposing of property."

155 See *supra*, Chapter III, Section 2(A)(a)(i), p. 52, para. 3.21(d).

156 See I.L.C., *Draft Conclusions on Identification of Customary International Law, with commentaries,* in *Report of the I.L.C., 68th session*, at pp. 76-77, especially Conclusions 8 and 9.

3.27 That burden is impossible for the United States to discharge. The so-called 'terrorism exception', the extraordinary breadth of which has already been addressed in Chapter II above, is without basis in international law.

3.28 First, there is no extensive and near-uniform recognition of the so-called 'terrorism exception' even by reference to U.S. practice, let alone in the practice of States more broadly. Whereas the exception encompasses a broad range of "terrorist" acts, as is well known, there is no agreed definition of "terrorism" under international law.

3.29 In the *Jurisdictional Immunities* case, the Court observed that the U.S. law "has no counterpart in the legislation of other States".[157] Since that time, only one other State (Canada) has introduced a comparable exception to State immunity in its domestic legislation.[158] To use the words of the Court in the *Jurisdictional Immunities* case, it is "particularly significant"[159] that no form of 'terrorism exception' is reflected in the UN Convention, the 1972 European Convention[160] or the draft Inter-American Convention.[161]

3.30 More recently, the substantial number of States comprising the Non-Aligned Movement have specifically protested against the United States' "defiance to international law through the unilateral waiving of the sovereign immunity of State and their institutions in total contravention of the international and treaty obligations of the United States and under a spurious legal ground that the international community does not recognize".[162]

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157 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at p. 138, para. 88.

158 See the Canada State Immunity Act R.S.C. 1985, c. S-18, s.6.1 and the Canada Justice for Victims of Terrorism Act S.C. 2012, C.1, Section 2.

159 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at p. 138, para. 89.

160 European Convention on State Immunity, concluded 16 May 1972, entered into force on 11 June 1976, 1495 U.N.T.S. 182.

161 Draft Inter-American Convention on Jurisdictional Immunity of States, 22 I.L.M. 92.

162 See e.g. 'Communiqué by the Coordinating Bureau of the Non-Aligned Movement in Rejection of Unilateral Actions by the United States in Contravention of International Law, in Particular the Principle of State Immunity', 5 May 2016, in U.N. document A/70/861 (IM, Annex 94).

3.31 Secondly, in any event, rather than purporting to incorporate customary international law, the U.S. and Canadian legislation has been specifically enacted for the purpose of dis-applying the law of State immunity, thereby depriving the United States' position of even a claim to the required element of *opinio juris*.

3.32 When the U.S. Congress enacted the FSIA in 1976, it noted that the bill was intended to codify principles of international law.[163] The FSIA did not originally contain any so-called 'terrorism exception'. When the exception was being introduced subsequently, the U.S. Government actively opposed enactment on the ground that it lacked any basis in international law or practice. The views of the U.S. Government were communicated, for example, in evidence presented to the U.S. Senate Committee on the Judiciary in 1994.[164]

3.33 Reference may also be made to the introduction of a new Section 1605B in Title 28 of the U.S. Code[165] pursuant to the enactment of the JASTA on 28 September 2016. The opposition of the United States Government to this provision, together with the opposition of numerous foreign States,[166] likewise confirms that the so-called 'terrorism exception' under U.S. law is contrary to international law. President Obama vetoed the bill which preceded JASTA, including on the ground that "JASTA would upset longstanding international principles regarding sovereign

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163 S. Rep. No. 94-1310 U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2, at 9 (1976) (IM, Annex 7). See also *Permanent Mission of India to the United Nations v. City of New York*, U.S. Supreme Court, 551 U.S. 193, at 199-200 (2007) confirming that the FSIA represented the "codification of international law at the time of the FSIA's enactment", including limited specified "pre-existing" exceptions to sovereign immunity "recognized by international practice".

164 See Hearings on Section 825 before the Subcommittee on Courts and the Administrative Practice of the Senate Committee on the Judiciary, 103d Cong., 2nd Sess 10 (1994) (IM, Annex 9).

165 Section 1605B of the 28 U.S. Code provides:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—
>
> (1) an act of international terrorism in the United States; and
>
> (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."

166 As the U.S. President recorded in his reasons for vetoing the JASTA Bill, "[a] number of our allies and partners have already contacted us with serious concerns about the bill": see Veto Message from the President – Section 2040, 23 September 2016 (IM, Annex 23).

immunity".[167] No material distinction can be drawn between the abrogation of jurisdictional immunities under the JASTA and the so-called 'terrorism exception' for States designated 'sponsors of terrorism'.

3.34 Thirdly, the so-called 'terrorism exception' under Section 1605A of the FSIA wrongly treats immunity as a matter of grace and comity by conferring upon the U.S. Executive the absolute discretion, unchecked by the U.S. courts, to grant or withhold immunity.[168]

3.35 Fourthly, there is widespread agreement among the most highly qualified publicists that the so-called 'terrorism exception', whether under U.S. law or at all, is unlawful.[169]

(b) Immunities from Enforcement

3.36 As a separate matter to jurisdiction, as a general rule of customary international law, States enjoy immunity from enforcement against their property located in a foreign State. As recognised in the *Jurisdictional Immunities* case, that immunity "goes further" than jurisdictional immunity.[170] Enforcement measures involve a greater and more direct interference with a State's sovereignty, including the freedom to manage its own affairs, than the pronouncement of a judgment by a foreign court *per se*. The I.L.C.'s first Rapporteur on Jurisdictional Immunities of States and their

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167 *Ibid*. See also the earlier statements by the White House Spokesperson of 18 April 2016 and of 17 May 2016 (IM, Annex 26).

168 See *supra* Chapter III, Section 2(A)(a)(i), p. 51, para. 3.21(a).

169 See e.g. J. Dellapenna, *Suing Foreign Governments and their Corporations* (Washington D.C.: Bureau of National Affairs, 1988), at pp. 415-416; H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. revised, New York: O.U.P., 2015), at pp. 82, 148-149, 274-275 and 285; R. Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Right Law* (Oxford: O.U.P., 2008), at p. 355; and Y. Xiaodong, *State Immunity in International Law* (Cambridge: C.U.P., 2012), at p. 227.

170 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, p. 99 at p. 146, para. 113.

Property characterised immunity from enforcement "the last bastion of State immunity".[171]

3.37 As with jurisdictional immunities, the property of a State is immune from attachment unless it falls within a recognised exception. In the *Jurisdictional Immunities* case, the Court held that the essence of Article 19 of the UN Convention reflects customary international law. In particular, it was accepted as a "well-established practice" that before any measure of constraint may be taken against property belonging to a foreign State, it is necessary that the property in question: "be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim".[172]

3.38 Two other aspects of immunity from enforcement warrant a particular mention on the facts of the current case.

3.39 First, as recognised by the most highly qualified publicists, and as reflects customary international law, Article 19 of the UN Convention requires that, absent any express consent or earmarking, "the State of the forum must ensure that its courts respect the 'segregation' or division of foreign State property among the various, separate legal persons recognized by the municipal law of that foreign State."[173]

3.40 Secondly, under customary international law, the property of a foreign central bank (whether it is a separate juridical entity or not) enjoys a high level of immunity from

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171 Professor Sucharitkul in I.L.C., *Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries,* in Y.I.L.C., 1991, vol. II, Part Two, at p. 56. For this reason, a waiver of immunity from jurisdiction does not constitute a waiver of immunity from execution. See, e.g., Article 55 of the ICSID Convention which expressly distinguishes the State's immunity from execution from a State's commitment to recognise the binding nature of the award and to carry it out: Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 U.N.T.S. 159.

172 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at p. 148, para. 118.

173 R. O'Keefe, C. Tams and A. Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (Oxford: O.U.P., 2013), at p. 324.

enforcement.[174] The special protection from interference with central bank property is evident in State practice: see, for example, the practice of the U.S. (other than with respect to states designated so-called 'sponsors of terrorism'),[175] the U.K.,[176] Japan,[177] Singapore,[178] South Africa,[179] China and Hong Kong,[180] Pakistan,[181] Belgium,[182] France,[183] Germany[184] and Switzerland.[185]

(c) Respect for separate juridical status

3.41 As noted earlier, and addressed in greater detail in Chapter IV below, Article III(1) of the 1955 Treaty of Amity requires respect for the separate juridical status of companies incorporated in accordance with the laws of the Treaty Parties.

3.42 Certain provisions of the 1955 Treaty of Amity expressly require the Court to refer to and apply domestic law by way of a *renvoi*. For example, Article III(1) of the 1955 Treaty of Amity expressly refers, and requires reference, to "[c]ompanies

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174 Note, for example, Article 21 of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, U.N. doc. A/59/508, p. 4:

> "Specific categories of property
>
> 1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): …
>
> (c) *property of the central bank* or other monetary authority of the State;" (emphasis added)

175 Section 1611(b)(1) of the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2, (IM, Annex 6). See also *NML Capital Ltd v. Banco Central de la Republica Argentina*, U.S. Court of Appeal for the 2nd Circuit, 652 F. 3d 172 (2d Cir. 2011).

176 U.K. State Immunity Act 1978, Sections 13(4) and 14(4).

177 Japan Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, Articles 18 and 19.

178 Singapore State Immunity Act, Section 16(4).

179 South Africa Foreign States Immunities Act 1981, Section 15(3).

180 China Law on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks 2005, Articles 1 and 2; *Democratic Republic of the Congo and ors v FG Hemisphere Associates LLC,* Hong Kong Court of Final appeal, FACV No 5, 6, and 7 of 2010, 147 *I.L.R.* 376, (2011) 14 HKCFAR 95, (2011) 14 HKCFAR 226, [2011] 4 HKC 151, 8 June 2011.

181 Pakistan State Immunity Ordinance 1981, Section 15(4).

182 Belgium Act of 24 July 2008, (Belgian State Gazette, 4 August 2008).

183 France Code Monétaire et Financier, Article L. 153-1.

184 Bundesgerichtshof BGH (Federal Court of Justice), decision dated 4 July 2013, case VII ZB 63/12, published in German in WM (Wertpapiermitteilungen) 2013, 1469.

185 Switzerland Debt Enforcement and Bankruptcy Act 1989, Article 92(1)(11).

constituted under the applicable laws and regulations of either High Contracting Party". In this connection, the relevant domestic law on companies and juridical status is incorporated by reference into the 1955 Treaty of Amity, and is to be applied directly. The approach under Article III(1) parallels the position under customary international law. In the *Diallo* case the Court held that, "in determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law".[186]

3.43 A second general principle of international law is that corporate entity A is not liable for the debts of, or damage caused by, corporate entity B. As a corollary, international law requires respect for the separate juridical status of corporate entities

3.44 In the *Barcelona Traction* case, the Court held that:

> "[I]nternational law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. …international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. ... SI in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations…These entities have rights and obligations peculiar to themselves."[187]

3.45 The Court explained that the need to recognise the separate juridical status of companies under municipal law arises from the fact that:

> "If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without serious justifications, invite serious difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has … not only to take cognizance of municipal law but also to refer to

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186 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment,* I.C.J. Reports 2007, p. 582 at p. 605, para. 61. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment,* I.C.J. Reports 2010, p. 639 at p. 675, para. 104.

187 *Barcelona Traction, Light and Power Company, Limited, Judgment,* I.C.J. Reports 1970, p. 3 at pp. 33-34 paras. 38-39.

> it…In referring to such rules, the Court cannot modify, still less deform them."[188]

3.46 Reference may also be made to the *Diallo* case, in which the Court characterised the "independent legal personality" of corporate entities as a "fundamental rule".[189]

(d) Law of State responsibility

3.47 Customary international law is also relevant as the framework for determining the United States' liability. The law of State responsibility, as codified in the I.L.C.'s Draft Articles on Responsibility of States for Internationally Wrongful Acts ('**Articles on State Responsibility**'), is relevant in two main respects.

3.48 First, U.S. law, including the U.S. Constitution, may not be invoked as an excuse for failure to perform obligations under the 1955 Treaty of Amity. It is a fundamental principle of the law of State responsibility that a State cannot invoke provisions of its own municipal law to justify a breach of its international obligations. This rule of customary international law is codified in Article 3 of the Articles on State Responsibility, which states:

> "The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterization of the same act as lawful by internal law."

3.49 More specifically, the customary international law rule reflected in Article 27 of the Vienna Convention provides that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

3.50 Similarly, where the U.S. courts have made rulings on the meaning of the 1955 Treaty of Amity, such rulings cannot be binding on international courts and tribunals.

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188 *Ibid*, at p. 37, para. 50. See also *Elettronica Sicula S.p.A. (ELSI), Judgment,* I.C.J. Reports 1989, p. 15 at p. 58, para. 93 taking into account the position in Italian bankruptcy law.

189 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment,* I.C.J. Reports 2007, p. 582 at p. 606, para. 63.

3.51 Secondly, the United States is responsible for the conduct of its Executive, Legislature and Judiciary. Pursuant to Article 4(1) of the ILC Articles on State Responsibility:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

3.52 The Court is required to determine whether the enactment and application of U.S. law entails a breach of the 1955 Treaty of Amity. As the Permanent Court recognised in *Certain German Interests in Upper Silesia*:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[190]

B. Domestic law

3.53 Domestic law – principally Iranian law on the facts of this case – has an important role in the interpretation and application of the 1955 Treaty of Amity. As already noted, Article III(1) of the Treaty requires that a *renvoi* be made to domestic law for the purpose of determining the existence of a corporate entity with separate juridical status.

