INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

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

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

MAY 17, 2021

TABLE OF CONTENTS

PART I: THE UNITED STATES' CASE

CHAPTER 1: INTRODUCTION

1.1 This case is about Iran's attempt to evade compensatory damages judgments by U.S. courts in respect of terrorist acts against U.S. nationals for which Iran bears responsibility. The U.S. legislative measures that Iran assails were enacted for the purpose of allowing recourse against State sponsors of terrorism—including Iran, and its agencies, instrumentalities, and officials—before U.S. courts. Among the most egregious acts of Iran's systemic policy of supporting terrorist acts directed at U.S. nationals and other U.S. interests that such recourse was aimed to address was the terrorist bombing of the U.S. Marine barracks in October 1983, which killed 241 peacekeepers and injured many more. The *Peterson* case, which is at the heart of Iran's claims before the Court, was brought by the victims and family members of the U.S. peacekeepers who were killed by that bombing. Other cases cited by Iran in its claims were similarly brought by many more such victims who have not been compensated for other egregious conduct by Iran.

1.2 Iran attempts to distance itself from the reality at the heart of this case. During the preliminary phase of the case, Iran, side-stepping any engagement with the allegations made by the United States, repeatedly stated that it would address these allegations when it comes to the merits.[1] Iran's Reply, however, again fails to address the U.S. allegations in any meaningful way. It says, moreover, that these allegations of fact are irrelevant as its claims arise under the Treaty of Amity and that the U.S. factual allegations and contentions of law that are rooted in Iran's terrorist conduct make no claim that Iran has violated the Treaty of Amity. Iran therefore maintains that its claims must be addressed without regard to the Iranian conduct that stands at the very heart of the measures enacted by the United States and the judgments of the U.S. courts arising from those measures. In support of this contention, Iran puts forward an expansive reading of the Court's Preliminary Objections Judgment, contending that this requires a direct treaty-nexus between Iran's conduct invoked by the United States and the Treaty of Amity. Absent such direct treaty-nexus, Iran contends that its conduct invoked by the United States is irrelevant to these proceedings.

1.3 This cannot be correct. The U.S. measures that serve as a basis for Iran's claims were enacted as a direct response to the egregious conduct that Iran, and other State sponsors of

[1] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 12, 2018, 3pm, p. 37, ¶ 5 (Mohsen Mohebi); *id.*, p. 38, ¶ 10.

terrorism, engaged in against U.S. nationals and U.S. interests. The Treaty of Amity does not address terrorist conduct, or the measures that may be taken by its Parties in response to such conduct. It is predicated, however, on peaceful relations between the two Parties. Even without regard to the exceptions' clause in Article XX of the Treaty, it cannot but be material to the consideration of any claim under the Treaty that a Party has engaged in conduct that is so fundamentally at odds with the very essence of what the Treaty was designed to promote. The challenged U.S. measures are inextricably linked to choices that Iran made: *first*, to sponsor acts of terrorism against U.S. nationals and interests; *second*, to refrain from appearing in U.S. courts to contest its liability for such acts; and *third*, to refuse to pay the judgments ultimately rendered against it or otherwise to provide any compensation to the victims of such acts. The Court must assess the challenged U.S. measures in the context of these choices, not, as Iran contends, in a vacuum.

1.4 Rather than directly confronting the heinous nature of its conduct, Iran relegates its response to this critical aspect of the U.S. case to a short appendix included at the end of its Reply. The appendix is inadequate to the task of addressing the serious charges against Iran and the supporting evidence that the United States has submitted. But it is even less than meets the eye. The appendix is little more than a cut and paste from the appendix that Iran submitted in 2017 with its observations and submissions on the U.S. preliminary objections. The preliminary phase is, however, long over. Iran's evident unwillingness to respond in any material way to the U.S. allegations—even though Iran told the Court it would do so at the merits phase—speaks volumes and should be damning to its case.

1.5 Indeed, what is most notable about Iran's appendix is what it fails to address. Critically, Iran has *nothing* to say about the October 1983 bombing of the U.S. Marine barracks, notwithstanding that it is at the heart of Iran's case. By far the largest sum obtained by the holders of terrorism judgments against Iran was obtained by victims of the bombing and their families in the *Peterson* case. The measure that receives perhaps the most attention from Iran in its Reply[2] relates *solely* to the *Peterson* enforcement proceedings and thus to the barracks bombing. Yet, despite its place at the heart of this case, Iran makes no attempt to address the evidence showing that it was behind the bombing.

1.6 Rather than address its conduct that gave rise to the measures, Iran engages in distraction, with a lengthy discussion of cases that have little to do with its remaining claims,

[2] Iran Threat Reduction and Syria Human Rights Act of 2012 § 502, 22 U.S.C. § 8772 (2012).

namely cases arising out of the attacks on September 11, 2001. Iran's complaints about these cases are utterly meritless. More importantly, following the Court's Preliminary Objections Judgment, Iran has no surviving claim with respect to the 9/11 judgments. Iran previously complained that the 9/11 judgments violated its sovereign immunities. The Court, however, dismissed those claims as outside the scope of the Treaty of Amity. Moreover, none of the enforcement proceedings discussed in the Reply that have resulted in the turnover of Iranian assets concern the 9/11 judgments.[3]

1.7 Mindful, no doubt, of the effect of the Court's Preliminary Objections Judgment on its case, Iran attempts to salvage some part of that case in its Reply. Through updated versions of four charts originally attached to its Memorial listing hundreds of court proceedings, Iran seeks to convey the impression that there is a vast hinterland of judicial action that it says is in breach of the Treaty of Amity beyond those cases that are expressly discussed in Iran's written submissions. But the reality is very different. As the United States showed in the Counter-Memorial with respect to the original versions of these charts, and as continues to be the case with respect to the revised versions, Iran's Attachments 1, 3, and 4 are entirely irrelevant to this case because Iran has made only sovereign immunity claims in respect of the proceedings listed in these attachments. With respect to the remaining attachment (Attachment 2), which lists actions to enforce judgments obtained against Iran, Iran's Reply makes clear that its claims are, in fact, limited to only **8** of the 106 actions listed therein.[4] And even as to those **8**, over 98.5% of the funds turned over to the plaintiffs in these proceedings were turned over in a single case (*Peterson I*), which, as noted, involved the enforcement of a judgment finding Iran responsible for the 1983 Beirut Marine barracks bombing.

1.8 As this makes abundantly clear, this case is fundamentally about Iran's role in the 1983 Marine barracks bombing, its refusal to provide any compensation to the victims of that bombing, and its attempt to use a treaty of friendship, navigation and commerce to impugn reasonable measures that the United States took in order to hold Iran accountable for its actions in connection with the bombing and to assist the victims and their families in their efforts to obtain the compensation that they are due from Iran. And for all of Iran's complaints about the sanctity of the corporate form, the assets at issue in *Peterson I*—which, again, account for the

[3] *See* Iran's Reply, ¶ 2.60 n.161 (listing judgments that are the subject of enforcement actions addressed in the Reply).

[4] Iran's Reply, Chapter 2, Section 2. *See also infra* Chapter 8.

vast majority of the assets that have been turned over—are plainly assets of the Iranian State, which were held by its central bank, Bank Markazi.

1.9 To avoid liability and damages for its support of terrorism, Iran comes to the Court with unclean hands and on behalf of an entity that may not invoke the Treaty of Amity (*i.e.*, Bank Markazi) and companies that have not exhausted local remedies, making erroneous legal interpretations of provisions of domestic and international law that the United States did not breach. The Court should reject Iran's claims in their entirety. There are multiple reasons, whether cumulatively or in the alternative, why the Court can and should reach this result. *First*, the Court should conclude that Iran's unclean hands bar it from proceeding with its claims in their entirety and obtaining the relief that it seeks. *Second*, the Court should find that Bank Markazi is not a "company" within the meaning of the Treaty of Amity and, accordingly, reject Iran's claims under Articles III, IV, and V pertaining to the treatment of Bank Markazi—which, as noted, account for the lion's share of potential U.S. liability. *Third*, with respect to those entities that do qualify as companies, the Court should find that Iran has failed to show that they exhausted local remedies—indeed, in most cases the companies did not bother to appear at all in the U.S. court proceedings—and reject claims arising out of the treatment of those entities. *Fourth*, the Court should exclude Iran's claims regarding Executive Order 13599 from this case under Article XX(1)(c) and (d). *Fifth*, the Court should reject Iran's interpretations of the Treaty provisions at issue as erroneous and find that the United States did not breach any of these provisions in any event, but instead acted reasonably and consistent with its Treaty obligations in enacting and applying the challenged measures. *Sixth*, if the Court were to conclude that any of the challenged U.S. measures infringed Iran's rights under the Treaty, it should nevertheless preclude as abusive Iran's attempt to invoke those rights in order to avoid liability and paying compensation for the countless deaths and injuries Iran caused by supporting these heinous acts of terrorism specifically targeting U.S. nationals and U.S. interests.

1.10 The U.S. Rejoinder is structured as follows. In the remainder of **Part I**, **Chapter 2** clarifies the impact of the Court's Preliminary Objections Judgment and the termination of the Treaty of Amity on the scope of Iran's case. **Chapter 3** addresses Iran's past and continuing sponsorship of terrorism.

1.11 In **Part II**, the United States presents four defenses, described briefly above, showing that each requires dismissal of some or all of Iran's claims: **Chapter 4** addresses Iran's unclean hands, **Chapter 5** addresses Iran's failure to establish that Bank Markazi is a "company" for

purposes of the Treaty of Amity, **Chapter 6** addresses the failure to exhaust local remedies, and **Chapter 7** addresses the application of Article XX(1) to Executive Order 13599.

1.12 In **Part III**, the United States begins by correcting Iran's portrayal of the challenged measures in **Chapter 8**, before proceeding to Iran's claims under Article III(1) and (2) (**Chapter 9**), Article IV(1) (**Chapter 10**), Article IV(2) (**Chapter 11**), and finally Iran's subsidiary claims under Articles X(1), V(1), and VII(1) (**Chapter 12**). The United States also shows, in **Chapter 13**, that Iran's abuse of rights bars its claims, regardless of the Court's findings on the specific Articles at issue.

1.13 In **Part IV**, the United States provides a brief summary of its case (**Chapter 14**), observations on Iran's faulty submissions on remedies (**Chapter 15**), and a reiteration of its request for relief (**Chapter 16**).[5]

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

CHAPTER 2: THE COURT'S PRELIMINARY OBJECTIONS JUDGMENT AND IRAN'S RESIDUAL CASE

2.1 Iran's Reply obfuscates the effect of the Court's Preliminary Objections Judgment,[6] ignores the termination of the Treaty of Amity, and paints the false picture that this case is about hundreds of pending judicial proceedings before U.S. courts. The effect of the Court's Preliminary Objections Judgment was addressed in the U.S. Counter-Memorial (at paragraphs 2.1–2.18). Iran's response rests on four revised attachments (Attachments 1–4, as addressed above) containing cases that Iran says "remain relevant" or "remain as the basis of Iran's specific claims against the United States" or which "remain a matter of real current concern to Iran and to Iranian companies."[7] As noted above, those Attachments are actively misleading because nearly all of the cases indicated thereon are entirely irrelevant to these proceedings. It is an exercise by Iran in smoke and mirrors. This is addressed further below.

2.2 As regards the termination of the Treaty of Amity, the United States notified the termination of the Treaty on October 3, 2018, and that termination accordingly took effect no later than October 3, 2019.[8] While the United States acknowledges that the Treaty's termination does not go to jurisdiction, Iran, in its Reply, has attempted to enlarge its case by bringing claims arising after the effective termination date of the Treaty. This it cannot do. U.S. obligations under the Treaty of Amity ceased after termination. The United States therefore had no obligations under the Treaty in respect of post-termination measures. As a result, Iran cannot assert claims for breach of the Treaty based on legislative and executive measures that the United States took after the termination of the Treaty,[9] including the National Defense Authorization Act for Fiscal Year 2020 ("NDAA 2020"), enacted on December 20, 2019.[10] Likewise, judgments and decisions of U.S. courts that occurred after the termination

---

[6] Iran has misconstrued the Preliminary Objections Judgment as it bears on the interpretation of individual Treaty articles, including Articles III and IV, but those errors and inaccuracies will be identified in the chapters of the Rejoinder dealing with claims under those articles.

[7] Iran's Reply, ¶¶ 1.21-1.23.

[8] U.S. Counter-Memorial, ¶ 4.9. *See also Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 8, 2018, 10am, p. 24, ¶ 35 (Richard Visek); Press Statement on Threats to American Personnel and Facilities in Iraq, Secretary of State Michael R. Pompeo (Sep. 28, 2018); Remarks to the Media, Secretary of State Michael R. Pompeo (Oct. 3, 2018); Press Statement on U.S. Appearance before the International Court of Justice, Secretary of State Michael R. Pompeo (Oct. 8, 2018); Edward Wong, "Blaming Iran, U.S. Evacuates Consulate in Southern Iraq," N.Y. Times, Sep. 28, 2018 **(U.S. Annex 427)**.

[9] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Ch. III, Art. 13, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) **(U.S. Annex 254)** ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

[10] Iran's Reply, ¶¶ 2.103-107.

of the Treaty cannot be the basis of a claim for breach of the Treaty, including the April 24, 2020 order in *Bennett v. Islamic Republic of Iran* directing the turnover of assets belonging to Bank Melli, as well as subsequent developments in *Peterson II*, where there has been no order to date directing the turnover of any Iranian assets.[11] Therefore, in addition to Iran's claims failing on the merits with respect to these measures, they also fail because the measures post-date the termination of the Treaty of Amity, when the United States was no longer bound by its obligations.

2.3 The United States turns next to Iran's revised attachments, which form the backbone of its case. **Attachment 1** lists judgments obtained by plaintiffs holding Iran liable for its support for acts of terrorism. Iran's claims in respect of these judgments were based on alleged violations of its sovereign immunity. But the Court dismissed these types of claims in its Preliminary Objections Judgment.[12] As the Court summarized its ruling:

> [T]he Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them.[13]

2.4 Iran argues in its Reply that the judgments listed in Attachment 1 "remain relevant" because they are "a significant part of factual background to the U.S. measures of which Iran complains."[14] Specifically, Iran contends that the judgments are (i) relevant "as instances of the blocking and seizure of Iran's assets in violation of the provisions of that Treaty" and (ii) "relevant to the extent that they were solely issued against Iran but were enforced against Iranian companies, denying their separate juridical status, in breach of Iran's rights under the Treaty of Amity."[15]

2.5 As to Iran's first point, the issuance of a judgment against Iran does not itself result in the blocking or seizure of assets. Rather, it is the efforts, if any, by plaintiffs to *enforce* their judgments against Iranian assets—which are the subject of Iran's Attachment 2, discussed

[11] As of May 7, 2021.

[12] U.S. Counter-Memorial, ¶ 2.7.

[13] Preliminary Objections Judgment, ¶ 80.

[14] Iran's Reply, ¶ 1.21.

[15] Iran's Reply, ¶ 1.21.

next—that may result in the attachment of those assets or in their turnover to plaintiffs. Moreover, Iran's second point only serves to confirm that Iran's claims arise out of the manner in which plaintiffs *enforced* the judgments, rather than the substance of the judgments or the proceedings that produced them. The fact remains that Iran has made only immunity-related claims with respect to the judgments listed in Attachment 1, precisely the claims over which the Court previously denied jurisdiction.[16]

2.6 **Attachment 2**, which lists enforcement proceedings initiated by plaintiffs holding terrorism judgments against Iran, is relevant in part, but is also misleading. As noted above, Iran has made *particularized claims* only with respect to a small fraction of the more than one hundred proceedings listed on Attachment 2. Iran's particularized claims are **8** in number, as follows:

#	Case Caption	Case Number	Reply Reference
1	*Peterson v. Islamic Republic of Iran (Peterson I)*	10-cv-4518 (S.D.N.Y.)	¶¶ 2.84-96
2	*Peterson v. Islamic Republic of Iran (Peterson II)*	13-cv-9195 (S.D.N.Y.)	¶¶ 2.97-108
3	*Weinstein v. Islamic Republic of Iran*	02-mc-00237 (E.D.N.Y.)	¶¶ 2.63-69
4	*Bennett v. Islamic Republic of Iran*	11-cv-05807 (N.D. Cal.)	¶¶ 2.70-78
5	*Levin v. Bank of New York*	09-cv-5900 (S.D.N.Y.)	¶¶ 2.79-83
6	*Heiser v. Islamic Republic of Iran*	00-cv-2329 (D.D.C.)	¶¶ 2.109-112, 2.117
7	*Heiser v. Bank of Baroda, New York Branch*	11-cv-1602 (S.D.N.Y.)	¶ 2.114
8	*Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*	11-cv-1601 (S.D.N.Y.)	¶ 2.115

2.7 It is these **8** claims that are relevant in these proceedings and only these **8** claims.

[16] Iran concedes that "it does not rely on the cases in Attachment 1 in respect of its previous claim of sovereign immunity, which was found by the Court to fall outside of its jurisdiction in its ruling of 13 February 2019 on preliminary objections." Iran's Reply, ¶ 1.21.

2.8 The vast majority of other entries in Attachment 2 address cases in which little or no advancement of proceedings has occurred, let alone anything that could give rise to a claim for breach of the Treaty.[17] Moreover, Iran has included cases that would appear to have nothing to do with the breaches of the Treaty that it has alleged. For example, the very first entry in Attachment 2 is a case that involves, as Iran concedes, "assets owned by Iran itself"[18] rather than the assets of an Iranian company. This case, *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems*, is not subject to Iran's complaint about U.S. measures that permit terrorism judgments against Iran to be enforced against the assets of Iranian companies. Iran has also included a case (*Heiser v. Mashreqbank PSC*, No. 46) in which it has asserted that "Iranian funds" were turned over to plaintiffs but has not identified any Iranian entity to which the funds allegedly belonged or even mentioned the case in its Reply. Again, as these examples show, Iran's Attachment 2 is not an accurate depiction of its claims in this case, which are, in reality, confined to the **8** proceedings identified above.

2.9 In addition, as the United States demonstrates in Chapter 6, Iranian entities chose not to appear in four of the **8** proceedings (the *Levin* case and the three *Heiser* cases) to contest the turnover of their assets to plaintiffs, despite having notice of the proceedings and ample opportunity to participate. These entities therefore failed to exhaust their local remedies and Iran cannot pursue claims arising out of these four cases. Moreover, the *Peterson II* case remains pending before the U.S. courts and, accordingly, there has likewise been no exhaustion. As a result, Iran's claims are confined to at most three of the eight cases.

2.10 In any event, as the United States describes in Chapter 8 below, all **8** U.S. enforcement proceedings that Iran has challenged were conducted in a reasonable, non-discriminatory manner and, as detailed in Part III, do not give rise to claims for breach of the Treaty of Amity.

2.11 **Attachment 3**, which lists enforcement actions filed outside the United States by plaintiffs holding U.S. court judgments against Iran, is irrelevant because decisions by foreign courts in deciding whether to recognize and enforce U.S. court judgments are not actions attributable to the United States and cannot therefore be the basis for claims against the United

[17] *See infra* Chapter 6, Section C.

[18] Iran's Reply, ¶ 2.3.

States.[19] While Iran contends that plaintiffs' actions to enforce U.S. court judgments outside the United States are "a direct, foreseeable, and intended result of the U.S. measures,"[20] Iran has not explained how this purported causal link could suffice to render Iran's claims justiciable if, as the Court has already concluded, the only U.S. action in this chain of events—the issuance of judgments against Iran—does not itself constitute a breach of the Treaty of Amity.

2.12 As regards **Attachment 4**, which lists pending liability proceedings against Iran and Iranian State entities in U.S. courts, Iran effectively concedes that it has no direct connection to any of its claims, explaining that it is relevant only "as a factual exhibit demonstrating the extent to which the U.S. measures of which Iran complains remain a matter of real current concern to Iran and to Iranian companies."[21] Iran does not and cannot contest the fact that, as the United States explained in the Counter-Memorial,[22] any claims arising out of these actions, even if they had resulted in a judgment prior to the termination of the Treaty of Amity, would be based on an alleged violation of Iran's sovereign immunity and thus would not be actionable under the Treaty.

2.13 In sum, Attachments 1, 3, and 4 are entirely irrelevant to this case, as is the vast majority of Attachment 2. Iran's claims, as they relate to judicial proceedings, are limited to the **8** enforcement actions that are the subject of particularized claims in Iran's pleadings. Even as to these actions, there has been no exhaustion of local remedies in five of the eight cases, and Iran's claims regarding the *Bennett* and *Peterson II* cases must fail because, in the former case, the order directing the turnover of assets to plaintiffs occurred after the termination of the Treaty of Amity and, in the latter case, there has not yet been any such order.

2.14 Two consequences flow from Iran's overreach in the formulation of its case in its Reply. *First*, the residual scope of Iran's case is far narrower than Iran contends, limited to the **8** cases that are specifically addressed in Iran's Reply. It is these cases, and the legal and factual issues to which they give rise, that are the focus of this Rejoinder. *Second*, the United States respectfully contends that the Court cannot take Iran's case as it finds it. Iran is actively seeking

[19] Critically, even if Iran had viable claims with respect to the actions listed on Attachment 3, these claims remain entirely unsubstantiated. Iran only mentions Attachment 3 in two paragraphs in its Reply and provides no further evidence in support of its characterization of the Attachment 3 cases.

[20] Iran's Reply, ¶ 1.22.

[21] Iran's Reply, ¶ 1.23.

[22] U.S. Counter-Memorial, ¶ 2.7.

to obscure the scope and the reality of the case that remains, following the Court's Preliminary Objections Judgment.

CHAPTER 3: IRAN'S SPONSORSHIP OF TERRORISM

3.1 Iran sponsored terrorist acts directed against U.S. nationals and U.S. interests. As has been made clear throughout these proceedings, the United States responded to these and other attacks by adopting the measures that form the basis of Iran's claims, yet Iran now claims that those measures were in breach of the Treaty of Amity. In addition to detailed submissions on Iran's support for terrorism at the preliminary phase of the case, Iran's conduct was addressed extensively in the U.S. Counter-Memorial. Notwithstanding its professed intention to address these issues at the merits stage, Iran, in its Reply, fails to engage and respond in any meaningful way to the allegations that form the basis of the U.S. measures that it seeks to impugn. The essence of Iran's Reply on this issue is that the United States has not carried its burden of proof, and that Iran does not intend to undertake a "detour" from the path of its case against the United States.[23]

3.2 Yet in fact, the Court expressly left open for the merits the question of whether the egregious Iranian conduct invoked by the United States could provide a defense on the merits.[24] In so doing, while observing that the United States had not argued that Iran's conduct constituted a violation of the Treaty of Amity, the Court left open for the merits the relevance and consequence of the linkage between the Iranian misconduct identified by the United States and Iran's claims before the Court. It is against this background that the United States further addresses the issue of Iran's sponsorship of terrorism—the issue that was the motivation for, and is at the very core of, the measures adopted by the United States of which Iran complains.

3.3 Iran's conduct invoked by the United States is relevant to the U.S. unclean hands submissions, to the U.S. submissions concerning Iran's abuse of rights under the Treaty, and to the U.S. submissions on the application of the treatment standards in Articles III and IV, among others, and the exceptions embodied in Article XX(1)(c) and (d) that preclude Iran's claims with respect to Executive Order 13599.

Section A: Iran's Conduct Invoked by the United States Goes Directly to Iran's Claims in These Proceedings

3.4 Iran, in a passing sentence, denies U.S. allegations of its involvement in terrorist attacks. Crucially, however, Iran fails to engage with the issues and the evidence even as regards such cases as the 1983 Marine Barracks bombing that gave rise to the *Peterson*

[23] Iran's Reply, ¶¶ A.1, A.11.

[24] Preliminary Objections Judgment, ¶ 123.

litigation, which is the central pivot of the case that Iran has brought to the Court.[25] Iran takes the position that its conduct invoked by the United States is irrelevant to its claim. This conduct, however, provides *the* essential context for the Court's consideration of whether the U.S. measures at issue, designed to address sponsorship of terrorist activities by Iran and other States, can possibly amount to a breach of the Treaty of Amity. Iran's failure to engage on this point also shines a light on the true purpose of Iran's claim, which seeks to avoid the consequences of compensatory damages judgments against Iran for unlawful acts that resulted in the death and injury of U.S. nationals.

3.5 As discussed below, and as detailed in the U.S. Counter-Memorial,[26] the evidence of Iran's sponsorship of terrorism adduced by the United States includes, *inter alia*, admissions by Iranian government officials and Iranian agents, U.S. court decisions and decisions by the courts of Belgium, Germany, Azerbaijan, and others, and reports and findings by States and international organizations, including the United Nations.

Section B: The Evidence of Iran's Conduct Advanced by the United States Is Unchallenged

3.6 Iran's categorical denial of the conduct invoked by the United States rests on statements such as that Hezbollah and Hamas "are not the proxies of Iran."[27] In the face of the evidence advanced by the United States, such bald assertions are not persuasive. Absent any contradictory evidence from Iran, the evidence put forward by the United States rests unchallenged.

3.7 Significantly, Iran's denials are contradicted by the admissions of its own officials and agents confirming support for acts of terrorism. Iran's denial also stands in sharp contrast to the evidence relied on by multiple courts, both in the United States and elsewhere, finding Iran complicit in such acts of terrorism, as well as statements of multiple States and international organizations recognizing the Iranian regime's malfeasance.[28] The U.S. Counter-Memorial addressed this in detail and, subject only to the brief observations that follow, the U.S. accordingly refrains from repeating that review here.

---

[25] *See* Iran's Reply, ¶ A.1; *see also* U.S. Counter-Memorial, ¶¶ 5.26-5.27; *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 47-48 (D.D.C. 2003) **(U.S. Annex 36)**.

[26] U.S. Counter-Memorial, Chapter 5.

[27] Iran's Reply, ¶¶ A.1, A.6, A.11.

[28] *See generally* U.S. Counter-Memorial, Chapter 5.

3.8 Two essential points, though, do warrant comment. The first concerns Iran's silence on the heinous attacks for which it has been found responsible by a court and which are at the very heart of these proceedings. The second is to note that Iran's reprehensible conduct continues, with stark examples of which the Court should be aware even since the filing of the U.S. Counter-Memorial.

i. Iran's Silence on the Attacks at the Heart of This Case for Which It Has Been Found Responsible

3.9 Iran is conspicuously silent on the attack that is at the very heart of these proceedings, the 1983 Beirut Marine barracks bombing, despite the clear evidence establishing its responsibility.[29] Following the attack, the Iranian Minister of the Islamic Revolutionary Guard Corps ("IRGC") admitted that the explosive material used in the attack was provided by Iran,[30] and then-Speaker of the Majlis, and later President of Iran, Akbar Hashemi Rafsanjani, acknowledged Iran's responsibility for the bombing.[31] Further, statements made by the Iranian government and Hezbollah reflect the "deep, strategic, and unbreakable" alliance between them, including Hezbollah's public confirmation that it received assistance, training, and weapons from Iran – estimated at $100 million or more annually in financing.[32] The United States also detailed the evidence relied on by the U.S. court in *Peterson*, including testimony of intercepted Iranian messages instructing the instigation of attacks against the United States peacekeepers. It also included testimony of a member of the terrorist group that committed the attack, stating that the Iranian ambassador instructed the attacks to proceed, as well as evidence that Iran purchased the explosives used in the attack.[33]

3.10 Iran is silent on these statements of its own officials. It also has nothing to say about the other evidence of this attack or the many further acts supported and directed by Iran, detailed in prior U.S. submissions. This includes, for example, the confession of Manssor Arbabsiar, who admitted to conspiring with Iranian military officials to cause the assassination

[29] *See id.* ¶¶ 5.20-21, 5.26; *Peterson,* 264 F. Supp. 2d at 47-48 **(U.S. Annex 36)**.

[30] *See* U.S. Counter-Memorial, ¶ 5.23 (citing "Speech of Our Brother Rafiqdoust at One of the Country's Factories for Defense," Ressalat, July 20, 1987 (U.S. P.O. Annex 27)).

[31] *See id.* ¶ 5.24 (citing "Hashemi-Rafsanjani on Alleged McFarlane Visit," Tehran Radio Domestic Service, *in* VII Foreign Broadcast Information Service Daily Rep. 11 (Nov. 5, 1986) (U.S. P.O. Annex 26)).

[32] *Id.* ¶¶ 5.25, 11.13 (citing Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 25, 2011) (U.S. P.O. Annex 152)).

[33] *Id*. ¶ 5.27 (citing *Peterson,* 264 F. Supp. 2d at 54-58 **(U.S. Annex 36)**).

of Saudi Arabia's ambassador to the United States.[34] This evidence is particularly notable given that Arbabsiar, following his arrest, made monitored phone calls with an Iranian IRGC-Quds Force member who confirmed that Arbabsiar should move forward with the assassination attempt. The attempted assassination resulted in the Council of the League of Arab States condemning "the criminal Iranian attempt," the EU issuing sanctions, and the UN General Assembly calling on Iran "to comply with all of its obligations under international law, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents."[35]

3.11 Iran also has nothing to say about the expert and eyewitness testimony U.S. courts heard in connection with Iran's support for kidnappings like that of Terry Anderson, who testified to seeing Iranian uniformed troops training Hezbollah recruits in Lebanon and to being interviewed by an Iranian government agent while in captivity.[36] Likewise, Iran fails to rebut testimony and evidence cited by French, German, Kenyan, Azerbaijani, and other courts concerning Iranian-sponsored assassinations and other criminal acts.[37] Among other conclusions, those courts found that various attacks were "organized and executed by Iranian government officials;"[38] were not "a crime committed by lone gunmen," but were "organized by the Iranian regime;"[39] and that terrorists "had made agreements in advance with members of the special services organizations of the Islamic Republic of Iran, doing criminal activities with them."[40]

3.12 Where Iran does respond, in one isolated case, the "evidence" that it offers falls far short. In connection with the 1996 Khobar Towers bombing, which killed 19 U.S. service

---

[34] U.S. Preliminary Objections, ¶ 3.19 (citing Press Release, U.S. Dep't of Justice, Man Pleads Guilty in New York to Conspiring with Iranian Military Officials to Assassinate Saudi Arabian Ambassador to the United States (Oct. 17, 2012) (U.S. P.O. Annex 61)); Letter from the U.S. Dep't of Justice, U.S. Attorney, Southern District New York, *United States v. Manssor Arbabsiar*, S1 11 Cr 897 (JFK), Plea Agreement of Manssor Arbabsiar (Oct. 17, 2012) (U.S. P.O. Annex 62)).

[35] *See* U.S. Counter-Memorial, ¶ 5.63.

[36] *See* U.S. Counter-Memorial, ¶ 5.48; Chris Hedges, "The Last U.S. Hostage; Anderson, Last U.S. Hostage, Is Freed By Captors in Beirut," N.Y. Times, Dec. 5, 1991 (U.S. P.O. Annex 54).

[37] *See* U.S. Counter-Memorial, ¶¶ 5.3, 5.53, 5.55, 5.56.

[38] *Id.* ¶ 5.53 (citing *Elahi v. Islamic Republic of Iran,* 124 F. Supp. 2d 97, 105 (D.D.C. 2000) **(U.S. Annex 46)**).

[39] *Id.* ¶ 5.3 (citing Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial [Kammergericht: Urteil im 'Mykonos' – Prozess], at 188 (Apr. 10, 1997) **(U.S. Annex 5)**).

[40] *Id.* ¶ 5.55 (citing Supreme Court of Azerbaijan Judgment, Case No. 63, at 18 (Apr. 14, 1997) (U.S. P.O. Annex 69)).

members, Iran cites a single newspaper article, dated from 1998,[41] that fails to account for subsequent statements and developments in the investigation and the U.S. court proceedings.[42] The later U.S. criminal indictment described how elements of the Iranian government inspired, supported, and supervised members of Saudi Hizballah in carrying out the attack, including by providing Iranian-sponsored training inside Iran and directing the attackers' surveillance activities.[43] The U.S. court proceedings relied on testimony by both the Director of the U.S. Federal Bureau of Investigation and its Deputy Counterterrorism Chief at the time of the attack, who relayed information provided by participants in the attack. Those participants had prepared surveillance reports for IRGC officials, and received financing, explosives, and weapons from the Iranian government.[44]

3.13 With the exception of the Khobar Towers bombing, Iran does not respond to any of the other incidents the United States has highlighted as giving rise to the measures that are at the core of Iran's claims. As discussed, Iran's unsubstantiated denial of its support for these incidents asks the Court in effect to ignore not only the findings of the United States and its courts, and the evidence they relied upon, but also the findings of courts of numerous other countries, as well as the findings of international bodies and organizations like the Financial Action Task Force ("FATF"), the International Atomic Energy Agency, and the United Nations.

ii. Iran's Egregious Conduct Continues

3.14 The need for the United States to adopt measures in response to Iran's support for terrorist acts is underlined by the fact that since filing its Application, Iran has continued to engage in the same types of behavior that have defined its foreign policy for over four decades. Iran's continuing misconduct provides important context to Iran's motivations in coming before the Court. As this behavior makes clear, Iran does not seek redress for violation of its rights, but rather to shield itself from the consequences of its actions.

---

[41] Iran's Observations and Submissions, ¶ A.10.

[42] *See Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 48 (D.D.C. 2006) **(U.S. Annex 40)**; *see also* Criminal Indictment, *United States of America v. Al-Mughassil,* Case No. 01-228-A (E.D. Va. June 1, 2001) **(U.S. Annex 255)**.

[43] Press Release, U.S. Dep't of Justice, Attorney General Statement (June 21, 2001) **(U.S. Annex 256)**; Criminal Indictment, *United States of America v. Al-Mughassil*, Case No. 01-228-A (E.D. Va. June 1, 2001) **(U.S. Annex 255)**.

[44] U.S. Counter-Memorial, ¶¶ 5.37-5.38; *see also Blais*, 459 F. Supp. 2d at 48-49 **(U.S. Annex 40)**.

3.15 Recently, Iran has once again reaffirmed its continuing alliance with Hezbollah.[45] As remarked upon by Iranian IRGC commander Amir-Ali Hajizadeh, Iran is responsible for Hezbollah's missile capabilities.[46] Hezbollah's leader Hassan Nasrallah also boasted that in the last year alone Hezbollah had doubled its arsenal of precision-guided missiles.[47]

3.16 Significantly, during the pendency of this case, European law enforcement agencies foiled a bomb attack on the July 2018 conference in Villepinte, France, outside Paris, of the National Iranian Resistance Council, an Iranian political opposition group.[48] The event was attended by approximately 25,000 people, including multiple international political figures.[49] Senior U.S. political figures and officials, as well as figures from other countries (including Canada,[50] the United Kingdom,[51] Colombia,[52] and elsewhere), attended the rally.[53] Amongst other notables were Louis J. Freeh, the former F.B.I. director who led the FBI investigation into the Khobar Towers bombing, Bill Richardson, the former U.S. Ambassador to the United Nations, Stephen Harper, the former prime minister of Canada, and Ingrid Betancourt, a Colombian politician and former presidential candidate.[54]

3.17 The bomb plot was described in considerable detail by Belgian state security services and prosecutors, and in the judgment of the Belgian court that convicted the plotters. Assadollah Assadi, an Iranian diplomat accredited in Austria, directed the plot.[55] As detailed by the Belgian authorities and prosecutors, Assadi carried the bomb in his diplomatic suitcase

---

[45] Dale Gavlak, "Lebanese Bristle Over Iran Commander's Comments Regarding Hezbollah Missile Capabilities," Voice of America, Jan. 4, 2021 **(U.S. Annex 257)**.

[46] *Id.*

[47] *Id.*

[48] Corr. [Court of First Instance] Antwerp, Ct. AC8, Feb. 4, 2021, 20A003763, p. 24 (English translation) **(U.S. Annex 258)**.

[49] Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times, Feb. 4, 2021 **(U.S. Annex 259)**.

[50] *Id.*

[51] Daniel Boffey, "Belgian Court Sentences Iranian Diplomat to 20 Years Over Bomb Plot," The Guardian, Feb. 4, 2021 **(U.S. Annex 260)**.

[52] *See* Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times, Feb. 4, 2021 **(U.S. Annex 259)**.

[53] Samuel Petrequin, "Iranian diplomat convicted of planning attack on opposition," Associated Press, February 4, 2021 **(U.S. Annex 261)**.

[54] *See* Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times, Feb. 4, 2021 **(U.S. Annex 259)**.

[55] Corr. [Court of First Instance] Antwerp, Ct. AC8, Feb. 4, 2021, 20A003763, pp. 8, 11, 33 (English translation) **(U.S. Annex 258)**.

when he boarded a commercial flight from Tehran to Vienna.[56] He then drove to Luxembourg and handed over the explosive, a USB-drive, 18,000 Euros, and a new phone to an Iranian-Belgian couple.[57] The couple—who were his co-defendants in the case—were apprehended while driving toward Brussels, and law enforcement subsequently arrested Assadi while he was transiting through Germany.[58] Belgium's state security services have stated that intelligence officials determined the planned bombing was a State-sanctioned operation approved by Iran.[59] Assadi himself, during interrogation, "warned that armed groups were thought to be ready to undertake something in Belgium, in case he would be convicted."[60]

3.18 Assadi's trial, and that of the three other Iranians, commenced in Belgium in November 2020. Assadi refused to appear in court. The trial concluded in late January 2021, and on February 4, 2021 the court found Assadi and the other three defendants guilty of the attempted deadly bombing.[61] The court further held that Assadi and the other defendants were part of a terrorist group located within Department 312 of Iran's intelligence service (MOIS), used information they gathered through MOIS to organize the bombing, and intended to commit this deadly attack.[62] The court additionally found that the bomb was "fine-tuned . . . and tested multiple times" in Iran.[63] Assadi was found to have "operated from an Iranian political cover" and "did not perform any diplomatic activities," but instead "ran informants in Europe."[64] As the court recognized, "[w]orking under diplomatic status without in fact performing these duties is only possible with the consensus of those responsible with the Iranian state."[65] Due to his role as the "operational brain behind the attack," and lack of conscience about the

[56] *See id.* at 33; Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times, Feb. 4, 2021 **(U.S. Annex 259)**.