3.54 U.S. law, including the decisions of the U.S. courts, is principally relevant as a matter of 'fact'. As explained in Chapter V below, the protections conferred by the 1955 Treaty of Amity upon Iranian "nationals and companies" include protections as to their treatment by the U.S. courts. For example, pursuant to Article III(2), Iranian "companies" "shall have freedom of access to the courts of justice". As the Court recognised in *Avena*:

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[190] *Case Concerning Certain German Interests in Polish Upper Silesia (The Merits), Judgment,* P.C.I.J. Collection of Judgments Series A.– No. 7, at p. 19.

"If and in so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts."[191]

[191] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment,* I.C.J. Reports 2004, p. 12 at p. 30, para. 28.

CHAPTER IV.
BREACH OF IRAN'S ENTITLEMENT TO THE RECOGNITION OF THE SEPARATE JURIDICAL STATUS OF ITS COMPANIES UNDER ARTICLE III(1) OF THE TREATY OF AMITY

4.1 In this Chapter, Iran demonstrates that it is entitled under Article III(1) of the Treaty of Amity to the recognition of the separate juridical status of its companies, and that the United States has breached its obligation in this regard.

SECTION 1.
IRAN'S ENTITLEMENT TO THE RECOGNITION OF THE SEPARATE JURIDICAL STATUS OF ITS COMPANIES

4.2 Article III(1) of the Treaty of Amity reads as follows:

> "Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit."[192]

4.3 As explained further in the three subsections below, (a) the last sentence of this provision accords a very broad definition to the term "companies";[193] (b) the Iranian entities under discussion in the instant case are "companies" within the meaning of the Treaty; and (c) it follows that, pursuant to the first sentence of Article III(1), the United States is under an obligation to recognise the juridical status of these companies constituted under Iranian laws and regulations.

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[192] Article III(1) of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, 284 U.N.T.S. 93 (IM, Annex 1).

[193] The term "companies", "as used in the present Treaty", appears in Art. III, IV, V, VI, IX, and XI.

A. The term "companies" within the meaning of the Treaty

4.4 The term "companies" is defined in Article III(1) as encompassing "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." That is evidently a broad definition, aimed at covering any kind of corporate entity,[194] with no suggestion that certain sorts of legal entity should be excluded. In particular, the definition of "companies" includes corporate entities which are owned or controlled by private investors as well as corporate entities which are wholly or partly owned or controlled by the State. The identity of the holders of the shares in a corporate entity is irrelevant to the question whether that entity is a "company". It follows from the Article III(1) definition that government instrumentalities and agencies may also be included in the definition of "companies". What matters for the purposes of Article III(1) is whether there is a discrete corporate entity.

4.5 This interpretation of the notion of "companies" is confirmed by the *travaux préparatoires* of the Treaty of Amity. They show that the Parties actively considered the question of how broadly the term "companies" should be defined in the Treaty. Though intending the Treaty protections to benefit public as well as private companies, Iran was initially concerned that a definition including State-owned companies in the Treaty could automatically benefit the U.S.S.R.'s public companies through application of the most-favoured nation principle.[195] Iran therefore proposed inserting the words "privately owned" before the word "corporations" in Article III, but also extending the Treaty protections to publicly owned or publicly funded companies in a separate exchange of letters.[196] The United

194 The legal notion of a corporation refers to an entity that is legally separate from its members, and which enjoys its own personality and can hold rights and incur obligations in its own name.

195 Letter of the U.S. Embassy in Tehran to the U.S. Department of State, dated 16 October 1954, at p. 3 (IM, Annex 2); see also Aide Memoire of the U.S. Embassy in Tehran, dated 20 November 1954, at p. 1 (IM, Annex 3).

196 *Ibid.*; see also Telegram of the U.S. Embassy in Tehran to the U.S. Department of State, dated 27 November 1954, at p. 1 (IM, Annex 4).

States rejected this proposal, insisting that both Parties intended State-owned companies to benefit from the Treaty protections.[197]

4.6 It can also be noted that the wording of Article III(1) of the Treaty of Amity includes language which is identical to Article XXII, paragraph 3, of the U.S. Standard Draft FCN Treaty, the commentary to which states that: "the intent of this definition is to encompass all 'juridical' persons of whatever denomination and to distinguish them from natural persons. They are creations of the state and not the state as such."[198] The commentary to Article 1 of the U.S. Standard Draft FCN Treaty, which contains the term "companies", also states that: "[t]he term 'companies' is used throughout the treaty to designate artificial persons of all kinds even as the term "nationals" is used to designate natural person."[199]

B. The Iranian entities at issue in the present case are "companies" within the meaning of Article III(1)

4.7 Bank Markazi is the Central Bank of the Islamic Republic of Iran. It is a legal entity incorporated in Iran and with separate juridical status under the Monetary and Banking Act (1972) of Iran.[200] It "enjoys legal personality" pursuant to Article 10(c) of the Act 1972, which also provides that Bank Markazi is generally "subject to the rules and regulations pertaining to joint-stock companies",[201] and that "unless specifically stipulated by Law, the Central Bank of the Islamic Republic of Iran shall not be subject to the general laws and regulations applying to ministries, government corporations and agencies and agencies affiliated to the Government, nor to the provisions of the banking section set forth in this Act."[202] The Central Bank of Iran

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197 Telegram of the U.S. Department of State to the U.S. Embassy in Tehran, dated 13 December 1954 (IM, Annex 5).

198 C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", U.S. Department of State (1962), at p. 318 (IM, Annex 20).

199 *Ibid*.at p. 68.

200 The Monetary and Banking Act of Iran, approved on 9 July 1972, with subsequent amendments as of 3 March 2016 (IM, Annex 73).

201 *Ibid.*, Art. 10(c).

202 *Ibid*., art. 10(d).

has been attributed a capital of 5 billion rials,[203] and it pays taxes to the Iranian Government as long as its operations generate net profits.[204] Bank Markazi is administered by a general assembly and a board of directors which are independent in their decision-making. It can enter into purchase or sale contracts, own or lease real property, and appear before courts of law to litigate or defend claims.

4.8 Bank Melli Iran was incorporated in 1927 under Iranian law as the first Iranian bank. The Iranian Parliament granted to Bank Melli Iran the sole power to issue banknotes in 1931, thus establishing that bank as the State's bank of issue. Bank Melli Iran assumed 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 system. Bank Melli Iran was replaced in respect of the functions of the central bank by Bank Markazi, under the Monetary and Banking Act 1960. Bank Melli Iran then became, and is still, a State-owned bank, acting as a bank in the national and international financial system. Bank Melli Iran is a state-owned company, the legal personality of which is separate from the State. It has been granted a capital of 2 billion rials, owns assets in its own name, can give or receive loans, and may appear before courts of law to litigate or defend claims.[205]

4.9 Export Development Bank of Iran was incorporated in 1991 as a State-owned company under Iranian law. The preamble of its Articles of Association states that the Bank has juridical personality and financial independence. It is entitled to enter into contracts for the purchase, sale or rent of property, and the granting or receiving of loans, and has the right to litigate or defend claims before courts of law.[206]

4.10 Bank Saderat Iran is a commercial bank incorporated as an independent legal person under Iranian law. It was established in 1952, nationalized pursuant to the nationalization of banks in 1979, but then became again a non-governmental bank in

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203 *Ibid*., art. 10(e).

204 *Ibid*., art. 25.

205 Articles of Association of Bank Melli Iran, approved on 17 November 1981 (IM, Annex 74).

206 Articles of Association of Export Development Bank of Iran, approved on 9 July 1991 (IM, Annex 75).

2010. Its shares are floated on the Tehran Stock Exchange. The Iranian Government owns a minority share.[207]

4.11 The Iranian Telecommunication Infrastructure Company (TIC) is a State-owned company incorporated in Iran.[208] Its task is creating, developing, managing, organizing, supervising, maintaining and implementing the main telecommunication network and infrastructural activities. It is not engaged in telecommunication as such, which has been transferred to the private sector in 2004. Pursuant to Article 5 of its Articles of Association, "[t]he Company [is] an independent legal entity and is run as a private joint stock. In addition, the Company has financial, administrative and recruitment independence".[209] TIC has been granted a capital, owns assets in its own name, is entitled to make profits and can appear before courts of law to litigate or defend claims.

4.12 National Iranian Oil Company was incorporated in Iran in 1951. It is a State-owned joint-stock commercial company, with independent legal personality and all the rights attached to such status.[210] The same can be said of Iran Air which was incorporated under Iranian law in 1962 as the Iran National Airlines Corporation.[211]

4.13 Iranohind Shipping Company was incorporated in Iran in 1974. It is a subsidiary of Islamic Republic of Iran Shipping Lines Co, which is a State-owned company. It has a separate juridical personality with all rights attached to such status.[212]

4.14 Iran Marine Industrial Company is a public joint-stock company incorporated in 1968 in Iran. The Government of Iran is not one of its shareholders. It has an independent legal personality and all the rights attached to such status.[213]

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207 Articles of Association of Bank Saderat Iran, approved on 19 October 2014 (IM, Annex 77).

208 Articles of Association of Telecommunications Infrastructure Company, approved on 19 September 2008 (IM, Annex 76).

209 *Ibid*., at p. 3.

210 Statute of National Iranian Oil Company, approved on 11 May 2016 (IM, Annex 78).

211 Articles of Association of Iran Air, approved on 24 April 1968 (IM, Annex 79).

212 Articles of Association of Iranohind, approved on 10 June 2000 (IM, Annex 83).

213 Articles of Association of Iran Marine Industrial Co., approved on 14 July 2011 (IM, Annex 82).

4.15 Similarly, Behran Oil Company and Sediran are Iranian entities that have been duly incorporated under Iranian law as having separate legal personality, they are also companies as defined by the 1955 Treaty of Amity.[214]

C. The United States' obligation to recognise the juridical status of Iranian companies

4.16 As already pointed out above, Article III(1) of the 1955 Treaty provides that "companies constituted under the applicable laws and regulations of [Iran] shall have their juridical status recognized" within the U.S. territory. The right to recognition of their juridical status attaches to all Iranian companies constituted under Iranian law, including, but not limited to, the Iranian companies expressly mentioned in the present Memorial.

4.17 The right to recognition of a company's juridical status is not qualified in any way, and includes the right to recognition of that company's separate legal personality and its right to own and dispose of property. Indeed, "[c]onfering independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting."[215] It also follows from this recognition that, since "'[t]he separation of property rights as between company and shareholders is an important manifestation of [the distinction between the separate legal entity of the company and that of the shareholder]",[216] the assets and property of an Iranian company cannot be considered assets of another legal person, including the Iranian State in circumstances where the Iranian State is a shareholder in the company.

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214 Articles of Association of Behran Oil Company, approved on 7 September 2011 (IM, Annex 81) and Articles of Association of Sediran (IM, Annex 80). The articles of association of other relevant Iranian companies are annexed to this Memorial as Annex 84 (National Iranian Tanker Company), Annex 85 (National Iranian Gas Company), Annex 86 (National Petro-Chemical Industries) and Annex 87 (Islamic Republic of Iran Shipping Lines).

215 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment,* I.C.J. Reports 2007, p. 582 at p. 605, para. 61.

216 *Barcelona Traction, Light and Power Company, Limited, Judgment,* I.C.J. Reports 1970, p. 3 at p. 34, para. 41.

SECTION 2.

BREACH OF IRAN'S ENTITLEMENT TO THE RECOGNITION OF THE SEPARATE JURIDICAL STATUS OF ITS COMPANIES UNDER ARTICLE III(1) OF THE TREATY OF AMITY

4.18 As has been established above, the juridical status of Iranian companies must be recognised by the United States under the 1955 Treaty, and may not be conflated with the personality of any other legal person, including the Iranian State. The United States has violated, and continues to violate, this obligation by abrogating the rights of Iranian companies as juridical persons distinct from Iran. The wrongful acts in this respect take the form of (a) Laws and Executive Orders, and (b) court judgments.

A. The abrogation of separate juridical status of Iranian companies by U.S. Legislative and Executive Acts

4.19 Two periods in the legislative treatment reserved by the U.S. law to Iranian companies can readily be distinguished. Before 2002, the FSIA 1976, as interpreted by the U.S. Supreme Court, did not override the principle of the separate juridical status of legal persons, including Iranian companies.[217] By contrast, since 2002, the U.S. Congress has pursued an explicit policy, the object of which is to reverse the prior legal position by abrogating the separate juridical status of Iranian companies. As acknowledged by the U.S. Court of Appeals for the Ninth Circuit in the *Bennett v. Bank Melli* case, because it was very difficult to enforce judgments against Iran under the law as it had been, "Congress responded by enacting new statutes, this time designed to facilitate the satisfaction of such judgments by expanding successful plaintiffs' ability to attach and execute on the property of agencies and instrumentalities of terrorist states".[218] To this end, as was noted in Chapter II above, the U.S. Congress adopted Section 201(a) of the TRIA of 2002, the NDAA 2008

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[217] See *supra*, Chapter II, Section 2, p. 20, para. 2.10.

[218] *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) at p. 9 (IM, Annex 64).

(codified in 28 U.S.C. Section 1610(g)), and finally Section 502 of the ITRSHRA (codified in 22 U.S.C. Section 8772). For its part, the Executive adopted Section 7(b) of E.O. 13599. These measures are considered in turn below.