[57] Corr. [Court of First Instance] Antwerp, Ct. AC8, Feb. 4, 2021, 20A003763, p. 39 (English translation) **(U.S. Annex 258)**.

[58] *Id.* at 27-28.

[59] *Id.* at 43-45; *see also* Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times, Feb. 4, 2021 **(U.S. Annex 259)**.

[60] Corr. [Court of First Instance] Antwerp, Ct. AC8, Feb. 4, 2021, 20A003763, p. 32 (English translation) **(U.S. Annex 258)**.

[61] *Id.* at 45-46.

[62] *Id.* at 44-45.

[63] *Id.* at 33.

[64] *Id.* at 44.

[65] *Id.*

prospect of committing fatalities, Assadi was sentenced to twenty years in prison, the heaviest sentence of all the defendants.[66]

3.19 As in the present case, Iran did not attempt to counter the evidence of its involvement in the plot before the Belgian court, but instead sought to deflect responsibility by asserting Assadi's diplomatic immunity. The Belgian court rejected that defense on the basis that Assadi was arrested in Germany when traveling outside his alleged diplomatic duties, and not in Austria, the only country in which he enjoyed such status.[67] Predictably, and consistent with its response to other criminal proceedings in which its officials and agents have been found responsible for acts of terrorism, Iran has refused to recognize the Belgian court's verdict.

3.20 Other criminal cases continue to catalogue Iran's practices. In November 2019, in a case with disturbing implications in light of the 2018 bomb plot in Europe, two men pled guilty in U.S. court to charges arising from their conducting surveillance activities on behalf of Iran, including on Iranian dissidents in the United States.[68] In the same month, in Sweden, authorities charged a man with spying on dissident communities and passing the information to Iranian security services.[69] Seven months later, a Danish court sentenced a Norwegian citizen for spying for an Iranian intelligence service and complicity in a suspected plot to kill an Iranian Arab opposition figure in Denmark.[70]

3.21 Iran's execution of journalist Ruhollah Zam in December 2020 represents a further reminder of how the Iranian regime operates. Iranian agents kidnapped Zam from Iraq, after he was lured there by a prospective meeting with Grand Ayatollah Ali al-Sistani, an Iraqi cleric with strong ties to Iran and known as a rival of Khomeini, in order to discuss financial support for a television channel.[71] Once Zam was in Iran, he was convicted of "corruption on earth" and sentenced to death.[72] A subsequent statement released by the German Federal Foreign Office provided that: "The Federal Government is horrified about the execution of the blogger Ruhollah Zam carried out today in Iran . . . . We are shocked by the circumstances surrounding

---

[66] *Id.* at 48, 57.

[67] *Id.* at 9-11.

[68] Press Release, U.S. Dep't of Justice, Two Individuals Plead Guilty for Working on Behalf of Iran (Nov. 6, 2019) **(U.S. Annex 262)**.

[69] "Sweden Charges Man with Spying on Ahwazi Community for Iran," Reuters, Nov. 6, 2019 **(U.S. Annex 263)**.

[70] "Norwegian Found Guilty of Spying for Iran in Denmark," Reuters, June 26, 2020 **(U.S. Annex 264)**.

[71] Elian Peltier, "Iran Issues Death Sentence for Opposition Journalist," N.Y. Times, June 30, 2020 **(U.S. Annex 265)**.

[72] *Id.*

the conviction, particularly by the preceding kidnapping from abroad."[73] France, the country in which Zam held refugee status, released a statement describing his execution as "a barbaric and unacceptable act that is contrary to Iran's international commitments."[74] The EU released a statement stating that it "condemns this act in the strongest terms."[75] Special Rapporteurs with the UN Office of the High Commissioner for Human Rights described Iran's actions as "a serious violation of Iran's obligations under the International Covenant on Civil and Political Rights."[76]

3.22 Iran also remains on the FATF list of High Risk Jurisdictions Subject to a Call for Action. This is particularly noteworthy as, at oral argument, Iran responded to U.S. charges, including that it provided financial support to terrorist groups and activities, by asserting that its parliament "has voted for Iran to become a party to the United Nations Convention for the Suppression of the Financing of Terrorism."[77] Almost two years later, however, Iran has yet to sign or ratify the Convention in line with Iran's FATF action plan to address strategic deficiencies in its Anti-Money Laundering/Countering the Financing of Terrorism ("AML/CFT") system. In February 2020, FATF determined that "given Iran's failure to enact the Palermo and Terrorist Financing Conventions in line with the FATF Standards, the FATF fully lifts the suspension of counter-measures and calls on its members and urges all jurisdictions to apply effective counter-measures."[78] As recently as October 2020, FATF released a statement about "what is often externally referred to as the 'black list,'" calling on "all members and urg[ing] all jurisdictions to apply enhanced due diligence, and in the most serious cases, countries are called upon to apply counter-measures to protect the international

[73] Press Release, Federal Foreign Office of Germany, Federal Foreign Office on the Execution of the Blogger Ruhollah Zam (Dec. 12, 2020) **(U.S. Annex 266)**.

[74] Statement by the Ministry for Europe and Foreign Affairs Spokesperson, French Embassy in London, Iran – Execution of Ruhollah Zam (Dec. 12, 2020) **(U.S. Annex 267)**.

[75] Press Statement, European External Action Service, Iran: Statement by the Spokesperson on the execution of Mr. Ruhollah Zam (Dec. 12, 2020) **(U.S. Annex 268)**.

[76] Statement, U.N. Office of the High Commissioner for Human Rights, Iran: UN Experts condemn execution of Ruhollah Zam (Dec. 14, 2020) **(U.S. Annex 269)**.

[77] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 12, 2018, 3pm, pp. 38-39, ¶ 11 (Mohsen Mohebi).

[78] Financial Action Task Force, *High-Risk Jurisdictions Subject to a Call for Action - 21 February 2020* (Feb. 21, 2020) **(U.S. Annex 270)**.

financial system from the ongoing money laundering, terrorist financing, and proliferation financing (ML/TF/PF) risks emanating from the [listed countries]," including Iran.[79]

3.23 Iran has persistently failed to provide any meaningful response to the allegations and evidence of Iran's sponsorship of terrorist attacks, both against the United States and other States, presented in the Counter-Memorial. In so doing, Iran continues to ignore that its acts form the foundation for the United States' adoption of responsive measures. The Court should accordingly understand Iran's silence for what it is—an admission that Iran cannot rebut the charges the United States has levied against it.

Section C: Concluding Observations

3.24 Iran's conduct detailed in the preceding paragraphs, as well as in the U.S. Counter-Memorial and other pleadings in this case, are directly relevant to the proceedings before the Court. The United States does not need to assert that this conduct constitutes a breach of the Treaty of Amity for it to be material to the Court's consideration of Iran's claims.

3.25 It is inescapable that the relief that Iran seeks in this case is relief from measures that the United States enacted to address Iran's conduct as here described. There is no avoiding that the U.S. measures in issue were enacted to address conduct of State sponsors of terrorism, including Iran, and to provide recourse against Iran and other such States for victims of terrorist attacks. There should be no doubt about the materiality of Iran's conduct both to the interpretation and application of the Treaty of Amity, in the face of a claim by Iran for relief from the consequences of its egregious conduct, and to Iran's entitlement to pursue its claims more generally.

[79] Financial Action Task Force, *High-Risk Jurisdictions Subject to a Call for Action - 23 October 2020* (Oct. 23, 2020) **(U.S. Annex 271)**.

PART II: PRELIMINARY CONTENTIONS

In Part II, the United States responds to arguments in Iran's Reply concerning the four defenses, initially articulated in the U.S. Counter-Memorial, that require dismissal of some or all of Iran's claims. Chapter 4 builds on the discussion in Chapter 3 of the evidence regarding Iran's role in numerous terrorist attacks on U.S. nationals, as well as Iran's failure to offer a substantive response to that evidence in its Reply, to establish that Iran comes to the Court with unclean hands and that, as a result, its claims must be rejected. Chapter 5 highlights Iran's failure, in its Reply, to provide any additional evidence that would support Bank Markazi's classification as a "company" under the Treaty of Amity. Chapter 6 shows that Iran's efforts to avoid the application of the requirement to exhaust local remedies are futile and that there has been no exhaustion in many cases. Finally, Chapter 7 addresses Iran's flawed interpretation of Article XX(1)(c) and (d), both of which squarely apply to Executive Order 13599.

CHAPTER 4: IRAN COMES TO THE COURT WITH UNCLEAN HANDS

Section A: Overview of the U.S. Case

4.1 In Chapter 8 of the U.S. Counter-Memorial, the United States presented its unclean hands defense in response to Iran's claims. The essence of that defense is that Iran's own egregious conduct lies at the heart of its claims. Iran's claims improperly target the very measures that the United States took to mitigate the consequences of Iran's egregious conduct. As set out in Chapter 1 and 3 above, the central *Peterson* litigation was one of the means by which victims obtained redress from 1983 U.S. Marine barracks bombing, a terrorist act for which Iran bears responsibility. Iran now endeavors to avoid paying compensation to those victims by an attempt to hold the United States accountable for breaches of the Treaty of Amity. There is thus an undeniable nexus between the subject-matter of Iran's claims and its conduct, with the effect that Iran should be barred from seeking relief from this Court pursuant to the doctrine of unclean hands.

4.2 As set out in the Counter-Memorial,[80] and developed in Chapter 3 above, Iran has sponsored a comprehensive program of terrorist acts against U.S. nationals from 1983 until the present day. This is a fact that Iran fails to address in any credible manner in its Reply.[81] Instead, Iran seeks to marginalize its legal relevance by claiming that a direct treaty-nexus

[80] *See* U.S. Counter-Memorial, Chapter 5.

[81] *See* Iran's Reply, Annex A.

between its conduct and its claims is required by the Preliminary Objections Judgment. However, as is addressed further below, there is no such requirement. Further, all of the relevant criteria that have emerged from both case-law and commentary are met in this case. In those circumstances, Iran is unable to avoid the Court's consideration of Iran's misconduct and its legal effects.

4.3 The United States deploys the doctrine of unclean hands as a shield, not a sword. It uses the doctrine defensively, rather than a basis on which to advance a claim. This is necessary because Iran deploys the Treaty of Amity as claimant, seeking to obtain redress for U.S. measures directed at addressing and assuaging the effects of Iran's campaign of State-sponsored terrorism. It seeks the Court's assistance to evade the consequences of its own misconduct. For that reason, it is essential that the Court recognize the reality of the case before it and reject Iran's claims in respect of the U.S. measures responsive to them. The doctrine of unclean hands provides an avenue by which the Court can secure this just and proper outcome.

4.4 Against that background, this Chapter proceeds as follows. Section B addresses Iran's various defenses to the application of the unclean hands doctrine. Section C summarizes the application of the doctrine to the facts of this case.

Section B: Iran's Defenses to the Unclean Hands Doctrine Are Meritless

4.5 Iran's attack on the U.S. invocation of unclean hands ignores the facts entirely and misstates the U.S. position. The United States first addresses Iran's core contentions (subsections i. to iv.), before dealing with several subsidiary points that Iran has advanced (subsection v.).

i. Iran Misreads the Preliminary Objections Judgment

4.6 Iran claims that the United States "overlooks the crucial fact"[82] that unclean hands was decided by the Court in the Preliminary Objections Judgment. As Iran reads the Judgment, the Court has already made a "determinative finding in dismissing the United States' defense based on the clean hands doctrine . . . on the merits."[83]

4.7 Iran is wrong to read the Judgment as it does. The United States accepts, of course, that the Court dismissed the U.S. preliminary objection based on unclean hands at paragraph 122 of that Judgment. However, the Court's finding was expressly without prejudice to the position

[82] Iran's Reply, ¶ 11.4.

[83] Iran's Reply, ¶ 11.6.

on the merits. The Court made this clear in the paragraph immediately following that on which Iran relies. At paragraph 123, the Court stated: "Such a conclusion is however *without prejudice* to the question whether the allegations made by the United States . . . could, eventually, provide a *defence on the merits*." It is precisely because of that clear indication that the United States advances a defense on the merits at this stage of the proceedings.[84] Nothing in the Court's Preliminary Objections Judgment limits its ability to do so.[85]

ii. Iran Mischaracterizes the Nature of the Nexus That Is Required for Invocation of the Unclean Hands Doctrine and Would Have the Court Apply Additional Criteria That Are Not Part of the Doctrine

4.8 As noted above, one of Iran's core contentions is that the doctrine requires the United States to allege a breach of the Treaty of Amity, which it has failed to plead. It relies specifically on the Court's statement at paragraph 122 of the Preliminary Objections Judgment (since reiterated in the *Jadhav* case[86]):

> The Court begins by noting that the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based. Without having to take a position on the "clean hands" doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine (*Avena and Other Mexican Nationals (Mexico v. United States of America*), Judgment, I.C.J. Reports 2004 (I), p. 38, para. 47; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 52, para. 142).

4.9 The Court was not suggesting that a direct treaty-nexus is a necessary requirement. Nor could it have done so. There is no reason of logic or principle why that would be necessary in circumstances where the doctrine is advanced as a defense on the merits. Equity does not require such a nexus.[87] Nor should the Court. Instead, when the doctrine is employed as a

---

[84] *See* U.S. Counter-Memorial, ¶ 8.4.

[85] It is also notable that at the earliest opportunity the United States expressly reserved its right to raise the doctrine of unclean hands as a defense on the merits; *see* U.S. Preliminary Objections, ¶ 6.38, n.251.

[86] *Jadhav Case (India v. Pakistan)*, 2019 I.C.J. 418, 435, ¶ 61. *See also id.,* Declaration of Judge Iwasawa, 520, ¶ 3.

[87] *See* SNELL'S EQUITY ¶ 5-010 (33rd ed. 2018) **(U.S. Annex 84)**. See, more broadly, the nexus expressed in *Frierdich & Co*, Opinion of the Umpire, 10 *R.I.A.A.* 50, 54 (July 31, 1905) **(U.S. Annex 99)** (where the company was the "primary and potent cause of its own misfortunes" and was denied its requested relief on that basis). *Cf. Jadhav Case*, 2019 I.C.J., Declaration of Judge Iwasawa 520, ¶ 3 (where a declaration of inadmissibility is sought in a case involving a compromissory clause).

shield, a subject-matter nexus is all that must be proved.[88] This reflects a principled approach to the question of causation, consistent with the doctrine's underlying considerations of equity and good faith.

4.10 On any reasonable view, there is a manifest subject-matter nexus in this case. As explained in the U.S. Counter-Memorial,[89] Iran's acts are directly engaged by the case that Iran brings to the Court. That case concerns U.S. measures directly responsive to those wrongful acts, as explained further in Section C below. Indeed, Iran's entire case seeks to press the alleged Treaty breaches into action to assist it in evading its responsibility for the very same conduct that led to the U.S. measures of which it complains.

4.11 Iran further contends that there are other, strict criteria governing the application of the unclean hands doctrine where no treaty breach is alleged, namely that (i) the breach must concern a continuing violation; (ii) the remedy must seek protection against future violations (*i.e.*, specific performance, rather than damages); and (iii) there must be a relationship of reciprocity between the States' obligations.[90] In this connection, Iran purports to apply the criteria set down in Judge Hudson's individual opinion in the *Diversion from the Water Meuse* case, as summarized by the *Niko Resources* tribunal.

4.12 As set out in the Counter-Memorial,[91] the criteria that Judge Hudson identifies have no application to this case. They apply to the specific maxim of *exceptio non adimpleti contractus* (the exception of non-performance of a contract, codified in Article 60 of the Vienna Convention on the Law of Treaties).[92] Iran has given no answer to this point but simply ignored the U.S. submissions entirely.

iii. Iran's Criticism of the U.S. Case-Law Analysis Is Misplaced

4.13 Further, in an attempt to undermine the credibility of the U.S. position, Iran generally attacks the U.S. case-law analysis. It describes that analysis as "distorted," contending that the U.S. has provided "truncated quotes of the selected decisions" (noticeably preferring not to offer particulars of any claimed truncations). Iran then describes the resulting U.S. conclusion as follows: ". . . the Respondent comes to the conclusion that although many states have relied

[88] *See* U.S. Counter-Memorial, ¶ 8.13; *see also* ¶ 8.8.

[89] *See* U.S. Counter-Memorial, ¶¶ 8.16-8.23.

[90] *See* Iran's Reply, ¶¶ 11.27-11.28, 11.30(b).

[91] *See* U.S. Counter-Memorial, ¶ 8.14.

[92] *See id.*

on the unclean hands doctrine, this doctrine 'has never [been] rejected [. . .] as a matter of principle'. . . ."[93] One is left with the impression that the United States has fitted its analysis of the case-law to meet this broad proposition of fact.

4.14 This mischaracterizes the U.S. position. In its Counter-Memorial, the United States expressly accepted that doubt has been expressed about the doctrine's status and scope.[94] Further, the United States acknowledged that the Court has never applied the doctrine.[95] It did not put the point any more widely than that, despite the impression that Iran tries to convey. As the U.S. Counter-Memorial states: "While *the Court* has not previously upheld a defense on this basis, *it* has also never rejected the doctrine as a matter of principle."[96] In its efforts to undermine the U.S. position, Iran has misquoted the U.S. case.

4.15 Contrary to the impression given by Iran, the United States has been clear in its analysis and presentation of the authorities on which it relies. The United States respectfully invites the Court to review its submissions as advanced, rather than as asserted by Iran.

iv. The Court Should Disregard Iran's Attempt to Downplay the Significance of the Many Invocations by States of the Unclean Hands Doctrine, Including Iran's Own Unqualified Endorsement

4.16 Iran does not take issue with the fact that the doctrine of unclean hands has had—as Iran puts it—"many invocations by states."[97] Iran's case, rather, proceeds on the basis that "[i]nternational courts and tribunals have not applied the clean hands doctrine."[98] In fact, Iran goes so far as to say "there is no so-called clean hands doctrine"[99] that is capable of application.

4.17 Iran's position is at odds with its own unqualified endorsement of the doctrine in pleadings before both the Iran-U.S. Claims Tribunal[100] and before the Court.[101] Of particular

---

[93] Iran's Reply, ¶ 11.9.

[94] *See* U.S. Counter-Memorial, ¶ 8.5.

[95] *See id.*, ¶¶ 8.5 and 8.9.

[96] *Id.*, ¶ 8.9 (emphasis added).

[97] Iran's Reply, at 231 (subheading A).

[98] *Id.*

[99] Iran's Reply, ¶ 11.13.

[100] *See Aryeh v. Iran*, Case Nos. 842, 843 & 844, Respondent's Hearing Memorial and Written Evidence, Vol. III, Exhibit C (Mar. 23, 1993) (Doc. 80) (IRAN-U.S. CL. TRIB.) (U.S. P.O. Annex 187).

[101] See Iran's pleadings before this Court in the *Oil Platforms case*, in which Iran itself appeared to invoke the unclean hands doctrine in response to the United States' counter-claim. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Further Response to the United States' Counter-Claim, ¶¶ 7.41-7.43 (Sep. 24, 2001). Iran also appeared to accept the relevance of this doctrine to the merits. *See Oil Platforms (Iran v. United States)*,

note is Iran's reliance on Professor Edwin Borchard's observation—also relied upon by the United States in these proceedings[102]—that "[i]t is an established maxim of all laws, municipal and international, that no one can profit by his own wrong, and that a plaintiff or a claimant must come into court with clean hands."[103] Equally revealing are Iran's concluding remarks in the case of *Aryeh v. Iran*, which contain the following passage:

> The claim should be dismissed under the *universal, equitable doctrine of 'clean hands'*. The doctrine, which *is supported by a vast and diverse body of international legal literature, State practice and international case-law*, states that anybody wishing to bring a claim before an international court, must have acted properly and correctly prior to the claim, particularly with respect to the laws of the respondent State. *Equity demands that one who has behaved illegally in a particular State not then be allowed to sit in judgment of that State's allegedly illegal actions*.[104]

4.18 The fact that the *Aryeh* case—like the others in which Iran invoked the clean hands doctrine[105]—arose in a different factual context is plainly no answer to Iran's *volte-face* on the law.[106] Its endorsement of the doctrine was general and unqualified.

4.19 Putting its own invocation of the doctrine to one side, the significance of States' repeated reliance on the doctrine is that it demonstrates the doctrine's recognition as a general principle of law applicable on the international plane under Article 38(1)(c) of the Court's

---

2003 I.C.J. 161, 179, ¶ 28 (Nov. 6) ("According to Iran, as far as State-to-State claims are concerned, such principle may have legal significance only at the merits stage, and only at the stage of quantification of damages, but does not deprive a State of *locus standi in judicio*.")

[102] *See* U.S. Preliminary Objections, ¶ 6.33, citing EDWIN BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 713 (1915).

[103] *Aryeh v. Iran*, Respondent's Hearing Memorial and Written Evidence, Vol. III, Exhibit C, at 34 (U.S. P.O. Annex 187).

[104] *Id.* at 44 (emphasis added).

[105] *Mohtadi v. Iran*, Case No. 271, Award No. 573-271-3 (Dec. 2, 1996), 32 IRAN-U.S. CL. TRIB. REP. 124, ¶ 34 (U.S. P.O. Annex 188); *Karubian v. Iran*, Case No. 419, Award No. 569-419-2 (Mar. 6, 1996), 32 IRAN-U.S. CL. TRIB. REP. 3, ¶ 148 (U.S. P.O. Annex 189). *See also Oil Platforms (Islamic Republic of Iran v. United States of America)*, Further Response to the United States' Counter-Claim, ¶¶ 7.41-7.43 (Sep. 24, 2001).

[106] Iran's Reply, ¶ 11.15. Nor should the Court have the impression that the Tribunal rejected the existence of the doctrine in any of these three cases. In *Mohtadi v. Iran* at ¶ 92, the Tribunal found it "unnecessary to consider the issue." In *Karubian v. Iran* at ¶ 161, the Tribunal barred the claimant's claim on the basis of the doctrine of abuse of rights. In *Aryeh v. Iran*, the Tribunal declined to apply the unclean hands doctrine on the basis that there was "no evidence that would support the Respondent's contentions that the claim should be barred on the basis of the theories of clean hands, estoppel, misrepresentation, good faith or state responsibility." Case No. 266, Award No. 583-266-3 (Sep. 25, 1997), 33 IRAN-U.S. CL. TRIB. REP. 368, 386-7 ¶ 62 **(U.S. Annex 274)**.

Statute. As indicated in the Counter-Memorial, that practice is significant, and has since developed further still.[107]

v. Iran's Other Points Are Equally Unpersuasive

4.20 In addition to its core contentions addressed above, Iran's Reply makes five additional points in an effort to resist the application of the unclean hands doctrine, which the United States deals with below. None have merit.

4.21 *First*, Iran contends that the doctrine cannot be treated as a general principle of law within the meaning of Article 38(1)(c) as the domestic jurisdictions that the United States identifies are "significantly limited to common law countries."[108] This submission overlooks Iran's previous acceptance before this Court that "[t]he concept of 'clean hands' finds its origins in Roman law, as an equitable doctrine, in English law and also in Islamic law."[109] It also entirely ignores the United States' reference to the manifestation of the doctrine in civil law systems.[110] Indeed, the breadth of doctrine is such that Judge Weeramantry, Vice-President of the Court, described the doctrine of unclean hands as "a principle of equity and judicial

[107] At least 25 States have relied on the doctrine in international disputes. As noted in the U.S. Counter-Memorial at n.187, at least 13 States (Australia, Belgium, Canada, Germany, Greece, Israel, Kenya, the Netherlands, Nicaragua, Pakistan, Portugal, the United Kingdom, and, of course, the United States) have invoked an unclean hands-based objection before the Court. As set out in n.193 of the U.S. Counter-Memorial, 8 States—Bangladesh, Bolivia, Ecuador, Indonesia, the Philippines, Russia and Venezuela—have invoked the doctrine in investor-State cases. Since the Counter-Memorial was prepared, it has also been invoked by a further 5 States: the Lao People's Democratic Republic in *Sanum Investments v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award ¶¶ 99 and 104 (Aug. 6, 2019) **(U.S. Annex 275)**; Republic of Colombia in *Glencore International AG v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award ¶ 566 (Aug. 27, 2019) **(U.S. Annex 276)**; Poland in *GPF v. Republic of Poland*, SCC Arbitration V 2014/168, Final Award ¶ 197 (Apr. 29, 2020) **(U.S. Annex 277)**; Mozambique in *Patel Engineering v. Mozambique*, PCA Case No. 2020-21, Respondent's Motion for Bifurcation, at 5 (Nov. 20, 2020) **(U.S. Annex 278)**; Spain in *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Second Proposal to Disqualify all Members of the Tribunal ¶ 40 (Dec. 15, 2020) **(U.S. Annex 279)**.

[108] Iran's Reply, ¶ 11.18.

[109] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Reply and Defence to Counter-Claim, ¶ 8.6 (Mar. 10, 1999). As explained in the U.S. Counter-Memorial, ¶ 8.7, the doctrine also has its origins in Chinese customary law.

[110] *See* U.S. Counter-Memorial, ¶ 8.7. Reference is made in n.184 to Switzerland: Swiss Civil Code of Obligations of Mar. 30, 1911 (as at Apr. 1, 2017), Article 66 **(U.S. Annex 85)** and Germany: Bürgerliches Gesetzbuch (BGB) (German Civil Code) § 817 **(U.S. Annex 86)**. *See also* Czech Republic: The Civil Code of the Czech Republic, Feb. 3, 2012, §6(2) **(U.S. Annex 280)**; Québec: *Bertout v. Saffran* (2019) QCCS 4367, ¶ 52 (Oct. 22) (Québec Superior Court) **(U.S. Annex 281)**; U.S. Counter-Memorial, ¶ 18.4, n.537.

procedure, well recognized *in all legal systems* . . . ."[111] In any event, a principle does not require universal application in order to be recognized under Article 38(1)(c).[112]

4.22 *Second*, Iran attempts to marginalize the seminal Mixed Claim Commission decisions on which the United States relies (namely *Frierdich & Co* and *Good Return and the Medea*). It observes that equity was the "exclusive basis" of both commissions,[113] and "is not a source of public international law."[114] If Iran's point is that these decisions do not apply international law, but were made *ex aequo et bono*, that is wrong.[115] In any event, Iran overlooks the fact that equity itself may be a material source of law.[116]

---

[111] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 1999 I.C.J. 124 (Provisional Measures Order of June 2), 184 (Dissenting Op. of Judge Weeramantry, Vice-President of the Court) (emphasis added).

[112] M. CHERIF BASSIOUNI, "A Functional Approach to General Principles of International Law," 11 MICH. J. INT'L L. 768, 788-789 (1990) **(U.S. Annex 282)**.

[113] Iran's Reply, ¶ 11.10, n.826. In the footnote, Iran also observes in passing that the cases are quoted "very partially" and are in fact "much less coinciding with the U.S. thesis than it alleges." This unparticularized criticism is neither helpful nor accurate.

[114] Iran's Reply, ¶ 11.10.

[115] *Frierdich & Co.* was a decision of the French-Venezuelan Mixed Claims Commission. That Commission was governed by the Protocol between Venezuela and France signed on February 27, 1903. This provided in Article 1 that "The Commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity without regard to objections of a technical nature, or of the provisions of local legislation." Vol. X *R.I.A.A* 3 **(U.S. Annex 283)**. Umpire Plumley explained in the *Aroa Mines Case* (before the British-Venezuelan Commission, governed by a materially identical Protocol), "[t]he phrase, 'absolute equity', used in the protocols, the umpire understands and interprets to mean equity unrestrained by any artificial rules in its application to the given case. Since this is an international tribunal established by the agreement of nations, there can be no other law, in the opinion of the umpire, for its government than the law of nations; and it is, indeed, scarcely necessary to say that the protocols are to be interpreted and this tribunal governed by that law, for there is no other; and that justice and equity are to be invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity." *Aroa Mines (Limited) Case – Supplementary Claim,* Vol. IX *R.I.A.A* 402, 444 (1903) **(U.S. Annex 284)**. *Good Return and the Medea* was a decision of the Ecuadorian-United States Claims Commission made under the convention between the United States and Ecuador on January 18, 1862. Article 1 of the convention does not refer to equity but states that commissioners "shall make solemn oath that they will carefully examine, and impartially decide, according to justice, and in compliance with the provisions of this Convention all Claims . . . ." **(U.S. Annex 285)**. The commissioners considered themselves bound to decide questions submitted to them "according to law and justice." *Good Return and the Medea*, Opinion of the Commissioner, Mr. Hassaurek, 29 *R.I.A.A.* 99, 102 (Aug. 8, 1865) **(U.S. Annex 98)**. It is also notable that this decision is cited by Professor Bin Cheng without noting the point of distinction sought to be drawn by Iran. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 156-157 (1953) **(U.S. Annex 286)**.

[116] *See Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 76 (Individual Opinion of Judge Hudson) (Jun. 28) ("What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals . . . . A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence."); *see also id.* at 77 ("It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."). Further and in any event, unclean hands is a part of the "legal concept of equity," which the Court has recognized as a general principle. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 60, ¶ 71 (Feb. 24) ("the legal concept of equity is a general

4.23 *Third*, Iran mischaracterizes the United States' use of investment treaty awards in its Counter-Memorial. After reading Iran's Reply, the Court would be forgiven for thinking that a core plank of the U.S. case on unclean hands was a collection of investment treaty awards. Iran explains that the U.S. "relies on various other investment cases in which States have raised a clean hands objection."[117] It ignores the fact that these awards are expressly cited as examples of States' reliance on the doctrine, not as evidence of a broader proposition.[118] Regardless, to the extent that the Court finds these awards of assistance, it should bear in mind that the points of detail that Iran advances in respect of those cases are neither completely nor accurately stated.[119] Nor do the awards on which Iran positively relies assist the Court.[120]

---

principle directly applicable as law"). *See also Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986, I.C.J. 554, 633, ¶ 149 (Dec. 22).

[117] *See* Iran's Reply, ¶ 11.16.

[118] *See* U.S. Counter-Memorial, n.193 ("The doctrine has been expressly invoked by at least eight States . . . ," followed by a list of investment decisions with the relevant State identified).

[119] *First*, Iran refers to the award in *Al-Warraq v. Indonesia*, which the United States cited as an example of State practice, explaining that the tribunal "based its use of the clean hands doctrine not on a general principle of law but on the express text of Article 9 of the OIC Agreement." Iran's Reply, ¶ 11.16. Iran omits to mention that the doctrine of clean hands was an additional reason for the Tribunal's decision on inadmissibility. *See Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award ¶ 647 (Dec. 15, 2014) **(U.S. Annex 91)**. For this reasoning, Professor Patrick Dumberry has described the *South American Silver v. Bolivia* tribunal's summary, quoted by Iran in its Reply at ¶ 11.16, to be "misleading." PATRICK DUMBERRY, "The Clean Hands Doctrine as a General Principle of International Law," 21 JOURNAL OF WORLD INVESTMENT AND TRADE 489, 515 (2020) **(U.S. Annex 288)**. *Second*, Iran cites the case of *Copper Mesa v. Ecuador*, contending that it "does not help the United States." Iran's Reply, ¶ 11.17. In Iran's submission, "the defendant had invoked the clean hands doctrine, but the tribunal did not address the argument . . . ." *Id.* In fact, the Tribunal identified various defects in the way in which the argument had been put, before concluding that it "prefers to take into account the Claimant's case not in the form of the doctrine of unclean hands as such, but rather under analogous doctrines of causation and contributory fault." *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award ¶¶ 5.62-5.65 (Mar. 15, 2016) **(U.S. Annex 92)**.

[120] Iran relies on the reasoning of two investment treaty decisions for the proposition that the doctrine does not apply in the absence of an express treaty clause, namely *South American Silver v. Bolivia* and the *Yukos v. Russia* awards. *See* Iran's Reply, ¶¶ 11.20-11.23. Neither case offers the Court much, if any, assistance. Neither tribunal conducted an adequate analysis of State practice or domestic law to assess whether it has achieved the requisite recognition. The *South American Silver* tribunal expressly lamented the insufficiency of the evidence presented by the respondent State. *See South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award ¶¶ 445-446 (Nov. 22, 2018). The *Yukos* tribunal seemed to have no regard to the domestic law position at all, whether on a comparative basis or otherwise. *See Yukos Universal Limited v. Russia*, PCA Case No. AA 227, Final Award, ¶¶ 1357-1363 (Jul. 10, 2014); *See*, with the same effect, *Hulley Enterprises (Cyprus) Limited v. Russia*, PCA Case No. AA 226, Final Award ¶¶ 1358-1363 (Jul. 18, 2014) **(U.S. Annex 81)**. Further, neither award considers the doctrine as a defense to the merits, which is the question that is presently before this Court. What is more, neither award appears to have been subsequently endorsed or applied. On the contrary, the reasoning and approach have been trenchantly criticized. *See* DUMBERRY, 21 JOURNAL OF WORLD INVESTMENT AND TRADE, 501-16 **(U.S. Annex 288)**. It is notable that the Tribunal's decision in *Glencore v. Bolivia* made no reference to the *Yukos* award. *See Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), ¶¶ 45-47 (Jan. 31, 2018) **(U.S. Annex 95)**.

4.24 *Fourth*, Iran relies heavily on the fact that the unclean hands doctrine was not included in the ILC Draft Articles as a "circumstance precluding wrongfulness."[121] This does not take it very far. The doctrine's invocation and application was recognized, but ultimately, it was considered unnecessary to include it.[122]

4.25 *Fifth*, and finally, according to Iran, the United States wrongly assumes that the doctrine is capable of being translated to the international stage.[123] However, Iran identifies no reason for which the doctrine is not perfectly adaptable to inter-State claims. Nor is there any. The doctrine—like the equitable maxims to which it is closely connected—is easily adapted to inter-State claims. The fact that States have consistently invoked the doctrine before international courts and tribunals is a testament to this. So, too, is its recognition by judges and commentators as a part of international law.[124]

Section C: The Doctrine's Relevance and Application in This Case

4.26 The United States acknowledges that the doctrine of unclean hands has not yet been applied by the Court. That fact should not dissuade it from doing so in the compelling circumstances of this case.

4.27 As set out in the U.S. Counter-Memorial[125] and developed above, the doctrine has a long and deep pedigree in a range of domestic jurisdictions, both civil and common law. It is closely linked to equitable maxims that this Court has recognized and applied, *i.e.*, *ex turpi causa non oritur actio* ("an unlawful act cannot form the basis of an action in law") and *nullus commodum capere potest de sua injuria propria* ("a party cannot benefit from its own

---

[121] Iran's Reply, ¶ 11.10.

[122] *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 162, ¶ 9 (2002) **(U.S. Annex 88)** ("The so-called 'clean hands' doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It does not need to be included here."). *See also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 675 (9th ed. 2019) **(U.S. Annex 289)**, where the same position is articulated.

[123] *See* Iran's Reply, ¶ 11.19.

[124] *See, e.g.*, Gerald G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 119 (1957) **(U.S. Annex 106)**.

[125] *See* U.S. Counter-Memorial, ¶¶ 8.5-8.15.

wrong").[126] It has been expressly accepted by Members of the Court[127] and recognized by States before international tribunals,[128] which attests to its character as a general principle of law. By its criteria, the doctrine permits the Court to deny a State's request for relief where it has engaged in serious misconduct or wrongdoing that has a sufficiently close connection to the relief sought.[129]

4.28 These requirements are plainly met in the extraordinary circumstances of this case. Iran has pursued a long-established and comprehensive program of terrorist acts specifically targeted at U.S. nationals and facilities. This resulted in (among others) the death of 241 U.S. peacekeepers in the attack on the U.S. Marine barracks in Beirut, which gave rise to the principal case that Iran relies on in its Reply, the *Peterson* case. As set out in the Counter-Memorial, U.S. courts concluded, on the basis of comprehensive fact and expert evidence, that Iran had sponsored that attack.[130] As one judgment put it, Iran's complicity was "established conclusively," it being "beyond question" that the Iranian government had contributed "massive material and technical support" to Hezbollah and its agents.[131] These acts are intimately connected to the claims that Iran now seeks to advance before the Court. Not only were the U.S. legislative and executive measures at issue responsive to the barracks bombings and similar attacks, but the judicial and legislative framework that the United States carefully developed to allow the victims of terrorism to obtain redress would never have been necessary, but for Iran's bad acts and the acts of other State sponsors of terrorism. The nexus between those acts and Iran's claims is clear and manifest.

4.29 For all of those reasons, the United States invites the Court to dismiss Iran's claims on the basis of its unclean hands.