(a) Section 201(a) of the TRIA of 2002

4.20 In 1999, the U.S. Congress proposed to amend Section 1610(f) of Title 28 of the U.S. Code, to provide that "all [blocked] assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state."[219] This proposal was strongly opposed by the Executive branch. Indeed, the State, Treasury, and Defense Departments submitted a joint statement expressing their grave concerns.[220] The proposal, they warned, was "fundamentally flawed" and would "seriously damag[e] … important U.S. interests".[221] The Departments explained that, by "direct[ing] courts to ignore the separate legal status of states and their agencies and instrumentalities," the proposal would "overturn […] Supreme Court precedent and basic principles of corporate law and international practice".[222] They added that "[i]f the United States were to 'pierce the corporate veil' in this manner, there could well be similar actions in foreign countries",[223] and that "[d]isregarding separate legal personality […] could possibly lead to substantial U.S. taxpayer liability for takings claims […] before international fora".[224]

4.21 Congress omitted the objectionable provision from the bill that was ultimately enacted in 2000. However, on 26 November 2002, President Bush signed the TRIA into law, overriding the long-standing objections of the Executive, with the result that the blocked assets of allegedly terrorist States, and those of their

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219 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. 2 (IM, Annex 12).

220 *Ibid.*, at pp. 10-21.

221 *Ibid.*, at p. 12.

222 *Idem.*

223 *Ibid.*, at p. 19.

224 *Ibid.*, at p. 20.

instrumentalities and agencies, were made available to satisfy judgments for compensatory damages against such States.[225]

4.22 Indeed, as explained in Chapter II, the TRIA expressly denied the separate legal status of such States and their agencies and instrumentalities, providing that the blocked assets of the latter should be considered 'blocked assets' of the former. As stated by the U.S. Supreme Court in the *Peterson* case, the TRIA "authorizes execution of judgments obtained under the FSIA's terrorism exception against 'the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party).'"[226]

4.23 Thus, Section 201(a) TRIA operates to set aside the separate legal personalities of Iranian State-owned companies and of Iran, and to render the former liable for judgments entered against the latter. Senator Harkin, one of TRIA's sponsors, rightly said that under this Act, for purposes of enforcing a judgment against an alleged terrorist state, "title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities."[227]

4.24 By establishing, as a matter of principle, the non-recognition of the juridical distinction between a State and its State-owned companies, the enactment and implementation of Section 201(a) of the TRIA, when applied to Iranian companies, has breached and continues to be in breach of Article III(1) of the 1955 Treaty of Amity.

(b) Section 1610(g) of Title 28 of the U.S. Code introduced by NDAA of 2008

4.25 In 2008, the U.S. Congress enacted the NDAA 2008, which added a new paragraph (g) to the section of the FSIA which governs the "[e]xceptions to the immunity from

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225 See supra Chapter II, Section 2(B), p. 21, para. 2.13.

226 *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), at p. 3 (IM, Annex 66).

227 U.S. Senator Harkin statement to the Senate, 19 November 2002, 148 Cong. Rec. S11524, at S11528 (2002) (IM, Annex 14).

attachment or execution" (28 U.S. Code, Section 1610).[228] Pursuant to this new provision, not only the property of a foreign State against which a judgment has been entered under the "terrorism exception" provision, but also "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 or execution upon that judgment, regardless of how much economic control over that property the foreign government exercises and whether that government derives profits or benefits therefrom. As has been noted:

> "[t]he provision may enable a plaintiff to 'pierce the corporate veil' of a corporation owned, in whole or in part, by a judgment debtor State without having to demonstrate to the court that the presumption of independent status should be overridden. It could also be read as an effort to make any entity in which the defendant State (including its separate agencies and instrumentalities) has any interest liable for the terrorism-related judgments awarded against that State."[229]

4.26 Thus, Section 1610(g) of Title 28 of the U.S. Code abrogates, in the cases covered by this provision, any juridical distinction between agencies or instrumentalities, and the foreign State, conflating their respective assets and interests in property. So far as concerns Iranian companies, the enactment and implementation of this provision is incompatible with the requirements of Article III(1) of the 1955 Treaty of Amity.

(c) Section 8772 of Title 22 of the U.S. Code introduced by the Iran Threat Reduction and Syria Human Rights Act 2012

4.27 Section 502 of the ITRSHRA introduces into Title 22 of the U.S. Code a provision according to which assets of "the central bank [Bank Markazi] or monetary authority of the Government of Iran or any agency or instrumentality of that Government" held in the United States for a foreign securities intermediary is subject to execution or attachment in aid of execution in order to satisfy any judgment passed against Iran (22 U.S. Code, Section 8772). This provision adds that:

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228 See *supra*, Chapter II, Section 3(B)(b) & (c), pp. 28-30, paras. 2.30-2.33.

229 J. Elsea, "Lawsuits against State Supporters of Terrorism: An Overview", *CRS Report for Congress*, 7 August 2008, at p. 3 (IM, Annex 27).

> "The term 'Iran' means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government." [230]

4.28 The new provision thus conflates the Iranian State with Iranian companies (as defined in the 1955 Treaty of Amity), rendering available for attachment the property and interests in property of the latter with respect to the execution of judgments against Iran (in respect of acts of alleged material support attributed to Iran alone, and in proceedings to which the Iranian companies were not Party). It follows that Section 8772 of Title 22 of the U.S. Code breaches the requirement under Article III(1) of the Treaty of Amity that the United States must recognise the juridical status of Iranian companies.

(d) Section 7(b) of Executive Order 13599

4.29 E.O. 13599 was adopted on 5 February 2012 with respect to blocking property of the Government of Iran and Iranian financial institutions within the United States. Again, in further violation of Article III(1) of the Treaty of Amity, this Executive Order specifically denies the separate legal status of Iranian companies, including Bank Markazi, providing at Section 7(b) that:

> "the term 'Government of Iran' means the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran."[231]

B. The denial of the separate juridical status of Iranian companies by U.S. judicial decisions

4.30 In application of the above Acts and Executive Order, a number of judicial decisions have attached the property and/or interests in property of Iranian companies with

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230 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).

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

respect to the execution of judgments against Iran, thus denying the separate juridical status of these Iranian companies.

4.31 In *Weinstein v. Islamic Republic of Iran*,[232] the U.S. Court of Appeals for the second circuit held that TRIA Section 201(a) authorised the attachment of Bank Melli's property to satisfy a terrorism-based judgment against Iran, even though Bank Melli 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. The Court of Appeals considered that Congress made clear its intent that assets of any 'instrumentality' of an alleged terrorist State were available to satisfy the 'terrorism judgment' against the State itself. The Court of Appeals concluded that its reading was confirmed by Section 201's legislative history, which indicates that the provision strips an alleged terrorist State of its immunity from execution or attachment and does not recognise any juridical distinction between an alleged terrorist State and its agencies or instrumentalities. The Court of Appeals affirmed the District Court's decision to grant the plaintiff's motion and appointed a receiver to attach Bank Melli's property in partial satisfaction of the judgment against Iran. The Supreme Court denied the petition for *certiorari* on 25 June 2012.

4.32 In *Heiser v. Islamic Republic of Iran*,[233] the District Court for the District of Columbia considered that, pursuant to 28 U.S.C. 1610(g), in order to attach the funds contractually owed by Sprint to TIC with respect to enforcing judgments against Iran, the plaintiffs needed only to establish that TIC is an 'agency' or 'instrumentality' of Iran within the meaning of U.S. law. The District Court observed that Section 1610(g) excludes any requirement that the foreign instrumentality be subject to the underlying claim and is thus not otherwise immune from liability, and expressly declared that property held by an instrumentality is subject to execution "regardless of the level of economic control over the property by the government of the foreign state." The District Court subsequently found that

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232 *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).

233 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2011, 807 F.Supp.2d 9 (D.D.C.2011) (IM, Annex 50).

TIC is an 'instrumentality' of Iran, and therefore held that the funds contractually owed to it by Sprint were subject to execution.

4.33 In *Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ*,[234] the U.S. District Court for the Southern District of New York agreed with *Weinstein*, holding that "Section 201(a) of the TRIA 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". The court also agreed with *Heiser* and *Peterson* that 28 U.S.C. § 1610(g)(1)(A) "expand[s] the category of foreign sovereign property that can be attached; judgment creditors can now reach any U.S. property in which Iran has any interest ... whereas before they could only reach property belonging to Iran", and that "the only requirement for attachment or execution of property is evidence that the property in question is held by a foreign entity that is in fact an agency or instrumentality of the foreign state against which the Court has entered judgment". Thus, the court ordered Bank of Tokyo to turn over funds belonging to several Iranian companies, including Iranohind Shipping Company, Bank Melli Iran, and Export Development Bank of Iran, notwithstanding the fact that they were not named in the *Heiser* judgment and have a separate legal status.[235]

4.34 In the same case, the judgment creditors obtained other orders to turnover funds belonging to Iranian companies. For instance, the District Court for the Southern District of New York ordered in 2012 to Mashreqbank to turnover funds belonging to Iranian enterprises for enforcing a judgment entered against Iran.[236] Similarly, in 2016, the District Court for the District of Columbia ordered Bank of America and

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234 *The Estate of Michael Heiser et al. v. The Bank of Tokyo Mitsubishi UFJ, New York Branch.*, U.S. District Court, Southern District of New York, 29 January 2013, 919 F.Supp.2d 411 (S.D.N.Y. 2013) (IM, Annex 55).

235 See *supra*, Chapter IV, Section I(B), paras 4.7-4.15, pp. 66-69.

236 *The Estate of Michael Heiser et al. v. Mashreqbank*, U.S. District Court, Southern District of New York, 4 May 2012, No. 11 Civ. 01609 (S.D.N.Y. 2012) (IM, Annex 53).

Wells Fargo to turnover funds belonging to Iran Marine and Industrial, Sediran and Iran Air.[237]

4.35 In *Peterson v Bank Markazi*,[238] the U.S. judiciary, including the Supreme Court, accepted the *Weinstein* opinion that there is no contradiction between, on the one hand, the obligation to recognise the juridical status of Bank Markazi, and, on the other hand, attaching its assets to satisfy a judgment entered against Iran. The Court of Appeals also accepted that, insofar as 22 U.S. Code, Section 8772 dictates that the assets of Bank Markazi must be attached to a judgment against Iran, it abrogated the 1955 Treaty of Amity. Therefore, the Court of Appeals applied 22 U.S. Code, Section 8772, and denied the separate legal status of Bank Markazi, in clear violation of Article III(1) of the 1955 Treaty of Amity.

4.36 In *Benett v. Bank Melli*,[239] on 22 February 2016, the U.S. Court of Appeals for the Ninth Circuit held that, notwithstanding the fact that "Bank Melli was not named as a defendant in any of the four cases [in which Iran was defendant] and was not itself alleged to have been involved in the underlying terrorist events,"[240] 'blocked assets' of Bank Melli could be attached to the execution of a judgment entered against Iran. The Court of Appeals held that:

> "(1) TRIA § 201(a) and FSIA § 1610(g) authorize attachment and execution of the monies owed to Bank Melli. (2) Those statutes do not impose liability […] (3) […] the blocked assets are property of Bank Melli under principles of California law and, thus, are subject to attachment and execution under TRIA § 201(a) and FSIA § 1610(g). […]."[241]

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237 *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).

238 *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), at pp. 6-7 (IM, Annex 62).

239 *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).

240 *Ibid*., at p. 12.

241 *Ibid*., at p. 30.

CHAPTER V.
BREACH OF PROTECTIONS UNDER ARTICLES III(2), IV(1), IV(2) AND V(1) OF THE TREATY OF AMITY GRANTED EXPRESSLY IN RESPECT OF "NATIONALS AND COMPANIES"

5.1 As already noted, the 1955 Treaty of Amity contains a series of protections granted to the "nationals and companies of either High Contracting Party" in respect of which Iran claims breach, namely Articles III(2), IV(1), IV(2) and V(1).[242] In this Chapter, Iran sets out its case on the interpretation of these provisions, and also its case on the United States' breach through the acts of its legislature, executive and judiciary branches.

SECTION 1.
ARTICLE III(2) OF THE TREATY OF AMITY: BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT TO FREEDOM OF ACCESS TO THE U.S. COURTS FOR ITS COMPANIES AND NATIONALS

A. The protections afforded by Article III(2)

5.2 Article III (2) of the 1955 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."

5.3 So far as is material for the present case, there are two elements to this provision. First, there is a protection to Iranian nationals and companies that is cast in

[242] The protection afforded by Article III(1) is the subject of Chapter IV above. Article VII(1), which accords protection in terms of the freedom of transfers, is considered in Chapter VI below as the entitlements thereunder are not restricted to nationals and companies of the Treaty Parties.

mandatory and absolute terms, i.e. an unqualified entitlement to freedom of access to the courts of justice and administrative agencies within the United States. Secondly, the protection is also formulated on a national treatment and a most favoured nation basis, i.e. the access must be allowed on terms no less favourable than those applicable to nationals and companies of the United States or of any third country. As to both elements, the protection is afforded to "companies" without qualification: there is no suggestion, and none could somehow be implied, that companies that are wholly or partly owned or controlled by one of the High Contracting Parties are excluded from the ambit of Article III(2).[243]

5.4 The freedom of access that is the subject-matter of Article III(2) is moreover formulated in the most comprehensive of terms. The entitlement is accorded with respect to both the judiciary and the administration, "in all degrees of jurisdiction", and with the confirmation that it is "both in defense and pursuit of" the rights of the given national or company.