---

[126] *See* U.S. Counter-Memorial, ¶ 8.7. This principle has been recognized by at least one Member of the Court as relevant to treaty interpretation. *See Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *Advisory Opinion of June 1, 1956*, I.C.J. 23, 46 (Separate Opinion of Sir Hersch Lauterpacht) ("It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument -- not to change it.")

[127] *See* U.S. Counter-Memorial, ¶ 8.9.

[128] *See id.*

[129] *See* U.S. Counter-Memorial, ¶ 8.13.

[130] *See* U.S. Counter-Memorial, n.212 in particular. *See also* U.S. Counter-Memorial, Chapter 5.

[131] *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 54, 58 (D.D.C. 2003) **(U.S. Annex 36)**.

CHAPTER 5: BANK MARKAZI IS NOT A "COMPANY" FOR PURPOSES OF THE TREATY OF AMITY

5.1 Iran's claims related to Bank Markazi allege violations of Treaty provisions (namely, Articles III, IV, and V) that extend protections only to "nationals" and "companies" of a Party. Those claims therefore can only proceed if Bank Markazi is considered a "company" under the Treaty. The facts presented by Iran, which have not substantially changed since the Preliminary Objections stage, do not support such a conclusion.

5.2 The only relevant activity that Iran has alleged that Bank Markazi has undertaken in the United States involves the investment of U.S. dollar security entitlements. Iran does not contest Bank Markazi's assertion, made on multiple occasions in U.S. litigation, that these investments were part of its management of Iran's currency reserves. Nor does Iran contest that Bank Markazi's management of Iran's currency reserves is a sovereign function. As a result, the only question remaining before the Court is whether Bank Markazi's activities related to its management of Iran's currency reserves may nonetheless be considered commercial in nature. They cannot. Given the sovereign nature of a central bank's responsibilities to manage a State's currency reserves, which has no commercial comparator, Bank Markazi is not a "company" under the Treaty, and therefore is not entitled to the protections of the specific Treaty provisions asserted by Iran.

Section A: Iran Has Not Provided Additional Facts That Would Demonstrate Bank Markazi Was Engaged in Activities of a Commercial Nature as It Pertains to This Case

5.3 In its Preliminary Objections Judgment, the Court established that a State-owned entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a "company" for purposes of the Treaty.[132] The Court acknowledged, however, the possibility that entities may "engag[e] both in activities of commercial nature (or more broadly, business activities) and in sovereign activities."[133] In such situations, the entity may be characterized as a "company" within the meaning of the Treaty, but only "to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities."[134]

[132] Preliminary Objections Judgment, ¶ 91.

[133] *Id.* ¶ 92.

[134] *Id.*

5.4 The Court took the view, for purposes of its Preliminary Objections Judgment, that it did not have all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of a commercial nature which would permit Bank Markazi to be characterized as a "company" within the meaning of the Treaty.[135] Notably, there was no factual dispute during the Preliminary Objections stage of the proceedings that Bank Markazi, as a central bank, performs sovereign central bank functions. The Court acknowledged that Iran conceded this point.[136] The Court also noted Iran's failure to demonstrate at the Preliminary Objections stage that Bank Markazi was engaged in other activities of a commercial nature that would qualify it as a company for purposes of the Treaty and afforded Iran the opportunity to demonstrate that "alongside the sovereign functions which it concedes, Bank Markazi engages in activities of commercial nature."[137]

5.5 The inquiry now is whether Iran, with its second chance, has adequately demonstrated that Bank Markazi has engaged in activities of a commercial nature, which would allow it to be characterized as a "company" in this case. In order to make such a showing, Iran must demonstrate that Bank Markazi's activities within the territory of the United States at the time of the U.S. measures were commercial and not sovereign central bank activities.[138]

5.6 Iran's Reply fails to do so. Iran has not provided substantial new information concerning the Bank's authorities or activities that was not already before the Court at the Preliminary Objections stage. Rather than provide factual information that would point to relevant commercial activities in the United States at the time of the U.S. measures, Iran attempts to recharacterize its core central bank activities as commercial. This attempt is based on a misreading of the Court's Preliminary Objections Judgment and other authorities relied on by Iran. Yet Iran's factual case is no more sufficient now than it was at the Preliminary Objections stage, and does not establish that Bank Markazi's activities are of a nature that would warrant Bank Markazi being considered a "company" under the Treaty.

---

[135] *Id.* ¶ 97.

[136] *Id.* ¶ 94.

[137] *Id.* ¶ 94, 97.

[138] *Id.* ¶ 93.

Section B: The Domestic Authorities Cited by Iran Further Demonstrate That Bank Markazi Is Responsible for Traditional Central Bank Functions Involving Sovereign Activity That Has No Commercial Comparator

5.7 In arguing that Bank Markazi's activities relevant to this case were of a commercial nature, Iran first argues that Bank Markazi can perform commercial activities under Iran's Monetary and Banking Act of 1972.[139] Even if Bank Markazi is authorized to undertake activities of a commercial nature, that is not sufficient for the inquiry in this case. Iran must further demonstrate that Bank Markazi *did* undertake commercial activities in the United States at the time of the relevant United States measures.

5.8 Yet, Iran falls short even on this preliminary step. While acknowledging that the Monetary and Banking Act of 1972 unambiguously assigns expansive sovereign functions to Bank Markazi and specific powers to execute those functions,[140] Iran points to Article 12 of the Monetary and Banking Act, which designates Bank Markazi as "Banker to the Government" to argue that in this capacity it performs banking activities that are identical to those performed by a commercial bank.[141] Iran's description, however, significantly understates the uniquely sovereign role that Bank Markazi performs as "Banker to the Government." In addition to keeping the accounts of Iranian government entities and handling all of their banking transactions, Article 12 assigns the following functions to Bank Markazi:

- Selling and repaying principal and interest on Government Bonds and Treasury bills, as the agent of the Government (Article 12(b));
- Keeping all of the country's foreign exchange and gold reserves (Article 12(c));
- Keeping funds in Rial for the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association and similar entities (Article 12(d));
- Making payment agreements in compliance with monetary, financial, commercial and transit agreements between the State and foreign States (Article 12(e)).[142]

---

[139] Iran's Reply, ¶¶ 3.15-22.

[140] *Id.* ¶ 3.17.

[141] *Id.* ¶ 3.18.

[142] Monetary and Banking Act of 1972, amended 2016 (IM Annex 73).

The activities of Bank Markazi as "Banker to the Government," as described in Article 12 of the Monetary and Banking Act of 1972, are far from identical to those performed by commercial banks and only further illustrate the broad scope of uniquely governmental activities that Bank Markazi engages in as a result of its central bank functions.

5.9 Next, Iran notes that Bank Markazi is vested with other financial and business activities that "are identical to those performed by private companies in a 'free and competitive market.'"[143] Iran has already made this point about Bank Markazi undertaking professional activities that are also performed by private companies.[144] The United States does not dispute that Iranian law empowers Bank Markazi to open accounts with foreign banks, carry out authorized banking operations, enter into contracts, purchase and sell gold and silver, and undertake any number of other specific activities that are necessary for Bank Markazi to carry out the sovereign functions that are detailed in the Monetary and Banking Act of 1972. Indeed, like any government entity, Bank Markazi would be unable to carry out its sovereign functions without being able to perform certain basic activities, such as entering into a contract, that private parties also undertake. But Iran has yet to demonstrate that these activities are done for anything other than carrying out the sovereign tasks and objectives of Bank Markazi. And in this context, Bank Markazi is operating as a central bank in a unique capacity that is vastly different from private companies operating in a free and competitive market.

5.10 Even assuming Iran's argument that Bank Markazi pays income tax to the Iranian government is accurate, as Iran asserts, such an argument suffers from a similar flaw in that it does not establish that the underlying activities of the Bank are commercial in nature. Iran admits that the profits on which Bank Markazi is taxed come from foreign currency transactions "as part of Bank Markazi's daily operations to satisfy foreign currency needs of the market."[145] The affidavit from a Bank Markazi official cited by Iran goes on to explain that any surplus resulting from these transactions constitutes part of the reserves of Bank Markazi, which it invests in a manner similar to other central banks, and uses "to instill market confidence, and promote central bank's primary objective of price stability."[146] The affidavit describes the type

[143] Iran's Reply, ¶ 3.19.

[144] Iran's Observations and Submissions, ¶ 4.34.

[145] Iran's Reply, ¶ 3.21, (quoting Affidavit of Ali Asghar Massoumi ¶ 10, *Peterson v. Islamic Republic of Iran*, Doc. 815, No. 1:10-Civ.-4518-KBF (S.D.N.Y. Aug. 31, 2017) (U.S. P.O. Annex A02) ("Massoumi Affidavit")). The quote used by Iran continues to note that these transactions are also undertaken to "stabilize the exchange rate under the managed float exchange rate regime of Iran."

[146] Massoumi Affidavit, ¶ 11.

of securities at issue in this case as part of Bank Markazi's investment of its reserves, with generated income being part of Bank Markazi's reserves, employed "solely for central banking purposes" including "proper conduct of monetary policy with a view to promoting national economic goals."[147] Regardless of whether or not Iranian law requires an income tax on these transactions, Bank Markazi has explicitly described such transactions as being in furtherance of its purposes and objectives as a central bank. Any income tax imposed under Iranian law would not alter the fundamentally sovereign character of Bank Markazi's activities.

i. The Specific Activities at Issue in This Case Concern the Exercise of Sovereign Functions by Bank Markazi

5.11 In turning to the specific activities of Bank Markazi at issue in this case, Iran fails to demonstrate that Bank Markazi's acts in the United States at the time of the U.S. measures fell outside of the sovereign functions assigned to it by Iran under the Monetary and Banking Act of 1972. The only activity within the United States that Iran asserts is at issue in the context of the present case is Bank Markazi's purchase of 22 security entitlements in dematerialized bonds issued by foreign governments and intergovernmental organizations.[148] Iran's Rejoinder does not attempt to tie these investment activities back to the authorities under the Monetary and Banking Act of 1972. However, in the *Peterson* litigation, Bank Markazi was explicit in its assertion that these assets were being used "for the classic central bank purpose of investing Bank Markazi's currency reserves"[149] and that Bank Markazi, like other central banks, "holds foreign currency reserves to carry out monetary policies such as maintaining price stability."[150]

5.12 Iran does not dispute that the transactions at issue here were undertaken by Bank Markazi for the purpose of investing its currency reserves. Nor does Iran dispute that Bank Markazi's management of foreign currency reserves was in furtherance of Bank Markazi carrying out monetary policies. Indeed, Iran does not even contest that a central bank's management of foreign currency reserves is a sovereign function. And understandably so, as

[147] *Id.* ¶ 29.

[148] Iran's Reply, ¶ 3.25.

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

[150] Petition for a Writ of Certiorari 7-8, *Bank Markazi v. Peterson*, No. 14-770 (Dec. 29, 2014) (U.S. P.O. Annex 117); *see also* U.S. Counter-Memorial, Chapter IX.C.

the sovereign nature of foreign currency reserves, and a central bank's management of those reserves, is widely recognized.[151]

ii. Bank Markazi's Sovereign Activity at Issue in This Case Is Dispositive in Determining That Bank Markazi Is Not a "Company" Under the Treaty

5.13 Because it is unable to argue that Bank Markazi was acting in anything other than a sovereign capacity with respect to these transactions, Iran instead adopts the position that it simply does not matter that Bank Markazi was carrying out sovereign tasks when determining whether Bank Markazi is a company under the Treaty. Iran asserts that so long as the specific transaction in question can be characterized as commercial, the fact that Bank Markazi was carrying out a sovereign function in that transaction is irrelevant.[152] Yet this attempt to reclassify Bank Markazi's activities as commercial, rather than sovereign, is both inconsistent with the Court's Preliminary Objections judgment and unsupported by the single other authority referenced by Iran in support of its position.

5.14 Iran is incorrect in arguing, as it did at the Preliminary Objection stage, that Bank Markazi's status as a "company" under the Treaty may be determined without regard to whether it is carrying out sovereign functions. The Court rejected this very argument in its Preliminary Objections Judgment.[153] There, the Court noted that "[a]ccording to Iran, whether an entity carries out functions of a sovereign nature, *i.e.*, acts of sovereignty or public authority . . . is of no relevance when it comes to characterizing it as a 'company'."[154] The Court disagreed with this analytical approach that ignored the functions carried out by the entity. Instead, the Court specifically noted that an entity could not be considered a "company" under the Treaty to the extent that the entity carried out sovereign activities linked to a sovereign function.[155] Thus, contrary to Iran's position, the Court specifically endorsed an examination of an entity's function in considering whether it could be characterized as a "company" under the Treaty.

5.15 Iran is also incorrect in identifying the reason why the Court joined the question of Bank Markazi's status to the merits. It was not, as Iran asserts, because the Court disagreed

[151] *See* sources cited *infra* n.166 *et seq.*

[152] Iran's Reply, ¶ 3.6.

[153] Preliminary Objections Judgment, ¶ 90.

[154] *Id.*

[155] *Id.* ¶ 91.

with the U.S. position that Bank Markazi's sovereign functions were relevant to the question.[156] Instead, it was because the Court rejected *Iran's argument* that the nature of the Bank's activities was irrelevant to the question. In rejecting that argument, the Court noted that Iran "has made little attempt to demonstrate that, alongside the sovereign functions it concedes, Bank Markazi engages in activities of a commercial nature."[157] And so, the Court afforded Iran an additional opportunity to demonstrate that Bank Markazi was engaged in activities of a commercial nature in the United States at the relevant time.

5.16 Iran has still made little attempt to demonstrate that Bank Markazi engaged in activities of a commercial nature in the United States in addition to its sovereign functions. Instead, it revives and revises its earlier argument to suggest a distinction between the sovereign functions of Bank Markazi, which it seemingly concedes, and the specific acts which Bank Markazi undertakes in carrying out those functions. Iran offers no credible support for such a distinction in the Court's Preliminary Objections Judgment, where the Court viewed the functions of an entity as closely related to its activities. Iran's reliance on the following sentence from the Court's Preliminary Objections Judgment: "there is nothing to preclude, *a priori*, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities"[158] is of no avail. The United States again reiterates its agreement with the proposition that a central bank may be authorized to undertake activities beyond its sovereign remit, such as assisting private companies in their businesses, and that such additional activities may be commercial in nature.[159] It is evident from the plain language of the Court's statement that it is referencing two separate activities – "both" commercial "and" sovereign activities. The Court is not, as Iran appears to assert, referring to a single activity and distinguishing between the nature and function of that activity.[160] And the activities of Bank Markazi at issue here concern the sovereign activity of managing foreign currency

[156] Iran's Reply, ¶ 3.8.

[157] Preliminary Objections Judgment, ¶ 94.

[158] Iran's Reply, ¶ 3.9 (quoting Preliminary Objections Judgment, ¶ 92).

[159] *See* U.S. Counter-Memorial, ¶ 9.16.

[160] Iran similarly errs in referencing the hearings in the *Oil Platforms* case where the United States argued that, whatever their normal function, the oil platforms in that case were used for guiding armed attacks on shipping in the Gulf. Iran's Reply, n.296. That example just illustrates in a different context the point made by the Court, and agreed by the United States, that central banks can engage in activities outside of their normal, sovereign, central bank functions. But that example does not further Iran's attempt to distinguish between functions and activities where the activity in question is undertaken in the exercise of a sovereign function.

reserves, not a set of separate activities taken in addition to those performed by Bank Markazi in carrying out its central bank functions.

5.17 Iran goes on to argue that activities which do not involve the exercise of State power are not "sovereign" activities. Far from advancing Iran's argument that Bank Markazi should be characterized as a "company" under the Treaty, this assertion undermines Iran's attempts to draw a distinction between functions and activities in the context of core central bank activities. Iran relies on a single decision by an arbitral tribunal to support the distinction between the nature and purpose of State-controlled bank activities.[161] However, the facts of that particular case do not help Iran. In fact, the tribunal's decision usefully contrasts the type of commercial activity that a State-owned or controlled bank might undertake to the core activities a central bank undertakes in exercising its sovereign responsibilities.

5.18 The case concerned whether Ceskoslovenska Obchodni Banka, A.S. ("CSOB") could be characterized as a "national of another Contracting State" for purposes of the dispute resolution mechanism in Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The tribunal adopted the following test with respect to that Convention: "'a government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function.'"[162] The tribunal then applied this test to two different sets of activities of the CSOB, both of which are significantly different from the management of foreign currency reserves at issue in this case.

5.19 *First*, the tribunal considered CSOB's role in "facilitating or executing the international banking transactions and foreign commercial operations the State wished to support." Specifically, CSOB had undertaken lending activities, which were driven by the State during the country's command economy. The tribunal concluded that these lending activities did not lose their commercial nature simply because they were directed by the State.[163] The United

---

[161] Iran's Reply, ¶ 3.11. Iran also discusses at some length the definition of commercial activity under the U.S. Foreign Sovereign Immunities Act, and the case law interpreting that definition, before concluding that neither U.S. Code nor the U.S. case-law related to State immunity applies to these proceedings. *Id.* ¶¶ 3.12-3.13. The United States agrees that the FSIA statutory definition does not apply in determining whether Bank Markazi is characterized as a "company" under the Treaty and notes that the Court did not distinguish between the purpose and nature of an activity in its Preliminary Objections Judgment.

[162] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶ 17 (May 24, 1999) (quoting Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 HAGUE REC. D. COURS 331, 354-55 (1972)). **(U.S. Annex 290)**.

[163] *Id.* ¶¶ 20-21 **(U.S. Annex 290)**.

States agrees with that conclusion – a State-controlled bank's lending activities to private parties do not become sovereign in nature simply because they are directed by a State in a non-market economy. Such activity is fundamentally different from the core central bank functions of setting monetary policy and managing a State's currency reserves. Lending to commercial entities is the type of additional activity, very different from the core sovereign functions of a central bank at issue in this case, that could be considered as activity of a commercial nature under the Court's Preliminary Objections Judgment.

5.20 *Second*, the tribunal went on to note that beginning in the early 1990s, "CSOB took various steps to gradually throw off its exclusive economic dependence on the State and to adopt measures to enable it to function in this new economic environment as an independent commercial bank" and as part of that transition took steps to strengthen its books.[164] With respect to those activities, the tribunal found that "the steps taken by CSOB to solidify its financial position in order to attract private capital for its restructured banking enterprise do not differ in their nature from measures a private bank might take to strengthen its financial position" even though the governments in question had an interest in seeing CSOB survive in a free market environment.[165] Here again, the United States does not dispute the tribunal's conclusion that this type of activity is properly considered commercial, and notes that the activities at issue in that case are not at all similar to Bank Markazi's management of its foreign currency reserves.

5.21 While the decision cited by Iran dealt with activities far different from those undertaken by Bank Markazi in this case, another arbitral decision more directly addresses the question of whether the activities of a central bank in managing its foreign currency reserve may nonetheless be considered commercial. In *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, the tribunal considered whether the activities of the central bank of Mongolia, MongolBank, in managing its reserves of foreign currencies could be attributable to the State.[166] The tribunal noted that MongolBank's central bank responsibilities fulfilled a role that only a State can fulfill, with one of those responsibilities being the holding and managing of the State's reserves of foreign

[164] *Id.* ¶ 21 **(U.S. Annex 290)**.

[165] *Id.* ¶ 25 **(U.S. Annex 290)**.

[166] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability ¶¶ 574 *et seq.* (Apr. 28, 2011) **(U.S. Annex 291)**.

currencies.[167] Mongolia advanced an argument very similar to that offered by Iran in this case, arguing that the specific activity of MongolBank, which involved exporting and refining gold and depositing its value in an account was a "purely commercial transaction," even while acknowledging that the MongolBank was exercising functions related to the management of Mongolia's foreign reserves.[168] The tribunal rejected Mongolia's argument, expressing "no hesitation in concluding that MongolBank acted *de jure imperii*" in undertaking the activities at issue for purposes of increasing the country's reserves.[169] While the specific activities in that case—transactions of gold deposits—are certainly the type of activity private commercial actors can perform, in the tribunal's view MongolBank's acts remained *jure imperii* as those acts were performed to carry out the bank's specific sovereign powers.

5.22 National courts have similarly held that a central bank engages in sovereign activity when managing foreign currency reserves and performing other core central bank responsibilities. For example, an English court found that funds comprising part of the National Fund of Kazakhstan were not used by Kazakhstan's state bank for a commercial purpose simply because the bank invested those funds in securities held by a third party.[170] In addressing the argument that the trading activities at issue in the case were clearly financial transactions with the aim of making profits, and thus could not have been transactions in the "exercise of sovereign authority," the court indicated that those transactions must be set against the backdrop of the fact that the transactions contained assets which were part of the National Fund and were thus part of the overall exercise of sovereign authority of Kazakhstan.[171] Courts in other jurisdictions have similarly recognized the sovereign character of a central bank maintaining foreign currency reserves and performing other traditional central bank activities.[172]

---

[167] *Id.* ¶ 582 **(U.S. Annex 291)**.

[168] *Id.* ¶ 587 **(U.S. Annex 291)**.

[169] *Id.* ¶ 592 **(U.S. Annex 291)**.

[170] *AIG Capital Partners v. Kazakhstan*, [2005] EWHC (Comm) 2239, ¶ 92 **(U.S. Annex 292)**.

[171] *Id.* Notably, the fact that the National Bank received a commission from the Kazakhstan government for its investment activities did not alter the court's analysis, which noted "the assets have to be put to use to obtain returns which are reinvested in the National Fund, i.e. to assist the sovereign actions." *Id.*

[172] *NV Exploitatie-Maatschappij Bengkalis v. Bank Indonesia*, 65 I.L.R. 348 (Netherlands, Court of Appeal of Amsterdam 1963) **(U.S. Annex 293)** (finding that the central bank of Indonesia was exercising a specifically sovereign function in maintaining the monetary position of the country); *Blagojevic v. Bank of Japan*, 65 I.L.R. 63 (France, Court of Cassation 1976) **(U.S. Annex 294)** (finding the Bank of Japan was engaged in sovereign activity in carrying out its responsibilities for foreign exchange control).

Section C: Concluding Observations

5.23 The Court, in its Preliminary Objections Judgment, provided Iran a second opportunity to demonstrate that "alongside the sovereign functions which it concedes, Bank Markazi engages in activities of commercial nature."[173] Iran has failed to demonstrate that this is the case. The factual record remains essentially the same as it was at the Preliminary Objections stage. This confirms what the United States has asserted throughout these proceedings, and what Bank Markazi itself repeatedly told U.S. courts, namely that, with respect to Bank Markazi's activities in the United States at the time of the U.S. measures at issue in this case, Bank Markazi acted solely in fulfillment of "the classic central bank purpose of investing [its] currency reserves."[174] Bank Markazi is therefore not a "company" as defined by the Treaty of Amity and Iran's claims under Articles III, IV, and V, to the extent they are related to the treatment of Bank Markazi, must be rejected. This necessarily includes all claims arising out of the *Peterson I* and *Peterson II* proceedings, both of which involve Bank Markazi assets, including claims related to legislative measures applied in those proceedings.

[173] Preliminary Objections Judgment, ¶ 94.

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

CHAPTER 6: THE FAILURE TO EXHAUST LOCAL REMEDIES BY THE COMPANIES IN RESPECT OF WHICH IRAN CLAIMS

Section A: Exhaustion of Local Remedies Is Required in this Case

6.1 In its Reply, Iran asserts that its case involves "State-to-State claims concerning U.S. violations of obligations owed directly to Iran under the Treaty of Amity" and that its rights "with respect to the treatment to be afforded to the Iranian State exist in parallel with the rights of Iran with respect to the treatment to be afforded to its companies and nationals under the Treaty."[175] As such, Iran says, its case is not one of diplomatic protection requiring exhaustion of local remedies.[176] But even if exhaustion were required, Iran asserts that Iranian companies are excused from pursuing local remedies because there is no "reasonable possibility of effective redress" in U.S. courts.[177]

6.2 Iran is incorrect on both points. As discussed below, the evidence demonstrates that the alleged injury to Iranian companies caused by alleged U.S. violations of the Treaty of Amity is the central feature of its claims. Iran's assertions of injury to itself are vague and unsupported. Moreover, Iran has failed to show that remedies in the United States are unavailable or do not offer a reasonable possibility of effective redress.

6.3 For these reasons, the Court should find both that exhaustion of local remedies is required in this case and that, with the exception of three cases, it has not taken place.

i. The Indirect Elements of Iran's Claims Are Preponderant

6.4 Iran asserts that exhaustion of local remedies is not required because its claim "concerns the position of Iran and the protections to which it and Iranian companies are entitled under the 1955 Treaty of Amity."[178] The United States does not, of course, dispute the well-established rule of customary international law that exhaustion of local remedies is not required where a case is founded on direct injury to the State itself. Here, however, Iran has asserted both direct injury to itself and indirect injury through its nationals. In such circumstances, as the International Law Commission observed, "it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is

[175] Iran's Reply, ¶ 9.3.

[176] *See id*.

[177] Iran's Reply, ¶ 9.5.

[178] Iran's Reply, ¶ 9.19.

preponderant" in order to determine whether local remedies must be exhausted.[179] The principal factors to consider include the "subject of the dispute, the nature of the claim and the remedy claimed."[180] Local remedies must be exhausted even where the State is requesting a declaratory judgment, in circumstances in which the claim being advanced is based preponderantly on an injury to its nationals.[181]

6.5 An examination of the evidence in this case clearly shows that Iran's claim is based preponderantly on alleged injuries to its nationals. *First*, Iran argued in its Memorial that the Court should interpret certain articles of the Treaty of Amity "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 properties are entitled in the context of civil proceedings . . . ."[182] But after a careful review of the relevant provisions with regard to the context and the object and purpose of the Treaty of Amity—to encourage economic activities between the Parties—the Court in its Preliminary Objections Judgment found that it did not have jurisdiction to consider Iran's claims concerning alleged violations of the international law of sovereign immunities.[183]

6.6 Consequently, as the Court has excluded all claims based on sovereign immunity protections, the principal subject and nature of Iran's remaining claims under the Treaty concern the alleged injury to Iranian companies, for which Iran is requesting monetary damages. This is a quintessential instance of an indirect claim. In its Reply, Iran has attempted to shift its argument to put more emphasis on injury to itself in a thinly-veiled effort to avoid the requirement to exhaust local remedies. But its assertion of "non-material or moral damage"[184] is not only vague, it is not founded on any provision of the Treaty. Iran has also failed to state how it has been injured with the necessary specificity, nor has it provided evidence to support such injury.

---

[179] International Law Commission, Draft Articles on Diplomatic Protection, with commentaries, Art. 14, commentary 11, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2) (2006), **(U.S. Annex 125)** [hereinafter ILC Draft Articles]. The commentary also notes the closely related *sine qua non* test, that is, would the claim have been brought but for the alleged injury to the national, although it states that there is little to distinguish the two tests.

[180] ILC Draft Article 14, commentary 12 **(U.S. Annex 125)**.

[181] *See id.*, commentary 13 **(U.S. Annex 125)**.

[182] Iran's Memorial, ¶ 3.20.

[183] *See* Preliminary Objections Judgment, ¶ 80.

[184] Iran's Reply, ¶ 9.26.

6.7 *Second*, one of the pillars of Iran's case is the "separate juridical status" of the Iranian companies that have been involved in U.S. court proceedings, which it emphasizes throughout its pleadings. It complains that the assets of Bank Melli, a State-owned company, were attached "even though" it was not a defendant in any of the underlying court proceedings,[185] and requests the Court to find that the United States has breached various obligations owed to specific Iranian companies and their property under the Treaty.[186] Moreover, Iran asserts that its claims "are not confined to one company or one incident."[187] The clear line of Iran's argument is that the property of Iranian companies—*not* State property—has been attached. It is the alleged damage to these companies that "colours and pervades" Iran's claim as a whole.[188]

6.8 Iran exhibited a marked disinterest in contesting claims brought against it in U.S. courts. Iran routinely failed to appear in liability proceedings, which led to numerous default judgments, and Iranian companies appeared only when their assets were at risk of attachment in enforcement proceedings. It was only after the property of a handful of Iranian companies was attached to satisfy the judgments against Iran that Iran commenced this case before the Court. This strongly suggests that the nature of Iran's claim is not direct injury to Iran, but rather injury to specific Iranian companies. That being the case, the rule on exhaustion of local remedies applies.

ii. This Case Is Distinct From the *Avena* and *Ukraine v. Russian Federation Cases*

6.9 Iran cites the *Avena* and *Ukraine v. Russian Federation cases*[189] as support for its assertion that this case is one "in which there is an injury to the State which in part consists in, and is interdependent with, the injuries to companies that are nationals of the State."[190] Both of those cases, however, involve multilateral treaties that embody consular or human rights

[185] Iran's Reply, ¶ 9.7.

[186] *See* Iran's Reply, ¶ 9.30, citing its submissions in its Application, ¶ 33, and Attachment 2.

[187] Iran's Reply, ¶ 9.30.

[188] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),* Judgment, I.C.J. Reports 1989, p. 15, ¶ 52.

[189] *See Avena and Other Mexican Nationals (Mexico v. United States of America),* 2004 I.C.J. 12 (Mar. 31); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* 2019 I.C.J. 558 (Nov. 8).

[190] Iran's Reply, ¶ 9.21.

obligations that are quite distinct from the bilateral obligations concerning economic relations under the Treaty of Amity that are at issue here.

(a) In Contrast to Mexico's Rights in Avena*, Iran's Claims Do Not Involve "Interrelated Rights"*

6.10 In *Avena*, Mexico alleged that the United States had violated its obligations to Mexico under Article 36(1) of the Vienna Convention on Consular Relations because it had failed to notify Mexico of the arrest and detention in the United States of Mexican nationals, thus preventing Mexico from exercising its rights of consular access and communication.[191] The Court first affirmed the exhaustion requirement by noting that each Mexican national would have to fully pursue his individual rights under Article 36(1)(b) in U.S. courts before Mexico could espouse his claims.[192] The Court then turned to Mexico's claims regarding injuries that it had allegedly suffered directly as a result of U.S. violations of obligations to Mexico. Citing its description in the *LaGrand* case of the three subparagraphs of Article 36(1) as an "interrelated regime," the Court stated that the failure of the United States to act in conformity with the notification obligation under Article 36(1)(b) precluded Mexico from exercising its rights under Article 36(1)(a) and (c) to have consular access to its nationals, communicate with them, and arrange for legal representation.[193] That is, Mexico could realize its right to exercise consular functions of assistance to and protection of its nationals only if the United States fulfilled its obligation to promptly notify Mexico of the arrest or detention of a Mexican national.

6.11 In contrast, Articles III, IV, and V of the Treaty of Amity involve only protections required to be accorded to nationals and companies of the Parties. These articles do not in any

---

[191] Art. 36(1) provides: With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

[192] *See Avena,* 2004 I.C.J., ¶ 40.

[193] *Avena,* 2004 I.C.J., ¶ 99, citing *LaGrand (Germany v. United States of America),* 2001 I.C.J. 466, 492, ¶ 74 (June 27).

way confer protections vis-à-vis the Parties themselves, so there is no interdependence of the rights of the Parties and their nationals and companies. Any alleged failure of the United States to act in conformity with these articles, as well as with Articles VII and X, of the Treaty did not preclude Iran from exercising any rights itself. There is simply no equivalence between what the Court described in *Avena* as the "special circumstances of the interdependence of the rights of the State and of individual rights" under the Vienna Convention[194] and Iran's claims under the Treaty of Amity in this case.

(b) Iran's Claims Rest on Alleged Injuries to Specific Iranian Entities, Not a Pattern of Conduct Aimed at Entire Ethnic Groups as in Ukraine v. Russian Federation

6.12 In contrast to Iran's claims under the Treaty of Amity concerning economic relations, Ukraine's case is based on alleged violations by Russia of obligations under a human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[195] Unlike the Treaty of Amity that addresses the protections the nationals of one State shall be afforded in the other State, CERD calls for action by States Parties to eliminate all forms of racial discrimination and to protect human rights, fundamental freedoms, and equality before the law within their own territories.

6.13 Ukraine's case was founded on alleged Russian violations of certain provisions of the CERD that obligate States Parties to, among other things, undertake to pursue policies to eliminate racial discrimination, guarantee equality before the law, and assure effective remedies against certain acts of racial discrimination.[196] As the Court stated, Ukraine's case was based on Russia's sustained campaign of discrimination against Crimean Tatars and Ukrainian communities in Crimea, for which Ukraine had submitted evidence of individual examples to illustrate the alleged Russian conduct.[197] The Court found that Ukraine was not adopting the cause of any particular nationals, but rather, directly challenging a pattern of

[194] *Avena*, 2004 I.C.J., ¶ 40.

[195] Ukraine also brought claims under the International Convention for the Suppression of the Financing of Terrorism, which are not germane here.

[196] Specifically, Arts. 2, 4, 5, 6, and 7.

[197] *See Ukraine v. Russian Federation*, 2019 I.C.J., ¶ 130.

conduct by another State Party.[198] Under such circumstances, the Court concluded, the rule on exhaustion did not apply.[199]

6.14 Here, Iran alleges that the United States has violated the Treaty of Amity with respect to a specific list of Iranian companies named as defendants in a limited number of specific court proceedings in the United States.[200] This is materially different from Ukraine's allegations of a widespread, indiscriminate campaign by Russia against two ethnic communities in Crimea. The case offers no support to Iran's attempt to recast its claims in terms of direct harm to Iran in order to avoid the requirement for its companies to exhaust local remedies.

iii. Conclusion

6.15 For all of the reasons discussed above, the Court should find that the preponderant elements of Iran's claims are indirect: they involve alleged injury to Iranian companies, not direct injury to Iran itself. As such, the Court should dismiss Iran's claims based on alleged injury to nationals or companies where local remedies have not been fully exhausted.

Section B: Exhaustion Is Not Futile

6.16 Iran urges the Court to excuse it from the rule on exhaustion of local remedies due to "the absence of the reasonable possibility of effective redress in [U.S.] domestic courts for Iran or any of its companies."[201] As the commentary to ILC Draft Article 15 makes plain, however, the exception to the rule on exhaustion is a high bar:

> [I]t is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.[202]

6.17 Examples of circumstances in which exhaustion is excused include cases where exhaustion would be futile because the local courts do not have jurisdiction, local courts will not review the relevant national legislation, or where there are well-established precedents

---

[198] *See id.*

[199] *See id.*

[200] *See* Iran's Reply, Attachment 2.

[201] Iran's Reply, ¶¶ 9.5, 9.8, citing ILC Draft Article 15(a).

[202] ILC Draft Art. 15, commentary 4 **(U.S. Annex 295)**.

adverse to the claimant.[203] As discussed below, Iran has failed to show that it is futile under any of these bases for Iranian companies to exhaust remedies in the United States.

i. Local Remedies Are Available

6.18 Iran asserts that Bank Markazi and Bank Melli "tried to obtain redress" and that their experience "confirms" that there is no reasonable possibility of redress in U.S. courts for Iran or "any of its companies."[204] There are three fatal flaws in Iran's argument. *First*, Iran mistakenly equates the ability of Iranian companies to defend their interests in U.S. courts with a guarantee that they will prevail. That is not, of course, what is required under either the Treaty of Amity or international law more generally. As the United States discussed in Chapters 13 and 14 of its Counter-Memorial and further shows in Chapters 9 and 10 of this Rejoinder, Iranian companies have full freedom of access to U.S. courts, in conformity with Article III(2), and have been accorded fair and equitable treatment, in conformity with Article IV(1). Furthermore, as noted above, the ILC stated that the exception to the rule on exhaustion does not hinge on whether it is "likely or possible" that a company would prevail, but only on whether the courts are "reasonably capable" of providing relief. Iran has failed to show that U.S. courts are not capable of providing relief. Indeed, in certain instances, Iranian companies or third parties have successfully challenged the efforts of claimants to attach Iranian property in execution proceedings to satisfy judgments against Iran.[205]

6.19 *Second*, Iran has extrapolated from the outcome of only a few cases to reach the sweeping conclusion that there is no possibility of redress for *any* Iranian company, and therefore they should all be excused from the requirement to exhaust local remedies.[206] This

---

[203] *See id.*, commentary 3 **(U.S. Annex 295)** (citing cases). The commentary also cites cases where exhaustion was excused because the local courts notoriously lacked independence or were not competent to grant appropriate and adequate remedies, or because the respondent State did not have an adequate judicial system.

[204] Iran's Reply, ¶ 9.5.

[205] See the following section and *infra* Chapter 8.