5.5 It follows that Iran's right to freedom of access to the U.S. courts for its companies and nationals under Article III(2) of the 1955 Treaty of Amity includes, on its ordinary meaning:

(a) the entitlement to raise applicable entitlements to immunity and to be granted applicable immunities from jurisdiction and enforcement;

(b) the entitlement to raise recognition by the courts of the juridical personality of Iranian companies, and to be granted such recognition, a right that is also granted separate protection under Article III(1) as discussed in Chapter IV above;

(c) the entitlement not to be held liable and not to be ordered to pay damages in respect of allegedly wrongful acts of the Iranian State in proceedings to which Iranian companies were not even parties; and

[243] See *supra* Chapter IV, Section 1(A), p. 65, para. 4.5.

(d) the entitlement to put forward a defence by reference to the law and facts as at the time or times of alleged wrongdoing, unaffected by retroactive and/or targeted or discriminatory legislation.

5.6 As to point (a) above, it is to be noted that the law of immunity is essentially procedural in nature,[244] and the protection afforded by Article III(2) in terms of "freedom of access" is likewise essentially procedural in nature. It naturally comprises not only the right to appear as a party to litigation but also the right to assert procedural rights and defences, such as with respect to immunities from jurisdiction and/or enforcement that are applicable as a matter of customary international law.

5.7 In this respect, it is also noted that Article XI(4) of the 1955 Treaty of Amity confirms the Treaty Parties' intention that *inter alia* State-owned or controlled corporations, be entitled to immunity in respect of acts *jure imperii*. Article XI(4) provides:

> "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

5.8 The purpose of this provision is to ensure that State enterprises engaging in commercial activities do not enjoy – through applicable immunities – a competitive advantage over privately owned companies.[245] Consistent with this purpose, no limit is placed on the right to rely on immunity in respect of any acts *jure imperii*; and,

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244 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment*, I.C.J. Reports 2002, p. 3 at p. 25, para. 60; see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at pp. 124, 136 & 140, paras. 58, 82 & 93. See also *supra*, Chapter III, Section 2(A)(a)(i), p. 51, para. 3.21(b).

245 See, e.g. the summary contained in the Report from the U.S. Senate Committee on Foreign Relations, 9 July 1956 *in* U.S. Senate, *Commercial treaties with Iran, Nicaragua, and the Netherlands* (Washington, U.S. Govt. Print. Off., 1956). See also H. Walker, "Treaties for the Encouragement and Protection of Investment: Present United States Practice", in *American Journal of Comparative Law*, vol. 5, issue 2, 1956, pp. 229-247, at pp. 238-239.

indeed, the provision confirms by strong implication the existence of a Treaty obligation that such immunity must be upheld.[246]

5.9 Any abrogation of the entitlement of Iranian companies (i) to raise and (ii) to be granted immunities from jurisdiction and/or enforcement that are applicable as a matter of customary international law would necessarily interfere with their freedom of access in terms of the defence of their rights before the U.S. courts. The same would apply so far as concerns abrogation of the other entitlements listed at para. 5.5 above.

5.10 However, each of the above entitlements has been abrogated through acts of the United States, as is explained further below.

B. Violation of Iran's entitlement to freedom of access to the U.S. courts for its companies and nationals under Article III(2)

5.11 The United States has breached Article III(2) of the 1955 Treaty of Amity in five separate respects.

5.12 First, in breach of Article III(2), the United States has breached Bank Markazi's entitlement to freedom of access through abrogation of its rights to put forward, and to be granted, immunity defences. As explained in Chapter III above,[247] as a central bank, Bank Markazi is entitled as a matter of customary international law to immunity from the jurisdiction of the U.S. courts, whilst its property is entitled to immunity from enforcement. Such immunities are also reflected in generally applicable U.S. law. Nonetheless, as outlined in Chapter II above,[248] the U.S. courts have been mandated through legislative and executive acts to exercise, and have

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246 As this Court recognised in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment*, 17 March 2016, at p. 18, para. 35: "An *a contrario* reading of a treaty provision – by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded – has been employed both by the present Court … and the Permanent Court of International Justice".

247 See *supra*, Chapter III, Section 2(A)(a)(i), pp. 53-54, paras. 3.23-3.25.

248 See *supra*, Chapter II, Section 4, pp. 30-34, paras. 2.34-2.43.

exercised, jurisdiction over Bank Markazi, while the property of Bank Markazi has been made subject to seizure, as follows:

(a) Although immunity from attachment and from execution is generally accorded to central banks as a matter of U.S. law,[249] Section 201(a) of the TRIA "trumps the central bank provision in 28 U.S.C. § 1611(b)(2)", enabling enforcement against any 'blocked assets', including, the 'blocked assets' of Bank Markazi.[250]

(b) Through E.O. 13599 of 5 February 2012, including as applied in the U.S. courts, assets of Bank Markazi located in the United States (or "within the possession or control of any United States person, including any foreign branch") as of 5 February 2012 became "blocked assets", and thereby subject to attachment or execution through the operation of Section 201 of the TRIA.[251]

(c) Through Section 502 of the ITRSHRA (codified as 22 U.S. Code, Section 8772), U.S. law has been amended with retroactive effect specifically to guarantee enforcement against the assets of Bank Markazi in the *Peterson* case, independently of Section 201(a) TRIA and E.O. 13599 (above). As noted in the joint dissenting opinion of Roberts C.J. and Sotomayor J.: "In the District Court, Bank Markazi had invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1611(b)(1). … Section 8772(a)(1) eliminates that immunity."[252]

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249 Section 1611(b)(1) of the U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2, (IM, Annex 6). See also *NML Capital Ltd v. Banco Central de la Republica Argentina*, U.S. Court of Appeal for the 2nd Circuit, 652 F. 3d 172 (2d Cir. 2011) as discussed *supra* at Chapter III, Section 2(A)(b), p. 58, para. 3.40.

250 *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), at p. 16 (IM, Annex 58).

251 *Ibid.*, at p. 12.

252 *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 p. 7 (IM, Annex 66). To be more precise, Section 8772 of Title 22 of the U.S. Code legislates retroactively that the assets of Bank Markazi identified in the *Peterson* case are subject to attachment, notwithstanding any other provision of law, including Section 1611(b)(1) of Title 28 of the U.S. Code, or executive order.

(d) Enforcement has been permitted against the "blocked assets" of Bank Markazi in the *Peterson* case, i.e. security entitlements in the amount of some USD 1.895 billion. These assets are now in the course of distribution, or already distributed, through the medium of the U.S. courts[253].

5.13 Through these acts, the United States has abrogated the immunities that Bank Markazi would otherwise enjoy as a matter of U.S. law and to which it is entitled under customary international law. In doing so, the United States has violated and continues to violate the right of Bank Markazi to freedom of access to the U.S. courts with respect to Bank Markazi's ability to defend proceedings brought against it in the U.S. courts and to pursue its right to immunity. There is accordingly a breach of Article III(2) of the 1955 Treaty of Amity. Related to this, the U.S. legislative, executive and judicial measures have also breached the implied obligation under Article XI(4) of the 1955 Treaty of Amity so far as concerns acts *jure imperii* and/or where State of Iran and Iranian State-owned companies did not engage in commercial activities within the United States.

5.14 Secondly, through abrogation of the rights of Iranian companies to recognition of their separate juridical status, the United States has interfered with and continues to interfere with their freedom of access before the U.S. courts "in defense and pursuit of their rights" (see para. 5.5 above).

(a) In terms of legislative and executive acts, this abrogation has been effected through Section 201 of the TRIA, E.O. 13599, and Section 502 of the ITRSHRA. The impact is manifest and, so far as concerns Section 502, is as recorded in the *Peterson* case by Roberts C.J. and Sotomayor J. (*i.e.* a change in the law to guarantee that the plaintiffs win)[254]

(b) The executive and legislative acts of the United States have been implemented in the U.S. courts, again in violation of the right to freedom of access under Article III(2) of the Treaty. Indeed, by abrogating the separate juridical

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253 *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).

254 *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 p. 7-8 (IM, Annex 66).

personality of Iranian companies, the U.S. courts denied them any right properly to defend their interests in cases such as *Peterson* (so far as concerns rights of Bank Markazi, in particular with respect to security entitlements of Bank Markazi to the amount of USD 1.895 billion),[255] the *Bennett* and *Weinstein* cases (so far as concerns Bank Melli, with respect to sums contractually owed to Bank Melli to the value of USD 17.6 million,[256] as well as its property rights in a building in New York,[257] compulsorily sold pursuant to orders of the U.S. courts for approximately USD 1.6 million)[258] and the *Heiser* case, so far as concerns TIC (with respect to sums contractually owed to TIC to the value of approximately USD 616,500) and a series of other Iranian companies.[259]

(c) The impact on Iranian companies flowing from the acts of the United States extends to attempts to enforce U.S. judgments against Iran against property of Iranian companies abroad.

5.15 Thirdly, the United States has violated and continues to violate the rights of Iranian companies to freedom of access to the U.S. courts "in defense and pursuit of their rights" through establishing, by legislation, the liability of such companies for (purportedly) wrongful acts of the Iranian State that were considered by the U.S. courts and made the subject of (default) judgments on liability in proceedings to which such companies were not parties. In short, Iranian companies have been or are being made liable to pay very substantial damages, with resultant interference with their property rights (i.e. seizure of their property).

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255 *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), confirmed by *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) and, subsequently, by *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) (IM, Annex 66).

256 *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).

257 *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) (IM, Annex 47).

258 *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).

259 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2011, 807 F.Supp.2d 9 (D.D.C.2011) (IM, Annex 50).

5.16 Fourthly, the United States has violated and continues to violate the rights of Iranian companies to freedom of access to the U.S. courts "in defense and pursuit of their rights" through the enactment and implementation (through the processes of the U.S. courts) of legislation having retroactive effect that ultimately enabled seizure of the property of these companies: see Section 1605A FSIA and Section 502 of the ITRSHRA. In particular, through the latter, and during the course of the *Peterson* case, the United States retroactively changed the law by depriving Bank Markazi of defences upon which it had previously relied, thereby disabling Bank Markazi from defending its rights and preventing impartial justice from being done. This is remarkable: 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.

5.17 Moreover, it is recalled that Article III(2) of the 1955 Treaty of Amity also provides that "access shall be allowed, in any event, upon terms no less favourable than those applicable to nationals and companies of … any third country". In each of the respects identified above, more favourable treatment is being accorded by the United States to the nationals and companies of other States. To take one obvious example, the central banks of other States are being afforded an unfettered right of access in terms of the ability to assert their immunity before the U.S. Courts (see Bank Markazi), whilst so far as concerns Section 502 of the ITRSHRA it is not merely a question of Bank Markazi not being allowed access to the U.S. courts "upon terms no less favourable than those applicable to" central banks of other States; rather, it is being singled out for a regime of access that is uniquely unfavourable.

5.18 Finally, so far as concerns Iranian companies that are agencies or instrumentalities of Iran as a matter of U.S. law, such companies have been treated less favourably than equivalent companies of third States in that, pursuant to the FSIA, they should have been treated as immune in claims before the U.S. courts unless one of the generally applicable exceptions of Section 1605 was applicable, such as with respect

to commercial activities of an agency or instrumentality carried on in the USA.[260] So far as concerns agencies or instrumentalities of third States generally, if a plaintiff brought a claim before the U.S. courts in reliance on the commercial activity exception and could not establish the requisite commercial activity, the court would give effect to the immunity. By contrast, in an analogous situation, Iranian companies that are agencies or instrumentalities of Iran as a matter of U.S. law would be (and have been) treated less favourably in that they would not be accorded immunity due to the further exceptions applicable by reference to Section 1605A as introduced by amendment to the FSIA in 2008.

SECTION 2.

ARTICLE IV(1) OF THE TREATY OF AMITY: BREACHES BY THE UNITED STATES OF PROTECTIONS WITH RESPECT TO FAIR AND EQUITABLE TREATMENT, UNREASONABLE OR DISCRIMINATORY MEASURES, AND EFFECTIVE MEANS OF ENFORCEMENT

5.19 Article IV(1) of the 1955 Treaty of Amity establishes three discrete but related protections for Iranian nationals and companies. It provides:

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

5.20 Thus, pursuant to the express terms of Article IV(1):

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[260] See Section 1605(a) of U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2 (IM, Annex 6):

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> … (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; …"

(a) Fair and equitable treatment must be accorded to Iranian nationals and companies as well as to their property and enterprises.

(b) The United States must refrain from applying unreasonable or discriminatory measures that would impair the legally acquired rights and interests of Iranian nationals and companies.

(c) The United States must assure that the lawful contractual rights of Iranian nationals and companies are afforded effective means of enforcement, in conformity with applicable laws.

5.21 These elements are examined in turn below, although it is noted at the outset 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.[261]

A. Fair and equitable treatment

5.22 Obligations of fair and equitable treatment have been the subject of much arbitral and academic focus in recent years, with the seemingly open-ended nature of the terms "fair" and "equitable" leading to difficulties when it has come to giving more specific content to such obligations. While the terms "fair" and "equitable" do have an ordinary meaning, recourse to synonyms (such as "just") has appeared of limited assistance, and in certain arbitral awards there has been a tendency to turn to such synonyms without paying due regard to other tools of interpretation.

5.23 So far as concerns the specific obligation of fair and equitable treatment as contained in the first clause of Article IV(1), it is initially to be noted, giving the terms their 'ordinary meaning' in accordance with Article 31(1) of the Vienna Convention, that –

[261] See *supra* Chapter IV, Section 1(A), p. 65, paras. 4.4-4.5.

(a) Fair and equitable treatment is to be accorded "at all times" both to Iranian companies and to the property and enterprises of such companies. The term "property" is not qualified in any way and would naturally include all forms of property, whether tangible or intangible (as would be the case for other references to "property" in Article IV of the 1955 Treaty of Amity).

(b) 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,[262] 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 (see further under section D below).

(c) The treatment to be accorded is not restricted by any territorial limitation on the place where the 'treatment' occurs.

5.24 As to context:

(a) The obligation to accord fair and equitable treatment in Article IV(1) is immediately followed by a prohibition in respect of certain unreasonable or discriminatory measures. It may thus be inferred that, in requiring fair and equitable treatment, the Treaty Parties were doing more than proscribing unreasonable or discriminatory measures that impair legally acquired rights and interests. Any other interpretation would require that the different elements of Article IV(1) were merely duplicative, and would cut across the principle of effectiveness.[263]

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[262] 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,* ICSID Case No. ARB/07/14, Award, 22 June 2010, at para. 263.

[263] As recognised in, e.g., *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment,* I.C.J. Reports 1994, p. 6 at p. 23, para. 47.

(b) The treatment is to be accorded *inter alia* to the "property" of nationals and companies. In Article IV(2), it is stated that "property" includes interests in property. In this context, the reference to property in Article IV(1) is also therefore correctly interpreted as including interests in property. There is no suggestion, and no reason to suppose, that any more narrow meaning was intended in Article IV(1); and a more restrictive meaning would be unnatural and introduce an unexpected inconsistency.

5.25 As to the object and purpose of the treaty, in the light of which the terms of Article IV must be interpreted, one of the key points of emphasis in the Preamble of the Treaty is "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples".[264] This suggests that one object and purpose of the treaty would be to establish, so far as concerns protected nationals and companies, an important degree of stability and predictability in the legal and regulatory regimes of each Party so far as concerns trade and investment. Without such stability and predictability, mutually beneficial trade and investment would be discouraged, not encouraged.

5.26 Turning to the cases that have considered the meaning of the term 'fair and equitable treatment', within the many arbitral awards of the past 10-15 years there have been various differing views expressed as to whether the fair and equitable treatment standard has its own autonomous meaning, what the standard comprises, and whether it is merely a reformulation of the customary international law minimum standard of treatment or whether, even if distinct, it is materially different. Iran's position is that *on any view* the fair and equitable treatment standard in Article IV(1) 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

[264] As to object and purpose, see *supra* Chapter III, Section 1, p. 47 para. 3.10.

(d) defeats the legitimate expectations of Iranian nationals and companies.

5.27 This interpretation finds considerable support in cases where the fair and equitable treatment standard is linked in a treaty provision to the customary international minimum standard,[265] as well as in those cases where it is not.[266] Each of the elements identified at paragraph 5.26 above is also supported by consideration of the object and purpose of the Treaty as outlined above.

5.28 As to each individual element identified at paragraph 5.26, there is now a wealth of arbitral decisions and academic commentary (albeit of varying levels of detail and quality). At this stage of the proceedings, Iran considers it sufficient to highlight only the key features of each element that are relevant to the current case.

5.29 As to treatment that is arbitrary, grossly unfair, unjust or idiosyncratic, these descriptors are largely self-explanatory. In a well-known passage from the *Elettronica Sicula S.p.A. (ELSI)* case, the term "arbitrary" was interpreted as meaning:

> "not so much something opposed to a rule of law, as something opposed to the rule of law. … It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[267]

Although formulated with respect to a treaty prohibition of arbitrary conduct,[268] this test has been accepted and applied by many investment treaty tribunals in the context of the fair and equitable treatment standard.[269]

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265 *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

266 *S*ee, e.g., *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID 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,* ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 291; *Liman Caspian Oil BV and Dutch Investment BV v. Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Award, 22 June 2010, para. 263, para. 285.

267 *Elettronica Sicula S.p.A. (ELSI), Judgment,* I.C.J. Reports 1989, p. 15 at p. 76, para. 128.

268 The treaty provision in question is quoted by the Court in its Judgment in the *ELSI* case, *ibid*, at pp. 71-72, para. 120 and reads:

> "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, *(b)*impairing their other legally acquired rights and interests in such enterprises or in the

5.30 The fair and equitable standard under Article IV(1) is of course intended to provide a measure of real protection; and in this respect it is important also to pose the question whether the U.S. measures at issue are grossly unfair, unjust or idiosyncratic. As to the latter, it is appropriate to ask whether the treatment afforded by a given State is unusual or not consistent with the practice of other States.

5.31 As to the second element identified at paragraph 5.26 above, there is an important distinction to be drawn between 'discrimination' and 'differential treatment'. The fair and equitable treatment standard in Article IV(1) does not require that Iranian nationals and companies be treated in precisely the same ways as their counterparts of U.S. or third party origin. However, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands.[270]

5.32 As to the third element identified at paragraph 5.26 above, there will be a breach of the fair and equitable standard in Article IV(1) where there is a lack of due process leading to an outcome which offends judicial propriety, and in particular where there is conduct that would support a complaint of a denial of justice. According to the well-known definition of denial of justice 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:

> "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

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investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise".

269 See, e.g., *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127; *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 319; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 378; *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 291.

270 See, e.g., *Saluka Investments BV (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, para. 307, considering the fair and equitable treatment standard in the 1991 BIT between the Netherlands and the Czech and Slovak Federal Republic).

> manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." [271]

5.33 Consistent with the above, 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. In this respect, it is important to emphasise that 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 that are of themselves unexceptionable. On one analysis, in such circumstances, it is the act of the local courts in deferring to the domestic law or regulation at issue that incurs the international responsibility of the State through the failure to recognise procedural rights of a party from which there can be no departure as a matter of international law. Professor Paulsson notes in *Denial of Justice in International Law* under the rubric of "targeted legislation":

> "But a more straightforward analysis may lead to the conclusion that the legislature itself has interfered in the judicial process to such an extent as to create a denial of justice."[272]

5.34 Thus, where legislation or executive orders deny to a given alien fundamental procedural rights and/or rights of defence required by international law, 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).

5.35 The same applies so far as concerns the application of laws resulting from retroactive targeted legislation or executive orders. As Professor Paulsson notes: "It

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[271] 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. Applied e.g. in *Liman Caspian Oil BV and Dutch Investment BV v. Republic of Kazakhstan,* ICSID 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.

[272] J. Paulsson, *Denial of Justice in International Law* (Cambridge: C.U.P., 2005), at p. 147.

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'."[273] But in the present context, whether the fault be laid at the feet of the legislature or of the judiciary, the violation of the Treaty obligation is plain.

5.36 As to the final element (as identified at paragraph 5.26 above), *i.e.* protection of the legitimate expectations of Iranian nationals and companies, there are many recent statements as to the importance of this element within 'fair and equitable treatment' provisions such as Article IV(1), including where such provisions are being interpreted as synonymous with or by reference to the customary international law minimum standard.[274] The question of whether legitimate expectations have been defeated occupies a central role in the question of whether there has been a breach of the fair and equitable treatment standard. In light of the obligations assumed by the High Contracting Parties to the 1955 Treaty of Amity, the legitimate expectations of all Iranian companies, and of the Iranian State included that both (i) the separate legal personality of Iranian companies would be respected, and (ii) the principles of sovereign immunity under international law would be respected.

B. Unreasonable or discriminatory measures

5.37 Pursuant to the second part of Article IV(1) of the 1955 Treaty of Amity, the United States is subject to the further obligation that it "shall refrain from applying unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests" of Iranian nationals and companies.[275]

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[273] J. Paulsson, *Denial of Justice in International Law* (Cambridge: C.U.P., 2005), at p. 199, internal cross-reference omitted.

[274] *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 560, referring to *Saluka Investments BV (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006.

[275] This is again a formulation that has been the subject of considerable arbitral and academic scrutiny in recent years. However, there may be considerable variation in the forms of provision that prohibit unreasonable or discriminatory measures, including to the effect that it is often arbitrary as opposed to unreasonable measures that are prohibited.

5.38 The language employed by the Treaty Parties demonstrates the intention that the prohibition be broad in scope:

(a) It is unreasonable *or* discriminatory measures that are prohibited.

(b) The prohibition is of unreasonable measures, as opposed to arbitrary measures. A prohibition of arbitrary measures would have suggested a more stringent threshold of deficiency.

(c) As to the term "measures", "in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby".[276]

(d) While it is not necessary for Iran to show a discriminatory intent on the part of the United States, evidence of such an intent may be taken into account when assessing breach.

(e) There is no qualification in terms of the severity of impairment, i.e. some form of adverse impact that is neither transitory nor *de minimis* would suffice.

(f) Protection is established in respect of both "rights" and "interests", so long as these are legally acquired (e.g. not acquired through theft or fraud). The term "interest" naturally encompasses interests in property,[277] as is also consistent with the description of "property" in Article IV(2) (as "including interests in property").

5.39 In the context of an international law agreement such as the Treaty, an important pointer as to whether measures are "unreasonable" or "discriminatory" will be whether the measures are consistent with principles of customary international law or, by contrast, at odds with general State practice. If the measures are contrary to both customary international law and general State practice, e.g., through abrogation of respect for separate juridical personality or applicable immunities, and are not

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276 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment,* I.C.J. Reports 1998, p. 432 at p. 460, para. 66.

277 See e.g. *Sedco, Inc v. Iran,* Award 309-129-3, 15 IUSCT 34, footnote 14.

measures of general application, it is most likely that they will be both unreasonable and discriminatory.

C. Effective means of enforcement

5.40 Pursuant to the final part of Article IV(1), each High Contracting Party "shall assure [with respect to nationals and companies of the other High Contracting Party] that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws". Analogous provisions are to be found in various bilateral investment treaties to which the United States is a party, as well as in the Energy Charter Treaty.[278]

5.41 Application of this provision in Article IV(1) requires as an initial step the identification of relevant "lawful contractual rights". Insofar as such rights are identified, it is to be noted that there is a positive obligation. The Article stipulates that such rights must be afforded effective means of enforcement, as opposed to stipulating a negative obligation such as a prohibition of conduct that would interfere with means of enforcement. Both as a matter of its ordinary meaning, and 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: it is a provision of broader scope, that requires a judicial framework that positively enables effective means of enforcement in conformity with the applicable laws. That in turn entails an obligation to permit effective reliance upon rights such as the entitlements to recognition of juridical personality, and to sovereign immunity, in the context of the enforcement of 'lawful contractual rights'.

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[278] See The Energy Charter Treaty, concluded 17 December 1994, entered into force on 16 April 1998, 2080 U.N.T.S. 95, art. 10(12): "Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.".

D. Breach of Article IV(1) by the United States

5.42 There has been breach by the USA of all three of the protections contained within Article IV(1), and such breach is ongoing.

5.43 *As to the first protection contained within Article IV(1),* the obligation at all time to accord fair and equitable treatment to (*inter alia*) Iranian companies and their property and enterprises, the acts of the USA have, and continue to, cut across each of the elements of fair and equitable treatment identified in paragraph 5.26 above, and have thereby breached this first limb of Article IV(1).

5.44 First, the legislative, executive and judicial acts of the USA at issue in this case, as outlined in Chapter II above, are correctly characterised as arbitrary, grossly unfair, unjust and idiosyncratic. They not only violate Article IV(1) of the 1955 Treaty of Amity: they are flagrant and egregious violations of fundamental legal principles protected by that provision. In this respect, contrary to the fair and equitable treatment standard in Article IV(1):

(a) Generally applicable immunities have been abrogated in contravention of customary international law. The acts of the USA removing the immunities to which Iran and Bank Markazi are entitled, and which protect the property of Bank Markazi, are both egregious and inconsistent with the practice of all other States (save for Canada).[279]

(b) The "fundamental rule" of recognition of separate juridical personality has been overridden so far as concerns Iranian companies including Bank Markazi, despite the repeated recognition of this rule in the jurisprudence of this Court, as well as in generally applicable Iranian and U.S. law.

(c) Iranian companies and their property and enterprises have been the subject of legislation, as implemented through judicial acts, that is targeted and operates with retroactive effect, so that defences – including as to immunity – that would have been available (whether under U.S. law or international law) to the

[279] See *supra*, Chapter III, Section 2(A)(a)(ii), p. 55, para 3.29.

Iranian companies at the time that the relevant proceedings were commenced were deliberately removed, alongside the express removal of any ability to rely on elementary legal principles such as *res judicata*, limitation of actions, and collateral estoppel.

(d) Orders for punitive damages against Iran have been imposed against Iranian companies and their property and enterprises.[280]

(e) As a natural consequence of the United States' acts, the property of Iranian companies outside the USA has been subject to claims in respect of the enforcement of judgments made by the U.S. courts against Iran.