[206] The circumstances here are distinct from the circumstances in *Ambiente v. Argentina*, which Iran cites as support for its assertion that "specific U.S. legislation as well as a Supreme Court judgment have rendered local remedies futile." Iran's Reply, ¶ 9.12, citing *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) **(U.S. Annex 296)**. That case involved claims brought under the Argentina-Italy BIT by Italian holders of bonds issued by the Government of Argentina. The tribunal determined that exhaustion of local remedies was futile on the basis of an Argentine law requiring courts to reject any claims brought by bondholders (such as the claimants) who had not participated in an earlier exchange offer, a law that had been challenged and found constitutional by the Argentine Supreme Court. Iran also cites a passage from the *Arbitration under Article 181 of the Treaty of Neuilly* for the proposition that exhaustion does not apply where "acts of authorized organs of the state" are implicated. Iran's Reply, ¶ 9.11, citing "Principal Question" Judgment (1934) at 789 **(U.S. Annex 297)**. That case was brought by Greece against Bulgaria concerning a dispute over the rights of several Greek nationals to forests in a region that had been

ignores the fact that, for example, Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (codified as 22 U.S.C. § 8772) applies only to assets of Bank Markazi; it does not affect any other Iranian entity.[207] Moreover, the provision does not itself require turnover of these assets, but requires the courts to determine whether turnover is appropriate.[208] The outcome of the litigation challenging the provision, in other words, was not preordained.[209] The same is true for attachment actions involving Section 201 of the Terrorism Risk Insurance Act ("TRIA"), which is a complex provision that requires courts to carefully analyze whether the sought-after assets are immune from attachment or whether they fall under any of the exceptions to attachment.[210]

6.20 Finally, many of the cases listed on Iran's Attachment 2 were commenced well before the cases Iran relies upon for its futility argument were decided.[211] With regard to the latter, the U.S. Supreme Court issued its decision in *Bank Markazi v. Peterson* on April 20, 2016, denied Bank Melli's petition for certiorari in the *Bennett v. Iran* case on March 30, 2020, and denied Bank Melli's petition for certiorari in the *Weinstein v. Iran* case on June 25, 2012. Yet approximately half of the cases listed on Attachment 2 were commenced prior to 2012,[212] and thus it seems unlikely that the cases just cited would have had much impact collectively on litigation decisions in other cases. But by generalizing based on the outcome of a few cases, Iran is in effect arguing for some sort of "retroactive futility" to excuse the failure of Iranian

---

transferred from the Ottoman Empire to Bulgaria in 1913 at the end of the first Balkan War. Under the terms of the 1913 Treaty of Constantinople, Bulgaria was obligated to respect existing private rights and titles to property, such as the disputed forests, unless there was "legal proof to the contrary." *Id.* at 787. In 1918, however, the Bulgarian Ministry of Agriculture declared that the disputed forests were in fact public property pursuant to the 1904 Bulgarian Forest Law. As the tribunal stated, "[c]onsidering that this law was not modified so as to admit of the application of a special regime in the annexed territories [*i.e.*, those transferred pursuant to the 1913 treaty], the claimants had reasons for considering as useless any action before the Bulgarian courts against the Bulgarian Treasury." *Id.* at 789. Both of these cases deal with laws affecting the claims of a narrow and specific group of claimants. Given the limited scope of these cases, they do not support Iran's sweeping assertion here that it is futile for any Iranian company to exhaust local remedies.

[207] It should be obvious that Iran's quotes from Chief Justice Roberts' dissent in *Bank Markazi v. Peterson et al.* (joined only by Associate Justice Sotomayor) do nothing to bolster Iran's futility argument, since the case addressed Section 8772 only and has no broader application. *See* Iran's Reply, ¶¶ 9.14-9.16.

[208] *See* U.S. Counter-Memorial, ¶ 6.16.

[209] See also the discussion of *Peterson* in *infra* Chapter 8, Section B.i.(a).

[210] *See* U.S. Counter-Memorial, ¶ 6.19; *infra* Chapter 8, Sections A and B. *See also Rubin v. Iran*, discussed below.

[211] *See* Iran's Reply, ¶¶ 9.6-9.7.

[212] *See* Iran's Reply, Attachment 2, column 5, "Date of Action."

companies to contest enforcement actions. For all of these reasons, the Court should reject Iran's assertion that local remedies are unavailable.

ii. Local Remedies Provide a Reasonable Possibility of Redress

6.21 Iran has also failed to show that the complained-of measures have created a "discriminatory and comprehensive regime" that, in practice, is not reviewable in U.S. courts or makes the courts incapable of granting appropriate remedies.[213] Even though Iran very rarely appeared to defend its interests in U.S. court proceedings at the liability stage, Iran goes so far as to assert that U.S. courts "openly acknowledge[]" that they are prevented from fulfilling their functions,[214] citing the district court opinion in the *Levinson v. Iran* case.[215] Iran cites a passage that comes near the end of the opinion, leading to a distorted impression that the findings against Iran were inevitable. However, a full reading of the opinion reveals that:

- The court, first noting that "strong policies favor resolution of disputes on their merits, and so the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party," carefully reviewed the legal standards for a default judgment, including that it is "not automatic" and the court has an "affirmative obligation to determine whether it has subject matter jurisdiction";[216]
- The court held a two-day evidentiary hearing, which included the testimony of three expert witnesses;
- The court stated that it must reach its "findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence," and that "uncontroverted factual allegations that are supported by admissible evidence may be taken as true";[217] and
- The court thoroughly reviewed the evidence to determine whether the plaintiffs had satisfied each of the four elements of the Foreign Sovereign Immunities Act ("FSIA")'s terrorism exception (28 U.S.C. § 1605A), including that they made an offer to Iran to arbitrate the claim and had submitted sufficient evidence to support their allegations.[218]

[213] Iran's Reply, ¶ 9.13

[214] *Id*.

[215] *See Levinson et al. v. Islamic Republic of Iran*, 443 F. Supp. 3d 158 (D.D.C. 2020) (Iran Reply Annex 82). The case was brought by the family of retired FBI Special Agent Robert Levinson under the terrorism exception to the Foreign Sovereign Immunities Act, §1605A, for the kidnapping, torture, and death of Mr. Levinson.

[216] *Levinson*, 443 F.Supp.3d at 166 (Iran Reply Annex 82) (internal quotes and citations omitted).

[217] *Id*. (Iran Reply Annex 82).

[218] *See id.* at 167-176 (Iran Reply Annex 82). The remaining two elements are (1) the foreign state was a designated State sponsor of terrorism, and (2) the plaintiffs are U.S. citizens.

6.22 Only after the court had determined that the plaintiffs had met all of the statutory requirements for jurisdiction, including that they had properly served Iran with the summons and complaint, and carefully examined the merits of the claim did it conclude that Iran was liable and the plaintiffs were entitled to relief. Contrary to Iran's lament that the *Levinson* ruling is illustrative of the "hopelessness" of Iran's and its companies' position under U.S. law,[219] the court's opinion shows that even in the absence of participation by the defendant, the plaintiffs were nevertheless required to prove every element of their case, in keeping with relevant law and procedure. It was not a foregone conclusion that they would prevail, which would be equally true in any other case. Iran cannot now point to the outcome of this one case—which was decided only in March 2020—as proof that it has been "hopeless" for Iran and Iranian companies to appear in U.S. court proceedings, especially when Iran made no effort in that case to defend its interests. It is not a court's responsibility to defend Iran, and Iran's failure to participate in proceedings has resulted in numerous default judgments.[220] And when Iranian companies finally do appear at attachment proceedings, it is usually too late to challenge the finding of facts in the underlying judgment, and the company is therefore limited to arguing that the enforcement is contrary to applicable law.

6.23 In fact, both Iran and other States have prevailed in enforcement cases, which further contradicts Iran's assertion of futility. The *Rubin v. Iran* case, for example, involved a suit to execute a $71.5 million default judgment against Iran for the 1997 suicide bombings in Jerusalem carried out by Hamas. The petitioners sought to attach the Persepolis Collection of artifacts,[221] which Iran had loaned to the University of Chicago in 1937, under Sections 1610(a) and (g) of the FSIA and Section 201 of TRIA. Iran filed a motion for summary judgment,[222] which the district court granted[223] and the court of appeals affirmed,[224] holding that the collection was immune from attachment because (1) Iran was not using it for commercial activity in the United States, as required under Section 1610(a) of the FSIA; (2) it was not blocked property, as required under Section 201 of TRIA; and (3) FSIA Section 1610(g) did

[219] Iran's Reply, ¶ 9.14.

[220] See *infra* Chapter 8, in particular Section B.ii and Section C, regarding the adversarial nature of the U.S. judicial system and the protections afforded defaulting sovereigns in U.S. courts.

[221] The petitioners included three other collections of artifacts in their suit, but the court dismissed those claims because the items were either no longer within the court's judicial district or were not Iranian property.

[222] The museums holding the collections were named as respondents and also moved for summary judgment.

[223] *See Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014) **(U.S. Annex 184)**.

[224] *See Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016) **(U.S. Annex 185)**.

not create an independent exception to the collection's immunity from attachment and execution. The petitioners then appealed to the U.S. Supreme Court, asserting that Section 1610(g) of the FSIA stripped the property of its immunity. In affirming the lower court's ruling, the U.S. Supreme Court made it clear that not all property of a foreign State is subject to attachment and execution by holders of judgments under Section 1605A.[225] In addition, as discussed in Chapter 8 below and as shown on the table attached at Appendix 1, in a number of cases other parties to the proceedings participated and asserted defenses that would have been available to the Iranian companies, had they chosen to defend their interests.[226]

6.24 In the *Harrison v. Sudan* case, victims of the 2000 bombing of the USS Cole sued Sudan under Section 1605A(a)(1) and (c) of the FSIA, alleging that Sudan had provided material support to al Qaeda for the attack. After the plaintiffs obtained a default judgment for $314 million, they brought a successful enforcement action for the turnover of Sudanese assets at several New York banks. At that point, Sudan filed an appeal contesting jurisdiction, alleging that the default judgment was invalid because Sudan had not been properly served under FSIA Section 1608(a)(3). After losing in the lower courts, Sudan appealed the case to the U.S. Supreme Court, which found in favor of Sudan and reversed the lower court's judgment.[227]

6.25 In addition, claimants in various cases against Cuba were unsuccessful in their efforts to enforce default judgments. Examples include *Alejandre v. Republic of Cuba*[228] (assets were not subject to attachment); *Hausler v. Cuba*[229] (under New York state law, electronic funds transfers (EFTs) did not belong to Cuba or its agencies or instrumentalities and therefore could not be attached under TRIA); *Villoldo v. Castro Ruz*[230] (upholding the general rule that U.S. courts will not give extraterritorial effect to a foreign State's confiscatory law); and *Jerez v. Republic of Cuba*[231] (Cuba was not designated a State sponsor of terrorism at the time of the

---

[225] *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816; 583 U.S. ___ (2018) **(U.S. Annex 75)**. Specifically, the Supreme Court ruled that "28 U.S.C. §1610(g) does not provide a freestanding basis for parties holding a judgment under §1605A to attach and execute against the property of a foreign state, where the immunity of the property is not otherwise rescinded under a separate provision within §1610." *Id.* at 827; 15.

[226] See, for example, Cases 3, 4, and 19, where the court granted the Internet Corporation of Assigned Names and Numbers (ICANN)'s motions to quash writs of attachment; and Case 7, where the court of appeals affirmed the lower court's decision to grant the U.S. motion to void the writ of attachment and execution.

[227] *See Sudan v. Harrison*, 139 S. Ct. 1048 (2019) **(U.S. Annex 298)**.

[228] *See Alejandre v. Telefonica Larga Distancia de Puerto Rico,* 183 F.3d 1277 (11th Cir. 1999) **(U.S. Annex 71)**.

[229] *See Hausler v. J.P. Morgan Chase Bank N.A.,* 770 F.3d 207 (2d Cir. 2014) **(U.S. Annex 299)**.

[230] *See Villoldo v. Castro Ruz.,* 821 F.3d 196 (1st Cir. 2016) **(U.S. Annex 300)**.

[231] *See Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014) **(U.S. Annex 301)**.

act of torture). In sum, Iran has failed to show that U.S. courts do not provide Iranian nationals and companies a reasonable possibility of redress. Indeed, the reality is that the courts have provided Iran, and other States such as Sudan and Cuba, meaningful procedural protections. Coupled with Iran's failure to show that local remedies are not available, the Court should find that Iran has not demonstrated that exhaustion of local remedies is futile.

Section C: Iran's Claims Excluded by the Requirement to Exhaust Local Remedies

6.26 To show the cases in which local remedies have or have not been exhausted, the United States prepared a chart based on the cases on Iran's Attachment 2. This chart, which is attached as Appendix 1, has five columns: (1) numbers from 1 through 106, matching the numbering of cases on Iran's Attachment 2; (2) the case caption and docket number; (3) whether an Iranian entity appeared; (4) the status of the case (as of February 15, 2021); and (5) whether any assets have been turned over to plaintiffs. The United States gathered the information in the last three columns from an examination of the court docket for each case. A review of Columns 3 and 4 shows that Iranian entities exhausted local remedies in only three cases: *Peterson v. Islamic Republic of Iran,* No. 38 on the chart; *Bennett v. Islamic Republic of Iran*, No. 54 on the chart; and *Weinstein v. Islamic Republic of Iran*, No. 63 on the chart.[232] Some cases were dismissed, but that was as a result of arguments advanced by third parties, including the United States.[233] In none of the remaining cases, with the exception of the *Peterson II* case, which is pending and thus not yet exhausted, have Iranian entities made any effort to defend their interests, let alone exhaust local remedies.

6.27 What also becomes clear in a review of the chart is that over 70 percent of the listed cases involve nothing more than plaintiffs registering their judgments. This is evident from the entries in Column 4 noting that, for example, judgments were registered, writs of attachment were issued or served, or notices of *lis pendens* were filed, but that no further action has

[232] The Government of Iran appeared in two cases, *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems* (No. 1 on the chart) and *Rubin v. Islamic Republic of Iran* (No. 12 on the chart). Iran did not exhaust its local remedies in the first case, but did in the second.

[233] See, for example, Cases 3 and 4 (courts granted ICANN's motion to quash writ of attachment) and Case 7 (court granted U.S. government's motion to void writ of attachment).

occurred. The registration of a judgment[234] or notice of *lis pendens*[235] is just the first step in an enforcement proceeding; Iran cannot possibly base a claim on cases at such a preliminary stage where nothing of substance has happened, let alone any turnover of assets. Iran has not even made an effort to articulate a claim regarding these cases.

6.28 In sum, all but the three cases noted above should be excluded from the Court's consideration because of the failure of Iran and Iranian companies to exhaust local remedies.

Section D: Iran Cannot Prove Its Case Without Exhausting Local Remedies

6.29 Iran's case, as recast in its Reply, is built upon an unstable foundation. Following the Court's exclusion of Iran's sovereign immunity claims and on the basis of the results of a very limited number of enforcement cases, Iran has altered the emphasis of its claims to assert sweeping damage to the Iranian economy in an effort to keep its case alive. But there is a large chasm in the middle of Iran's case. Of the cases listed on Iran's Attachment 2, assets have been turned over in only a small fraction of them. Furthermore, although in its Reply Iran

---

[234] The proceedings for enforcing a judgment are governed by state law in the United States, but in general the process has a number of steps:

(1) The judgment creditor registers the judgment with a court in any judicial district where there may be assets.

(2) Once assets are located, the judgment creditor must identify all third parties with an actual or possible interest in those assets.

(3) The judgment creditor may request the court to issue writs of attachment or liens on the assets to prevent them from being sold or transferred pending the court's decision on disposition.

(4) The judgment creditor must serve all parties notice of the enforcement proceeding and file proof of service with the court.

(5) The judgment debtor and third parties with an interest in the assets have the right to appear in the enforcement proceeding and can contest the judgment creditor's right to the assets on various grounds, *e.g.*, by seeking vacatur of a default judgment, contesting the judgment debtor's ownership, or asserting a secured interest in the assets.

(6) After a lower court decision and all appeals are exhausted, and if the final decision is in favor of the judgment creditor, the court orders distribution of the assets.

Such cases can involve dozens of potential third parties and take years to resolve. For example, the *Levin v. Bank of New York* case, discussed in detail in Chapter 8, involved hundreds of defendants, third party defendants, counterclaimants, cross claimants, and cross defendants. *See, e.g.*, *Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 L 812032, at *1-4 (S.D.N.Y. Mar. 4, 2011) **(U.S. Annex 323)** (describing procedural steps leading from registration of the judgment in April 2009 to final turnover order with respect to "Phase One" assets); *Levin v. Bank of New York*, Case No. 09-cv-5900, 2013 WL 5312502, at *2 (S.D.N.Y. Sep. 23, 2013) **(U.S. Annex 331)** (describing additional steps leading to turnover of "Phase Two" assets). *See also Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 413-15 (S.D.N.Y. 2013) **(U.S. Annex 334)** (describing similar steps, beginning with the registration of plaintiffs' judgments in September 2008 and December 2010 and concluding with a January 2013 court order directing the turnover of assets).

[235] In contrast to a registration of a judgment, a *lis pendens* is an official notice that a claim to a property has been filed. It generally serves as notice to the owner (or a potential buyer) of the property that s/he must assume any litigation associated with it.

states that the cases listed on Attachment 2 "remain as the basis of Iran's specific claims against the United States,"[236] it articulated claims for only eight cases, including the pending *Peterson II* case that has yet to result in the turnover of assets. As for the remaining cases, Iran has utterly failed to articulate the alleged injury to Iranian companies. And the Court must base its analysis of alleged injury to Iran only on the cases in which assets have actually been turned over, as alleged injury in the remaining cases is nothing more than speculation.

6.30 Consequently, the scope of the alleged damage to the Iranian economy has not been even remotely established. This is not a matter that can be deferred to a damages phase. The Court cannot simply presume that U.S. claimants, assuming they even proceed with their enforcement efforts, will prevail in such cases. Cases may be dismissed or overturned on jurisdictional grounds, and TRIA is a complex statute; it is not possible to generalize about whether a specific property can be attached or would be subject to one of its exceptions unless the matter is fully litigated.

6.31 Iran is trying to have it both ways—relying on Treaty provisions addressing the rights of Iranian nationals and companies to assert injuries to companies without showing how, in the vast majority of cases, the companies have been injured, while at the same time relying on these alleged injuries to assert direct injury to itself in order to circumvent the exhaustion requirement. Iran cannot prove its case in the abstract. It must prove it through specific evidence of injury.

6.32 For all of the reasons discussed above, the Court should find that Iran's claim is indirect and remedies in U.S. courts are reasonably available. As such, the Court must dismiss all elements of the claim involving alleged injuries to companies that have not exhausted local remedies.

[236] Iran's Reply, ¶ 1.22.

CHAPTER 7: ARTICLE XX(1) BARS IRAN'S CLAIMS REGARDING EXECUTIVE ORDER 13599

7.1 In its Counter-Memorial, the United States demonstrated that Executive Order 13599 ("E.O. 13599" or "the Executive Order") falls within two of the exceptions set out in Article XX(1) of the Treaty of Amity, thus barring Iran's claims with respect to the Executive Order. *First*, under subparagraph (c), the Executive Order "regulat[es] the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment." *Second*, under subparagraph (d), the Executive Order was "necessary to protect" the United States' "essential security interests." As will be explained below, nothing in Iran's Reply demonstrates otherwise.