(f) All the above has been on the basis of nothing more than the designation by the U.S. Executive of Iran as a State sponsoring terrorism, and the mere allegation of involvement by Iran in alleged terrorist acts. There has been nothing approaching a series of reasoned determinations that the Iranian companies whose property has been seized have been engaged in alleged acts of terrorism. And even if there had been such determinations, they would not have defeated the entitlement to applicable immunities.[281]

5.45 Secondly, the legislative, executive and judicial acts at issue in this case are correctly characterised as discriminatory. Iranian companies (and their enterprises) have been, and are being, singled out in order to deny to them generally available and elementary defences, including with respect to the immunity of the property of a central bank from enforcement and the recognition of separate juridical personality. The discriminatory nature of the U.S. measures is emphasised by the fact that they are contrary to customary international law, are not mirrored in the practices of other States (with just one exception),[282] and that U.S. legislation has gone so far as to target one specific case involving an Iranian company (Bank Markazi in the

280 See *supra* Chapter II, Section 5(A), pp. 35-39, para. 2.45-2.56.

281 See *supra*, Chapter III, Section 2(A)(a)(ii), p. 55-57, paras. 3.28-3.35.

282 See *supra*, Chapter III, Section 2(A)(a)(ii), p. 55, para 3.29.

Peterson case, through Section 502 of the ITRSHRA), removing all available defences through legislation, with retroactive effect.[283]

5.46 Thirdly, 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. For example, through legislative and executive fiat:

(a) Bank Markazi has been denied the right (i) to raise and (ii) to be granted an immunity defence.

(b) Multiple Iranian companies (including Bank Markazi, TIC, Iranohind Shipping Company, the Islamic Republic of Iran Shipping Lines, Export Development Bank of Iran, Bank Melli Iran, Bank Saderat, Behran Oil Company, Iran Marine Industrial Co., Sediran, and Iran Air) and their enterprises have been denied the right (i) to raise and (ii) to be granted a defence based on recognition of their separate juridical personality.

(c) Multiple Iranian companies (including as above) and their enterprises have been or are being made liable for (purportedly) wrongful acts of the Iranian State that were considered and made the subject of a judgment on liability in proceedings to which such companies were not even parties.

(d) The rights of defence of Iranian companies and their enterprises have been negated 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.

5.47 Finally, the legislative, executive and judicial acts at issue in this case have defeated and continue to defeat the legitimate expectations of Iranian companies, in particular the legitimate expectation that they and their property and enterprises would not be specifically targeted through the enactment of legislation having discriminatory

[283] *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).

and/or retroactive effect and that, in the light of the obligations assumed by the High Contracting Parties to the 1955 Treaty of Amity, both (i) the separate legal personality of Iranian companies would be respected and (ii) applicable principles of sovereign immunity under international law would be respected.

5.48 *As to the second protection contained within Article IV(1),* the protection against unreasonable or discriminatory measures, there has been a series of legislative and executive acts of the USA – implemented by the U.S. courts – that have singled out, and continue to single out, Iranian companies in order to deny to them generally available and elementary defences, including with respect to the immunity of the property of a central bank from enforcement and the recognition of separate juridical personality. As follows from what has already been said above, the unreasonable and discriminatory nature of the U.S. measures is emphasised by their being inconsistent with customary international law and the practices of other States, and the very specific targeting that U.S. legislation has effected (including with retroactive effect).

5.49 The impairment of the legally acquired rights of Iranian companies (including Bank Markazi, TIC, Iranohind Shipping Company, the Islamic Republic of Iran Shipping Lines, Export Development Bank of Iran, Bank Melli Iran, Bank Saderat, Behran Oil Company, Iran Marine Industrial Co., Sediran, and Iran Air) is manifest. These Iranian companies have been or are exposed to being deprived of massive sums in which they have a legal or beneficial interest.

5.50 *As to the third protection contained within Article IV(1),* the obligation to assure that "the lawful contractual rights" of Iranian nationals and companies are "afforded effective means of enforcement, in conformity with the applicable laws", there is an initial issue as to identification of relevant "lawful contractual rights".

(a) Such rights would plainly include rights to payment of sums owing under a given contract.

(b) As outlined in Chapter II above, certain of the assets of Iranian companies that have been subject to seizure constitute debts owing pursuant to a given contract, for example, the approximately USD 17.6 million contractually owed

to Bank Melli by Visa Inc. and Franklin Resources Inc,[284] the more than USD 4 million contractually owed by MasterCard to Bank Melli and Bank Sedarat[285] and a sum of approximately USD 616,500 contractually owed to TIC.[286]

5.51 The seizure of these sums by acts of the U.S. courts – in implementation of the legislative and executive acts of the United States – as well as the removal of any right of Iranian companies (i) to raise and (ii) to be granted recognition of their separate juridical status has negated the rights of Iranian companies to be afforded effective means of enforcing their lawful contractual rights to payment and receipt of the sums seized.

SECTION 3.

ARTICLE IV(2) OF THE 1955 TREATY OF AMITY: BREACH BY THE USA OF RIGHTS IN RESPECT OF CONSTANT PROTECTION AND SECURITY AND THE PROHIBITION ON TAKING

5.52 Article IV(2) of the 1955 Treaty of Amity provides:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

5.53 Article IV(2) thus contains two separate limbs, the first establishing a right to most constant protection and security, the second establishing a prohibition of takings.

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284 *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).

285 *Levin et al. v. Bank of New York et al.*, U.S. District Court, Southern District of New York, 31 October 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013) (IM, Annex 60).

286 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2011, 807 F.Supp.2d 9 (D.D.C.2011) (IM, Annex 50).

Under both limbs, the protection is (again) afforded to "companies" as broadly defined and without qualification.

5.54 The property at issue with respect to both limbs of Article IV(2) comprises the seized or attached property and interests in property of Iranian companies (including Bank Markazi, TIC, Iranohind Shipping Company, the Islamic Republic of Iran Shipping Lines, Export Development Bank of Iran, Bank Melli Iran, Bank Saderat, Behran Oil Company, Iran Marine Industrial Co., Sediran, and Iran Air), as identified in Attachment 2 to this Memorial[287].

5.55 The two limbs of Article IV(2) are considered further below.

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

5.56 As follows from the ordinary meaning of the words "most constant protection and security", the first sentence of Article IV(2) entitles the property of Iranian nationals and companies to a high level of physical and legal protection. The language used is not qualified in any way, and whilst there is reference to the level of protection "required by international law", this operates as a "floor", i.e. in no case can the level of protection afforded be less than that required as a matter of international law.

5.57 That the protection extends to legal as well as physical protection is confirmed by the approach of the Chamber in the *ELSI* case by reference to the "most constant protection and security" provision in the 1948 Italy-United States FCN Treaty.[288] At

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287 IM, Attachment 2.

288 *Elettronica Sicula S.p.A. (ELSI), Judgment,* I.C.J. Reports 1989, p. 15 at 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, and shall enjoy in this respect the full protection and security required by international law."

the minimum, and consistent with the approach of the Chamber in the *ELSI* case, the Treaty of Amity requires that the property of Iranian nationals and companies must receive protection as required by international law, i.e. legal protection as well as physical protection, including through protection against any executive or legislative measures formulated specifically to remove legal protections. Further, protection and security as "required by international law" must comprise any customary international law immunities that may apply with respect to the property of companies or nationals falling within the ambit of Article IV(2).

B. Breach by the USA of the first limb of Article IV(2)

5.58 The property and interests in property of Iranian companies has been and is, on an ongoing basis, being deprived of the entitlement under Article IV(2) to most constant protection and security within the USA.

5.59 In particular, the treatment that has been or is currently being accorded to the property of Iranian companies, as outlined in Chapter II above, breaches the first limb of Article IV(2). The property at issue includes, for example, the security entitlements of Bank Markazi to the amount of USD 1.895 billion,[289] the sums contractually owed to Bank Melli to the value of USD 17.6 million,[290] as well as its property rights in a building in New York,[291] sold for approximately USD 1.6 million,[292] the more than USD 4 million of MasterCard's debt contractually

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289 *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), confirmed by *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) and, subsequently, by *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) (IM, Annex 66).

290 *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).

291 *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) (IM, Annex 47).

292 *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).

owed to Bank Melli and Bank Saderat[293] and the sums contractually owed to TIC to the value of approximately USD 616,500,[294] together with the assets of the other Iranian companies seized within the *Heiser* litigation.

5.60 The breach of this first limb of Article IV(2) is being effected through (i) the denial to Bank Markazi of protection as required by international law in the form of immunities from enforcement so far as concerns its property, (ii) the denial to Bank Markazi of any form of legal defence so far as concerns protection of its property in the *Peterson* case (see the impact of Section 502 of the ITRSHRA), and (iii) the various measures of the United States removing from Iranian companies a series of generally applicable legal defences concerning the right to recognition of separate juridical personality, the right not to be made liable for (purportedly) wrongful acts of the Iranian State determined in proceedings to which such companies were not even parties, the right not to be made subject to legislation having retroactive effect, and the right to rely on elementary legal principles such as *res judicata*, limitation of actions and collateral estoppel.

C. 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

5.61 Pursuant to the second sentence of Article IV(2) of the 1955 Treaty of Amity:

> "Property of nationals and companies of either High Contracting Party, including interests in property… shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."

5.62 This provision protects property from being "taken", with the term "property" expressly stated as including interests in property (as is implicit in the reference to "property" elsewhere in Article IV).

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293 *Levin et al. v. Bank of New York et al.*, U.S. District Court, Southern District of New York, 31 October 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013) (IM, Annex 60).

294 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2011, 807 F.Supp.2d 9 (D.D.C.2011) (IM, Annex 50).

5.63 The term "taking" may be understood as synonymous with "expropriation" and, as a matter of its ordinary meaning, comprises any form of taking, whether direct or indirect. What matters for the purposes of the provision is whether the property or interest in property is "taken", not how it is "taken"; and in this respect the prohibition in Article IV(2) is consistent with the prohibition of both direct and indirect takings that has developed as a matter of customary international law.[295]

5.64 There is no restriction as to the identity of the actors to whom the prohibition applies. So far as concerns the facts of the instant case, the prohibition is applicable (at least) to acts of the executive, the legislature and the judiciary. Further, while it is anyway the case that an act of the judiciary may be expropriatory in nature, in the instant case the U.S. judiciary has merely acted to implement U.S. legislation and executive orders. If the acts of the U.S. legislature and executive are correctly seen as expropriatory in nature, then the same inevitably follows so far as concerns the relevant acts of the U.S. judiciary, which has merely been giving judicial effect to prior legislative and executive acts and thereby completing the taking of the property, including interests in property, of various Iranian companies.

5.65 The context of the second sentence of Article IV(2) is important to its interpretation.

(a) The prohibition of taking forms one element in a series of protections accorded to qualifying nationals and companies. The correct starting point must be that it is intended to form an element of protection differing from but complementary to the other protections set out in the Treaty.

(b) On this basis, by reference to the prohibition of impairment in Article IV(1), Article IV(2) is correctly construed as requiring something more than mere impairment of legally acquired rights and interests, i.e. Article IV(2) requires some form of actual or substantial taking. However, whereas in the case of the prohibition on impairment, the nature of and intent behind the impairment is critical, (i.e., the impairment must result from unreasonable or discriminatory

[295] See, e.g., G. C. Christie, 'What constitutes a taking of property under international law?' 38 *B.Y.B.I.L.* 307 (1962); R. Higgins, *The taking of property by the state: recent developments in international law*, Recueil des cours, 1982 III, Vol. 176, Chapter IV, at p.322 *et seq*.

measures), there is no such requirement in the second sentence of Article IV(2). All that matters is that property has been taken.

(c) Thus the focus in this provision is on the impact of the measure, not its nature or the intent behind it.

5.66 As is very frequently the case with treaty prohibitions of expropriation, Article IV(2) establishes an exception with respect to a limited category of takings, i.e. takings for a public purpose that are accompanied by the prompt payment of just compensation. It follows that an expropriation under Article IV(2) is not inevitably wrongful. There is, however, no need to dwell on the precise nature of these exceptions: an expropriation that is made in violation of international law could not be regarded as made for a "public purpose" within Article IV(2), and there is in any event no question of compensation having been (or being) paid.[296]

5.67 Article IV(2) also establishes the standard of compensation where there is a taking that falls *within* the stated exception, i.e. where there is a lawful expropriation. Thus the final sentence to Article IV(2) provides:

> "Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

5.68 It is emphasised that this is the standard of compensation for the limited form of taking that is expressly permitted by Article IV(2). Where a taking is in breach of Article IV(2), the appropriate remedy could be no less than, but may readily be different from or more than, the standard of "full equivalent" compensation to which Article IV(2) refers. As to that standard, Iran notes that the USA has taken the position that this requires that the relevant property be accorded its full market value, and that the valuation be as at the date of the expropriation, but disregarding

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[296] See, e.g., Memorandum of the U.S. Department of State Legal Adviser on the Application of the Treaty of Amity to Expropriations in Iran, 13 October 1983 (IM, Annex 19):

> "the Treaty of Amity expressly requires Iran to pay compensation for the expropriation of property owned by U.S. nationals. Such compensation must represent the full equivalent of the expropriated property and must be paid within a reasonable time after expropriation in a readily convertible currency."

the effects of any actions attributable to the expropriating government that were unlawful or were taken in anticipation of the expropriation.[297]

D. Breach by the USA of the second limb of Article IV(2) of the 1955 Treaty of Amity

5.69 The legislative and executive acts of the USA, as identified in Chapter II above, are of themselves expropriatory – and in violation of Article IV(2) – in nature, as they are expressly directed at the taking of the property of Iranian companies. The acts of the U.S. courts, as listed in Attachment 2 to this Memorial, have given effect to those legislative and executive acts, and constitute a taking in violation of Article IV(2). The property of Iranian companies thereby taken includes the security entitlements of Bank Markazi to the amount of USD 1.895 billion,[298] the sums contractually owed to Bank Melli to the value of USD 17.6 million,[299] as well as its property rights in a building in New York,[300] sold for approximately USD 1.6 million,[301] and the sums contractually owed to TIC to the value of approximately USD 616,500[302] together with the assets of the other Iranian companies seized within the *Heiser* litigation.[303]

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297 *Ibid.*

298 *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), confirmed by *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) and, subsequently, by *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) (IM, Annex 66).

299 *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).

300 *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) (IM, Annex 47).

301 *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).

302 *Estate of Heiser et al. v. Islamic Republic of Iran et al.*, U.S. District Court, District of Columbia, 10 August 2011, 807 F.Supp.2d 9 (D.D.C.2011) (IM, Annex 50).

303 See, e.g., *The Estate of Michael Heiser et al. v. Mashreqbank*, U.S. District Court, Southern District of New York, 4 May 2012, No. 11 Civ. 01609 (S.D.N.Y. 2012) (IM, Annex 53); *The Estate of Michael Heiser et al. v. The 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); *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

5.70 There is no question of such takings falling within the exception to Article IV(2). The acts at issue were not accompanied by payment of any compensation. Further, they cannot be regarded as acts done for a legitimate public purpose, since the takings were arbitrary and discriminatory, for the benefit of certain private litigants, disregarded the separate juridical status of the Iranian companies and, in the case of Bank Markazi, contravened immunities applicable as a matter of customary international law.

5.71 The United States may argue that certain regulatory acts of a State are not expropriatory in nature because they constitute an exercise of "police powers". This position is reflected for example in the U.S. Restatement (Third) of Foreign Relations Law,[304] as well as in various treaties to which the USA is a party,[305] but not in the 1955 Treaty of Amity. In any event, and 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.[306] Such criteria could never be satisfied so far as concerns the instant case.

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57); *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).

304 American Law Institute, *U.S. Restatement of the Law (Third), Foreign Relations Law of the United States* (Washington DC: American Law Institute Publishers, 1987), § 712 comment (g).

305 See e.g. Australia-United States FTA of 18 May 2004, signed 18 May 2004 entered into force on 1 January 2005, at Annex 11B., as follows:

> "The Parties confirm their shared understanding that Article 11.7.1 [the AUSFTA Chapter 11 provision on expropriation] is intended to reflect customary international law concerning the obligation of States with respect to expropriation. … 4 (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations."

306 Iran 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,* ICSID Case No. ARB(AF)/04/1, Award, paras. 87-88, referring to *Fireman's Fund Insurance Company v. Mexico,* ICSID Case No. ARB(AF)/02/1, Award, para. 196.

SECTION 4.

ARTICLE V(1) OF THE TREATY OF AMITY: BREACH BY THE USA OF IRAN'S ENTITLEMENT FOR ITS COMPANIES AND NATIONALS TO BE PERMITTED TO LEASE, ACQUIRE AND DISPOSE OF PROPERTY

A. Article V(1)

5.72 Pursuant to Article V(1) of the 1955 Treaty of Amity:

> "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 favourable than that accorded to nationals and companies of any third country."

5.73 Article V(1) establishes another important protection for (*inter alia*) the property of Iranian nationals and companies. The positive permissions to nationals and companies that are contained in Article V(1) are to an extent the counterpart to the restrictions on the activities of the Treaty Parties contained in Articles IV(1) and IV(2). Interference with the rights and interests of Iranian nationals and companies also violates *prima facie* Article V(1), including the right to dispose of property "by sale, testament or otherwise", i.e. as a given national or company sees fit. An act of the State that confiscates property also violates *prima facie* the right to dispose freely of that property.

5.74 As with Article III(2), the treatment secured by Article V(1) of the Treaty is accorded on a most favoured nation basis. Further, as with Articles IV(1) and (2), it is evident that the intention of the Treaty Parties is that the term "property" be construed broadly: the reference is expressly to the right to acquire or dispose of "property of all kinds".

B. Violation of Iran's entitlement for its companies and nationals to be permitted to lease, acquire and dispose of property under Article V(1)

5.75 As follows from Chapter II above, Iranian companies that fall / whose property falls or is considered by the U.S. Executive or the U.S. courts to fall within the ambit of Section 201 of the TRIA, and/or Sections 1610(b) and 1610(g)(1) of the 28 U.S. Code, and/or E.O. 13599, and/or Section 502 of the ITRSHRA are being, or have been, deprived of the right to dispose of their property as they see fit. Most obviously, those Iranian companies who have, as identified in preceding sections, been deprived of their property through the acts of the U.S. courts have simultaneously been deprived of their right to dispose of their property as they see fit.[307]

5.76 Further, the treatment accorded in this respect to Iranian companies is manifestly less favourable than that accorded to nationals and companies of third countries. There has been no general removal of the rights to dispose of property, but rather a specific and targeted regime has been imposed with respect to Iranian companies.

[307] See *supra*, e.g., Chapter II, Section 5(B), pp. 40-43, paras 2.57-2.63.

CHAPTER VI.
BREACH OF ARTICLES VII(1) AND X(1) OF THE TREATY OF AMITY

6.1 In addition to the general right of Iran to hold the United States to the commitments that it undertook in the 1955 Treaty of Amity, the Treaty contains a series of rights and protections that are enjoyed specifically by the State itself as well as the nationals and companies of the State. In this Chapter, Iran examines in turn Articles VII(1) and X(1) of the 1955 Treaty of Amity, setting out its case on breach by the United States.

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

6.2 Pursuant to Article VII(1) of the 1955 Treaty of Amity:

> "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."

6.3 Article VII(1) thus 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 prohibition is not limited to such transfers of nationals or companies, but applies also in relation to such transfers made by Iran and all organs of the State. Further, the prohibition is drawn very broadly through use of the term "restrictions", which is unqualified. Pursuant to its ordinary meaning,

this term encompasses a very wide range of acts aimed at or effecting some form of restriction on the freedom to pay, remit or transfer funds.

6.4 There are only two exceptions to the general prohibition in Article VII(1), and neither has any application so far as concerns the facts of this case. There is no suggestion that any restriction at issue in this case has resulted from concerns as to the availability of foreign exchange or from restrictions specifically approved by the International Monetary Fund.

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

6.5 Through the legislative and executive acts outlined in Chapter II above, the United States has negated the rights granted to Iran under Article VII(1).

6.6 The United States has restricted – to the point of rendering largely impossible in practical terms – any payment or transfer of funds:

(a) from any organ, agency or instrumentality of the State of Iran (as defined by reference to the FSIA, Section 201 of the TRIA, and/or Section 1610(b) and Section 1610(g)(1) U.S.C., and/or E.O. 13599, and/or Section 502 of the ITRSHRA) to the United States; and

(b) from such persons in the United States to Iran.

6.7 In practical terms, 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 Iran is an impossibility.

6.8 In this respect, it is recalled that pursuant to sections 1(a) and (b) of E.O. 13599 of 5 February 2012:

"(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."[308]

6.9 As noted in Chapter II above,[309] the broad effect of E.O. 13599 is to satisfy the pre-condition in Section 201 of the TRIA that there be relevant "blocked assets" of the alleged terrorist State, against which a given claimant can then enforce judgments. So far as concerns the 1955 Treaty of Amity, the effect of this Executive Order is a manifest and automatic violation of Article VII(1).

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

6.10 Pursuant to Article X(1) of the 1955 Treaty of Amity:

"Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

6.11 This is a provision that has already received the scrutiny of this Court in the *Oil Platforms* case. As with Article VII(1), Article X(1) entitles Iran itself (as opposed

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[308] U.S. Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22, emphasis added). For a definition of 'Government of Iran' in the E.O. 13599, see *supra*, p. 4, footnote 12.

[309] See *supra*, Chapter II, Section 4(A), pp. 31-32 , paras. 2.35-2.37.

to just Iranian nationals and companies) to the specified treatment, i.e. the entitlement to freedom of commerce and navigation.

6.12 There are three key elements to the provision so far as concerns the facts of the current case, each of which was the focus of attention in *Oil Platforms*.

6.13 First, as to the meaning of "commerce", the Court has found that the term "commerce" in Article X(1) "includes commercial activities in general – not merely the immediate act of sale and purchase, but also the ancillary activities integrally related to commerce".[310] The Court also noted 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' …".[311]

6.14 Secondly, as to "freedom of commerce", the Court has found that:

> "Any act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export."[312]

6.15 Thirdly, 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. Thus on the (very different) facts of the *Oil Platforms* case the Court held:

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310 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 819, para. 49, quoted at *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161 at p. 200, para. 80. The Court also rejected the U.S. contentions to the effect that the term was restricted to maritime commerce.

311 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 818, at para. 45; see also the consideration given to the term "for the purposes of commerce" at Article VI of the Treaty of 15 April 1958 in *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment,* I.C.J. Reports 2009, p. 213 at pp. 240-244, paras. 57-71.

312 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment,* I.C.J. Reports 1996, p. 803 at p. 819, para. 50, quoted at *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161 at p. 201, para. 83. See also at p. 203, para. 89.

> "What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States. After the completion of the first contract Iran had no ongoing financial interest in, or legal responsibility for, the goods transferred."[313]

6.16 As follows from the above, "freedom of commerce" within Article X(1) is a broad concept, and is apt to protect against legislative or executive acts that result in the automatic 'blocking' or seizure by one of the Treaty Parties of the assets of the other Party and/or of its agencies, instrumentalities and/or the assets of any company that it owns or controls. Such 'blocking' / seizure may impact directly on individual acts of commerce or, more broadly, render many forms of commerce impossible, including where commerce is dependent on the ability of State-owned banks to function in the Treaty Party effecting the 'blocking' / seizure.

6.17 In *Nicaragua v United States*, the Court found:

> "… it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce." [314]

6.18 The context is different, but the passage is of importance in demonstrating the breadth of acts that may interfere with international law rights to freedom of

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313 *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161 at p. 201, para. 83. See also at p. 207, para. 97.

314 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* I.C.J. Reports 1986, p. 14 at p. 129, para. 253. See also at p. 139, para. 278:

> "Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX. paragraph 1, of the 1955 Treaty; … ."

commerce. Indeed, 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.

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 1955 Treaty of Amity

6.19 The treatment currently being afforded to Iran, Bank Markazi and other Iranian companies, including Iranian financial institutions, and their respective property, radically interferes with Iran's right to freedom of commerce between the territories of Iran and the United States under Article X(1) of the 1955 Treaty of Amity. The violations of this provision include:

(a) Denying customary international law immunities to Iran in terms of jurisdiction and enforcement. The abrogation of Iran's entitlement to State immunity has led to a series of default judgments (as per Attachment 1 to this Memorial) pursuant to which Iran has been ordered to pay – thus far – in excess of USD 60 billion. Given that Iran's customary international law immunity from measures of constraint has also been abrogated, the ability of Iran to engage in any form of commerce between the territories of the two Treaty Parties is severely impeded. The breach of Article X(1) is only aggravated by the fact that U.S. law permits the making of awards for punitive damages against Iran (including in relation to past liability judgments entered against Iran) – and has been applied by the U.S. courts with the result that (thus far) approximately USD 31 billion has been awarded against Iran in terms of such punitive damages.

(b) The blocking of the assets of Iran, Iranian agencies and instrumentalities, and of companies that are owned or controlled by Iran likewise has the impact that the ability of Iran and such entities and companies to engage in any form of commerce between the territories of the two Treaty Parties is severely impeded. Indeed, where Iran or Iranian companies have had assets in the United States that were the products of commerce (for example the sums owed

to TIC or the Iranian Ministry of Defence), these have been 'blocked', and then seized.

(c) Enabling enforcement of U.S. court judgments entered against Iran against the property of Iranian companies that are owned or controlled by Iran, notwithstanding the respect for their separate juridical personality that is required consistent with the jurisprudence of this Court, as well as by the Treaty. This likewise has rendered and renders impossible commerce between the territories of the two Treaty Parties so far as concerns such companies.

(d) Moreover, the measures of constraint that negate the rights of Iran and Iranian companies under Article X(1) are in no sense confined to post-judgment measures and extend even to allowing plaintiffs to attach the property of Iran and Iranian companies through liens of *lis pendens* pursuant to Section 1605A(g) of the 2008 FSIA. By way of a recent example, it is a matter of public record that Iran Air has very recently agreed to purchase commercial aircraft valued at USD16.6 billion from The Boeing Company (Boeing) in the United States. The plaintiffs in the *Shlomo Leibovitch* case against (*inter alia*) Iran entered a Notice of Pending Action in 2008[315] and have now served on Boeing a Citation Notice (with a citation hearing set on 7 February 2017),[316] the aim of which is to compel the payment/transfer by Boeing of funds or assets received from or owned by Iran.[317] It is an apt illustration of how the U.S. legislative and executive acts that are the subject of these proceedings violate Article X(1).

(e) Denying customary international law immunities to Bank Markazi in terms of enforcement against its property has likewise violated and violates Article X(1) because of its actual or potential adverse impact on the freedom of commerce. For example, Bank Markazi cannot operate in the United States so

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315 *Leibovitch et al. v. Syrian Arab Republic et al.*, U.S. District Court, Northern District of Illinois, Notice of Pending Action, 8 April 2008, No. 08-cv-01939 (N.D. Ill. 2008) (IM, Annex 42).

316 *Leibovitch et al. v. Syrian Arab Republic et al.*, U.S. District Court, Northern District of Illinois, Citation Notice, No. 08-cv-01939 (N.D. Ill. 2016) (IM, Annex 72).

317 I. Kushkush, "Israeli group asks U.S. court to block Boeing deal with Iran", *Associated Press*, 16 December 2016 (IM, Annex 96).

as to process payments arising from commercial acts between the two States, and is thus barred from providing the infrastructure on which commerce depends.

(f) Removing generally applicable defences that would otherwise be available to Iranian companies has also violated and violates Article X(1), impeding actual or prospective commerce.

6.20 In short, the impact of the legislative, executive and judicial acts of the United States is that commerce between the two States is severely impeded, contrary to Article X(1). While the sanctions that the United States targets against Iran adversely impact the trade between the two States so far as concerns many forms of commerce, trade between Iran and the United States continues in certain respects (such as with respect to aircraft and agricultural and medical products). The legislative, executive and judicial acts of the United States as outlined in Chapter II operate as a separate and/or additional barrier to commerce and thereby breach Article X(1).

CHAPTER VII.
REMEDIES

SECTION 1.
SUBSTANTIAL LOSS HAS BEEN AND IS BEING CAUSED TO IRANIAN COMPANIES AND TO IRAN AS A RESULT OF THE VIOLATIONS BY THE UNITED STATES OF ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

A. Material losses suffered by Iranian companies

7.1 As the preceding chapters in this Memorial have shown, the U.S. measures have violated the obligations owed by the United States to Iran under the 1955 Treaty of Amity. In particular, the measures have violated the obligation to recognise the separate legal personality of Iranian corporations, and denied to Iranian companies and their property[318] the rights and protections to which they are entitled under the Treaty. The measures have impeded implementation of the commitment to freedom of commerce secured by Article X of the 1955 Treaty of Amity, and have impeded achievement of the Treaty's declared aim of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples; and the measures continue to do so. In consequence, the United States has breached its obligations to Iran *inter alia* under Articles III(1), III(2), IV(1), IV(2), V(1), VII(1), X(1) and XI(4) of the 1955 Treaty of Amity (and also under customary international law).

7.2 The impact of those measures is observed most immediately and most obviously in the instances where the U.S. measures have been applied by public authorities in the United States in order to seize property belonging to Iranian companies and transfer it to third parties. The proceedings in the *Peterson* litigation, in which about USD 1.895 billion in bond assets owned by Bank Markazi were turned over to the beneficiaries of default judgments against the Islamic Republic of Iran, are an

[318] The term "property" is used in this Chapter to mean all property, including interests in property. See *supra* Chapter V, pp. 89 & 103, paras. 5.24(b) & 5.62.

example. In cases such as this, specific, identifiable property has been taken, and the value of the property and associated costs to Iranian companies arising from the U.S. measures can be computed.

7.3 Iranian companies have also suffered, and continue to suffer, losses that are less easily quantifiable. These are the losses caused by U.S. measures in so far as they diminish the value of the property owned by the Iranian company, but without actually imposing measures on the property that constitute a 'taking' of that property within the meaning of Article IV(2) of the Treaty.

7.4 The liability of Iranian agencies and instrumentalities, including separate juridical entities, to have their property attached (and attached in respect of judgments given in claims to which they are not a party) necessarily limits the right of the property-owner to enjoy its rights in that property. The property cannot be held without the risk of seizure; and the value of the property as, for example, security for loans is accordingly diminished. There can, accordingly, be no doubt that its value to the property-owner is in fact reduced.

7.5 Similarly, restrictions upon the transfer of funds to or from the United States entail trading costs for affected companies, which are real and quantifiable losses. If the U.S. measures in question were legitimate regulatory measures, these would be legitimately-imposed costs of compliance. The U.S. measures are, however, not legitimate. They violate international law. The costs are the direct costs to Iranian companies of defending their lawful business activities against the effects of U.S. measures imposed in breach of its obligations under the 1955 Treaty of Amity.

7.6 As is explained below, restitution or, if that is not possible, monetary compensation is in principle the appropriate form of reparation in international law in respect of the quantifiable losses to which the previous paragraphs refer. The calculation of the amount of such losses, and of less specific losses such as those arising as 'lost opportunities' resulting from the discouragement of trade between Iran and the United States, is, however, a matter reserved in the Application for a later stage in these proceedings.

B. Injury to the Iranian State

7.7 In addition to the material losses sustained by Iranian companies as a result of the U.S. measures, there is also the question of the injury to the State of Iran itself arising from the violation of its rights under the 1955 Treaty of Amity by the United States. In part that injury is the damage caused by the loss of commercial opportunities: in part it is what the I.L.C. called, in its Articles on State Responsibility, 'non-material' or 'moral' damage.[319]

7.8 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 arises 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.

7.9 The question of the form of reparation that is appropriate in relation to each of these kinds of damage is discussed in the following section.

SECTION 2.

APPROPRIATE NATURE OF DECLARATIONS AND ORDERS SOUGHT.

7.10 The two essential aims of remedies in a case before the Court must be the cessation and non-repetition of the breach of international law, and the reparation of that breach. As it was put in the Commentary to the I.L.C. Articles on State Responsibility, "[t]he core legal consequences of an internationally wrongful act … are the obligations of the responsible State to cease the wrongful conduct (article 30)

[319] See I.L.C., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* in *Y.I.L.C., 2001, vol. II, Part Two*, at Article 31 together with paras. 7 and 8 of its commentary, and Article 37 together with para. 3 of its commentary.

and to make full reparation for the injury caused by the internationally wrongful act (article 31)."[320]

A. Cessation

7.11 An order for cessation of the breach makes explicit the legal obligations of the Respondent State that arise automatically from the breach of international law.

7.12 The duty to cease the breach and to remedy the injury already caused by it, by making appropriate reparation, was made clear by the Court in the *Jurisdictional Immunities* case:

> "According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.
>
> It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established."[321]

7.13 Iran accordingly requests the Court to order the cessation of the violations. The precise manner in which such an order would be implemented in U.S. law is a matter for the United States to determine. Iran thus also requests the Court to order that

> "the U.S.A. must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of

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[320] I.L.C., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* in *Y.I.L.C., 2001, vol. II, Part Two,* at commentary on Article 28, para. 2.

[321] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment,* I.C.J. Reports 2012, p. 99 at pp. 153-154, para. 137.

other judicial authorities infringing the rights, including respect for the juridical status of Iranian companies, and the entitlement to immunity which Iran enjoys under the Treaty of Amity and international law cease to have effect."[322]

B. Non-repetition

7.14 As far as an order for non-repetition is concerned, the Court has stated that:

> "as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis."[323]

7.15 Iran submits that in the present case the long period over which the U.S. legislature has, despite opposition from the U.S. Government, persisted in taking cumulative steps to cut down the rights secured by the 1955 Treaty of Amity, gives good cause to believe that the United States will repeat in the future the acts and conduct that violate the 1955 Treaty of Amity. Accordingly, Iran also requests the Court to make a specific Order of non-repetition. Specifically, Iran asks the Court to order that *the United States shall cease such conduct and provide Iran with an assurance that it will not repeat its unlawful acts.*

C. Reparation

7.16 The request for relief included in Iran's Application refers to several kinds of relief.[324] Sub-paragraphs (b) to (f) request declaratory relief, in the form of declarations of the scope of the obligations of the United States under the Treaty of

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322 The text is modelled on the *dispositif* in the *Jurisdictional Immunities* case *ibid*, at p. 155, para. 139(4).

323 *Ibid*, at p. 154, para. 138.

324 IA, paragraph 33.

Amity, and declarations that the United States has violated its obligations under the Treaty and is under an obligation to make full reparation for those violations.

7.17 The amount of reparation due by way of compensation for the injuries, both material and moral, caused by those violations is a matter reserved for a subsequent stage in these proceedings.

7.18 While the question of the amount due to Iran by way of reparation is reserved for a later stage in these proceedings, the basis of U.S. liability to make reparation is already clear. The duty to make reparation for breaches of international law is axiomatic. Article 31 of the I.L.C. Articles on State Responsibility provides:

> "*Article 31*
> *Reparation*
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[325]

7.19 The I.L.C. Articles on State Responsibility then provide that:

> "Article 34
> Forms of reparation
>
> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."[326]

7.20 The I.L.C. asserted that "because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful acts by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation."[327]

7.21 The same point was made by the Permanent Court of International Justice in the *Chorzów Factory* case:

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325 I.L.C., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* in *Y.I.L.C., 2001, vol. II, Part Two*.

326 *Ibid.*

327 *Ibid.*, Commentary on Article 35, at para. 3.

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[328]

7.22 There are thus three components in the reparations due to Iran: restitution, compensation, and satisfaction.

(a) Restitution

7.23 First, properties of Iranian companies that have purportedly been seized in pursuit of the U.S. measures, in breach of Iran's rights under the 1955 Treaty of Amity, must be restored to the ownership and control of the Iranian owners, which must be able to exercise the full range of the property rights in respect of those properties. This is the case in relation to the property rights of Bank Melli in New York, seized in relation to the *Weinstein* litigation, for example.[329]

(b) Compensation

7.24 Secondly, where there is property that has been dissipated, or which is no longer identifiable, or cannot for some other reason be restored to the Iranian companies from which it was taken, compensation must be paid by the United States. This may include property seized in third States as a result of the recognition and enforcement of orders of the U.S. courts.[330]

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328 *Case concerning the Factory at Chorzów*, *Merits, Judgment,* P.C.I.J. Series A. – No. 17, p. 4, at p. 47.

329 *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) (IM, Annex 47); *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); see *supra* Chapter II, Section 5(B), pp. 40-43, paras 2.57-2.63.

330 This is without prejudice to questions of the responsibility of third States for any such actions.

(c) Satisfaction

7.25 Thirdly, the I.L.C. Articles on State Responsibility identify satisfaction as "the remedy for those injuries, not financially assessable, which amount to an affront to the State."[331] In addition to the financial losses sustained by Iranian companies as a result of the U.S. actions, the State of Iran has itself sustained non-material or moral damage. Specifically, Iran has had its rights under the 1955 Treaty of Amity and under customary international law ignored and treated as nugatory by the United States. For that affront, reparation in the form of satisfaction is due.

7.26 Iran accordingly requests the Court to make an Order for appropriate remedies, in accordance with paragraphs 8.1, below.

[331] I.L.C., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* in *Y.I.L.C., 2001, vol. II, Part Two*, commentary on Article 37, para. 3.

CHAPTER VIII.
REQUEST FOR RELIEF

8.1 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' international responsibility is engaged 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 discriminatory treatment of such entities, and their property,[332] which impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, and (b) 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, and (c) expropriation of the property of such entities, and its failure to accord to such entities freedom of access to the U.S. 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 1955 Treaty of Amity, and (d) failure to respect the right of such entities 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), V(1) and XI(4) 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 United States shall cease such conduct and provide Iran with an assurance that it will not repeat its unlawful acts;

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[332] The term "property" is used in this Chapter to mean all property, including interests in property. See *supra* Chapter V, pp. 89 & 103, paras. 5.24(b) & 5.62.

(c) That the United States 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 United States to Iran under the 1955 Treaty of Amity;

(d) That the United States shall, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other authorities infringing the rights, including respect for the juridical status of Iranian companies, and the entitlement to immunity which Iran and Iranian State-owned companies, including Bank Markazi, enjoy under the 1955 Treaty of Amity and international law cease to have effect;

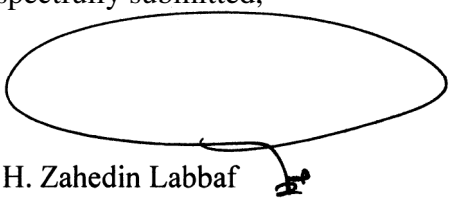
(e) That Iran and Iranian State-owned companies are entitled to immunity from the jurisdiction of the U.S. courts and in respect of enforcement proceedings in the United States, and that such immunity must be respected by the United States (including the U.S. courts), to the extent required by the 1955 Treaty of Amity and international law;

(f) That the United States (including the U.S. courts) is obliged to respect the juridical status (including the separate legal personality), and to ensure freedom of access to the U.S. 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 companies.

(g) That the United States is under an obligation to make full reparation to Iran for the violation of its international legal obligations in a form and in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves its right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States; and

(h) Any other remedy the Court may deem appropriate.

Respectfully submitted,



M. H. Zahedin Labbaf

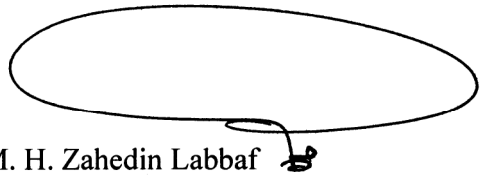
Agent of the Government of the

Islamic Republic of Iran

CERTIFICATION

I, the undersigned, M. H. Zahedin Labbaf, Agent of the Islamic Republic of Iran, hereby certify that the copies of this Memorial and the documents annexed in Volumes I to IV are true copies and conform to the original documents and that the translations into English are accurate translations.

The Hague, 01 February 2017



M. H. Zahedin Labbaf
Agent of the Government of the
Islamic Republic of Iran

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