Section A: Executive Order 13599 Engages Article XX(1)(c) as it Regulates Iranian Arms Production and Trafficking

7.2 Iran's claims with respect to E.O. 13599 fail because the Executive Order falls under the exception provided for in Article XX(1)(c) as a measure that regulates arms production and trafficking. Iran argues that E.O. 13599 does not regulate arms production or trafficking.[237] As explained in the U.S. Counter-Memorial, and below, this is simply not true. Iran further suggests that Article XX(1)(c) only applies to a Party's regulation of its own domestic production and export in arms,[238] an assertion that has no support in the treaty text and history.

i. E.O. 13599 Is a Critical Part of a Regulatory Scheme to Address Iranian Arms Trafficking

7.3 Article XX(1)(c) states that the Treaty shall not preclude the application of measures "regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment." The Court has not previously had occasion to interpret the meaning of subparagraph (c). The term "regulate" is not defined in the Treaty. However, the ordinary meaning of "regulate" is to "control or supervise by means of rules and regulations."[239] "Traffic" means "the commercial movement of goods or people" or "to deal or trade in something illegal."[240] Therefore, this exception ensures the Treaty does not preclude measures

[237] Iran's Reply, ¶¶ 10.5, 10.9.

[238] Iran's Reply, ¶ 10.13.

[239] CONCISE OXFORD ENGLISH DICTIONARY 1212 (11th ed. 2008) **(U.S. Annex 302)**.

[240] CONCISE OXFORD ENGLISH DICTIONARY 1528 (11th ed. 2008) **(U.S. Annex 302)**.

that, *inter alia*, control by rule or regulation the production of, commercial movement of, or illegal trade in arms.

7.4 In its Counter-Memorial, the United States set forth evidence of Iran's pursuit of ballistic missile capabilities and history of supplying arms and other support to militant and terrorist groups abroad.[241] Iran does not dispute that the pursuit of ballistic missile capabilities and supply of arms to militant and terrorist groups abroad constitutes the "production of or traffic in arms, ammunition and implements of war." Rather, Iran argues that E.O. 13599 does not regulate arms production or trafficking.[242] When the Executive Order is examined in context, it is clear that this argument has no basis.

7.5 The United States has long sought to contain, by rules and regulations, Iran's international arms trafficking, ballistic missile production, and financial support for terrorism. It has done this through a regulatory regime that provides for, *inter alia,* freezing the U.S.-based assets of Iranian governmental entities, Iranian financial institutions, and Iranian entities sanctioned for engaging in illicit activities, such as the provision of arms to terrorist groups, that are in the United States or the possession or control of a U.S. person.[243]

7.6 Executive Order 13599 followed a U.S. Treasury Department finding that Iran and Iranian financial institutions were using deceptive financial practices to evade U.S. and multilateral sanctions, including those targeting weapons proliferation and the provision of support to terrorist groups.[244] The finding highlighted practices such as the formation of front companies to obtain dual-use items that could be used in Iran's missile programs, the falsification of end-user information on export forms to allow prohibited items to be exported into Iran, and fund transfers to local banks to conceal the Iranian origin of funds.[245] The finding cautioned that Iran's deceptive financial practices put any financial institutions involved with them at risk of "unwittingly facilitating transactions related to terrorism, proliferation, or the evasion of U.S. and multilateral sanctions."[246] In light of this risk, the U.S. Congress passed

---

[241] *See, e.g.*, U.S. Counter-Memorial, ¶¶ 11.12-11.14.

[242] Iran's Reply, ¶¶ 10.5, 10.9.

[243] *See, e.g.,* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195 (U.S. P.O. Annex 198). *See also* U.S. Counter-Memorial, ¶¶ 11.16-11.17.

[244] *See, e.g.*, U.S. Counter-Memorial, ¶¶ 11.16-11.17.

[245] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72760-72761 (Nov. 18, 2011) (U.S. P.O. Annex 152).

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

Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 ("NDAA 2012"), which directed the President to block the assets of Iranian financial institutions within the United States or in the possession or control of U.S. persons.[247] The President did so through E.O. 13599, noting in the Executive Order "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties . . . ."[248] The Executive Order was designed to stop sanctioned entities from engaging in international arms trafficking by cutting off hidden or masked sources of funding arranged under the guise of seemingly legitimate transactions.

7.7 Iran suggests that the Executive Order can have nothing to do with Article XX(1)(c) because its text lacks an explicit reference to "arms," "weapons," or "ammunition."[249] Measures do not need to contain the precise words of the exception in order to be covered by it. It is clear from the Executive Order's history, detailed in the Counter-Memorial,[250] that the Executive Order works in conjunction with other measures to address Iran's production of and traffic in arms that support Iranian terrorism.[251] Adding an explicit reference to arms, for example, would not change the Executive Order's effect of making it more difficult for Iran to finance its international arms trafficking through deceptive financial practices.

ii. Article XX(1)(c) Is Not Limited to Regulation of Domestic Arms Production and Export

7.8 Iran contends that Article XX(1)(c) is limited to a Party's right to regulate its own production of or export or import of arms.[252] Iran supports this proposition by inaptly referencing a U.S. domestic law supposedly in force at the time of conclusion of the Treaty of Amity[253] and citing the Court's *Military and Paramilitary Activities (Nicaragua v. United States)* judgment.[254] Iran does not, however, provide textual support for its argument—and none exists. While the United States (like Iran) agrees that Article XX(1)(c) covers U.S. controls on arms and dual use exports and re-exports to Iran, on a proper interpretation, Article

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

[248] U.S. Counter-Memorial, ¶ 11.9; Exec. Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (IM Annex 22).

[249] Iran's Reply, ¶¶ 10.8-10.9.

[250] U.S. Counter-Memorial, ¶¶ 11.7-11.18.

[251] Exec. Order 13599, 7 Fed. Reg. 6659 (Feb. 5, 2012) at Preamble (IM Annex 22).

[252] Iran's Reply, ¶¶ 10.13, 10.15.

[253] Iran's Reply, ¶ 10.12.

[254] Iran's Reply, ¶ 10.15.

XX(1)(c) is not limited to the regulation of domestic manufacturing or trade in arms. This is apparent from its language which, unlike the exception for the "importation or exportation" of gold or silver provided for in Article XX(1)(a), is not limited to "importation or exportation" of arms. Rather it addresses the "traffic in arms," which refers to a broader international trade of munitions, including any transactions that enable or facilitate their international trade and result in their proliferation across borders to dangerous actors, and not just the physical crossing of the borders of such munitions between the parties to the Treaty. In that context, the word "production" directly next to the phrase "traffic in arms" is not naturally read as limited to domestic production. Thus, the text may also cover sanctions and other financial tools designed to regulate the production of or traffic in arms.

7.9 Iran argues that Article XX(1)(c) is limited to the U.S. right to regulate its own production, manufacturing, or export of arms because it is an extension of the U.S. Munitions Control Act of 1947.[255] This is erroneous. As an initial matter, the specific Act cited by Iran, which Iran states was concerned with "supervising this country's international traffic and trade in arms and munitions of war,"[256] was proposed, but never enacted into law. Regardless, Iran does not point to any negotiating history or other evidence to show that subparagraph (c) of Article XX(1) of the Treaty was intended to be confined to such measures alone.

7.10 To the contrary, U.S. law in force at the time the Treaty was negotiated was aimed at controlling arms trade by the United States *and* by others. For example, only four years before the Treaty of Amity went into effect, Congress enacted the Mutual Defense Assistance Act of 1951,[257] commonly known as the Battle Act, to "secure the cooperation of friendly foreign nations in the maintenance of a multilateral embargo on strategic exports to Communist countries."[258] The Battle Act established an Administrator who published a list of embargoed items, such as arms, ammunition, and implements of war,[259] and authorized the termination of certain forms of assistance to any nation knowingly permitting the shipment of arms, ammunition, implements of war, or other embargoed items, irrespective of origin, to any nation

[255] Iran's Reply, ¶ 10.12.

[256] Iran's Reply, ¶ 10.12.

[257] Pub. L. 213, 22 U.S.C. 1611 *et seq.* (1964) [hereinafter "Battle Act"] **(U.S. Annex 303)**.

[258] Harold J. Berman & John R. Garson, *United States Export Controls – Past, Present, and Future*, 67 COLUM. L. REV. 791, 810 (1967) **(U.S. Annex 304)**.

[259] Battle Act, §§ 102-103 **(U.S. Annex 303)**.

threatening the security of the United States.[260] Against this contemporaneous background, it would be highly surprising for the U.S. to negotiate and conclude a treaty exception focused only on domestic production or export of arms.

7.11 This appreciation is supported by another example. Two years prior to the entry into force of the Treaty of Amity, the United States promulgated regulations pursuant to the Trading with the Enemy Act of 1917. These prohibited any person subject to the jurisdiction of the United States from purchasing, transporting, importing, or engaging in any other transaction with respect to merchandise outside the United States whose country of origin was in China or North Korea.[261] Thus, the U.S. legislative landscape at the time the Treaty was negotiated and concluded focused on regulation of transactions outside the United States by persons subject to U.S. jurisdiction that affected U.S. national security, not just domestic export regulation.

7.12 Iran cites *Military and Paramilitary Activities* to support its argument that Article XX(1)(c) "only applies to measures that are directed to the production of or traffic in arms – not to any measures that could have an impact on" Nicaragua's (and thus Iran's) own production of arms.[262] However, the Court made no broadly applicable conclusions regarding the scope of the arms exception in *Military and Paramilitary Activities*. Rather, the Court's statement was specific to the facts of the case, where it found it did not need to examine the exception because it had not found the allegations regarding the U.S. supply of arms to the Contras to breach the Treaty in the first place.[263] Thus, nothing in *Military and Paramilitary Activities* undermines the application of Article XX(1)(c) to E.O. 13599.

Section B: Executive Order 13599 Engages Article XX(1)(d) as It Was Necessary to Protect U.S. Essential Security Interests

7.13 Article XX(1)(d) provides that the Treaty shall not preclude a Party's application of measures "necessary to protect its essential security interests." E.O. 13599 was promulgated as a measure necessary to protect the U.S. essential security interests in addressing Iran's support for arms trafficking, terrorism, and ballistic missile capabilities, and thus falls within Article XX(1)(d). Iran disputes whether E.O. 13599 was sufficiently timely and tailored to

[260] Battle Act, § 103(b) **(U.S. Annex 303)**.

[261] 18 Fed. Reg. 2079 (April 14, 1953) **(U.S. Annex 305)**; *see also* Berman & Garson, at 791, 793 **(U.S. Annex 304)**.

[262] Iran's Reply, ¶ 10.15.

[263] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* 1986 I.C.J. 14, ¶ 280 (June 27).

have been "necessary" to protect the identified U.S. essential security interests. As the following discussion of the text and context of the Executive Order confirms, however, E.O. 13599 was "necessary" within the meaning of the Treaty's essential security exception, and thus Article XX(1)(d) bars Iran's claims regarding E.O. 13599.

i. The Invoking State Is Entitled to Substantial Deference

7.14 The essential security exception is broad. The United States accepts in these proceedings that the Court may interpret the exception, but a high degree of deference is nonetheless due to the State invoking it. As the Court has remarked previously, "[t]he concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past."[264] The United States, too, made clear during negotiations of the Treaty of Amity that the Treaty recognized the "paramount right" of a State to "take measures to protect itself and public safety."[265] Like other, similar essential security exceptions, Article XX(1)(d) extends "broad freedom of action . . . to each treaty partner."[266]

7.15 The essential security exception at issue in the present proceedings leaves each party, acting in good faith, a wide discretion to determine the measures necessary to protect its security interests. For that reason, the Court has accepted that it should afford substantial deference to a State Party's determination that a measure is "necessary to protect its essential security interests."[267] In *Certain Questions of Mutual Assistance*, the Court characterized the essential security provision in the Treaty of Friendship and Co-operation in issue in that case as "giving wide discretion."[268] Given that, the term "necessary" does not mean that the measure is the only way for the United States to exercise the discretion afforded it under the Treaty, but rather requires that the Court accord careful regard and appropriate weight to U.S. good faith perceptions of its circumstances.

7.16 Iran's Reply attempts to undermine the relevance of *Certain Questions of Mutual Assistance*. In particular, Iran criticizes the United States for "only retain[ing] two words,

---

[264] *Military and Paramilitary Activities*, 1986 I.C.J. 14, ¶ 224.

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

[266] Charles H. Sullivan, U.S. Dep't of State, Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background 308 (1981) (describing essential security exceptions in treaties like the Treaty of Amity during the same period) (U.S. P.O. Annex 214).

[267] *See id.* at 308 (U.S. P.O. Annex 214).

[268] *Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 229, ¶ 145 (June 4).

'wide discretion' from the relevant passage" of the judgment.[269] This critique is misguided. The phrase "wide discretion," which the Court used in characterizing the essential security provisions in the Treaty of Amity and the U.S.-Nicaragua Friendship, Commerce, and Navigation Treaty, is the part of the judgment that is apposite to the present dispute.[270] The judgment was otherwise dealing with a differently phrased provision.[271]

7.17 Iran indeed notes the differences in the essential security exception language of the treaty at issue in *Certain Questions of Mutual Assistance* and the Treaty of Amity in an attempt to distinguish that case.[272] The variation in the provisions, however, is relevant to this dispute only insofar as the Court pointed to the Treaty of Amity's more narrowly phrased essential security provision as an example of "the competence of the Court in the face of provisions giving wide discretion."[273] In other words, the Court's "wide discretion" language in *Certain Questions of Mutual Assistance* is entirely applicable to the Treaty of Amity and the circumstances of this case. The Court's interpretation in *Certain Questions of Mutual Assistance* was clear and remains uncontradicted in its jurisprudence.

7.18 Finally, Iran's suggestion that the United States is seeking to transform Article XX(1)(d) into a self-judging provision is wrong.[274] As the United States said at the Preliminary Objections phase, "the essential security clause in this Treaty is not self-judging, [but] its history and context, taken together with the Court's own view as expressed in *Mutual Assistance*, indicate that invocation of the clause calls for a deferential review."[275] The United States maintains this position.

---

[269] Iran's Reply, ¶ 10.23.

[270] Article XXI(1)(d) of the U.S.-Nicaragua Treaty provides that "the present Treaty shall not preclude the application of measures . . . necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

[271] The relevant provision in the Convention Concerning Judicial Assistance in Criminal Matters of 1986 differs from Article XX(1)(d) of the Treaty of Amity as it states: "judicial assistance may be refused . . . [i]f the requested State considers that execution of the request is likely to impair its sovereignty, security, public policy or other essential interests."

[272] Iran's Reply, ¶ 10.23.

[273] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 229, ¶ 145 (June 4).

[274] *See, e.g.,* Iran's Reply, ¶ 10.19. Iran spends several pages of its Reply arguing that the United States "does not straightforwardly assert" that the provision is self-judging, but that the U.S. arguments in its Counter-Memorial "amount[] to such a contention."

[275] *See* U.S. Preliminary Objections, ¶ 7.30.

ii. There Is No Support for Iran's Alternative Standard

7.19 There is no support for Iran's alternative standard that the test is whether a measure is "*objectively required in order to achieve that protection*, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its internal obligations."[276] Iran's reliance for this rule on the award in the investor-State dispute *Deutsche Telekom v. India* is flawed for several key reasons.

7.20 *First*, Iran's selective quotation of the *Deutsche Telekom* award obscures the deference that the tribunal in fact afforded to the invoking State in that case. In the paragraph that immediately precedes that quoted by Iran, the tribunal provided important context, which, read in full, stated:

> In [its] review, the Tribunal will undoubtedly recognize a margin of deference to the host state's determination of necessity, given the state's proximity to the situation, expertise and competence. Thus, the Tribunal would not review de novo the state's determination nor adopt a standard of necessity requiring the state to prove that the measure was the "only way" to achieve the stated purpose. On the other hand, the deference owed to the state cannot be unlimited, as otherwise unreasonable invocations of [the essential security exception] would render the substantive protections contained in the Treaty wholly nugatory.[277]

The tribunal's emphasis on deference and the State's "proximity to the situation, expertise, and competence" is obscured in Iran's formulation but is fundamental to a widely-accepted consideration in applying an essential security exception.[278]

7.21 *Second*, in the application of its rule, the *Deutsche Telekom* tribunal did not repeat the phrase "objectively required." Nor did the tribunal analyze other putative alternatives to the challenged measures.[279] Instead, the tribunal's focus in application of the exception was on whether the measures were "principally targeted" at the security interests. After finding that India was motivated by a mix of interests including essential security interests, the tribunal provided this shorthand: "[t]he question is thus whether the . . . decision was 'necessary' to protect those interests, in the sense that it was *principally targeted to safeguard* 'to the extent

[276] Iran's Reply, ¶ 10.24 (quoting *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award ¶ 239 (Dec. 13, 2017) (emphasis added in Iran's Reply)).

[277] *Deutsche Telekom*, Interim Award ¶ 238.

[278] *Id.*

[279] The Tribunal makes just one passing reference to reasonable alternatives. *Id.* ¶ 290.

necessary' the defense and other strategic needs that fall within the purview of 'essential security interests.'"[280] The tribunal then concluded that India failed to establish a "nexus" between the measure and the interests pursued.[281]

7.22 *Third*, the *Deutsche Telekom* tribunal included no citation for its assertion. In sum, the *Deutsche Telekom* award does not provide any authority, let alone compelling authority, for applying an "objectively required" standard to the essential security provision in the Treaty of Amity. Further, even if the Court were to take the *Deutsche Telekom* award at face value, the tribunal's application does not support the "objectively required" standard that Iran would have the Court apply.

iii. Under the Article XX(1)(d) Standard, E.O. 13599 Was Necessary to Protect U.S. Essential Security Interests

7.23 Executive Order 13599 blocked all property of the Iranian government and financial institutions within U.S. jurisdiction (*i.e.*, within the United States or the possession or control of a U.S. person) in an effort to target "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties."[282] Iran cannot and indeed does not contest that preventing terrorism, terrorist financing, or halting the advancement of a hostile State's ballistic missile program constitute essential U.S. security interests. Rather, Iran argues that "the key question is whether U.S. essential security interests were engaged in 2012 when it issued E.O. 13599 to block the assets of all Iranian financial institutions."[283] Thus conceding the U.S. formulation of its essential security interests, Iran challenges only whether the Executive Order was "necessary" in light of the circumstances.

7.24 Under any definition of the Treaty's use of the term "necessary," E.O. 13599 was and remains necessary to protect U.S. essential security interests. The Executive Order is an incremental and methodical escalation of U.S. efforts to protect its essential security interests from the threats posed by Iran's support for terrorism, terrorist financing, and its ballistic missile program. The Executive Order built on and complemented earlier international and U.S. sanctions addressing illicit Iranian activities following the United States' recognition that then-existing measures had not adequately addressed the threat caused by Iran's concerted

[280] *Deutsche Telekom*, Interim Award ¶ 284 (emphasis added).

[281] *Id.* ¶ 288.

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

[283] Iran's Reply, ¶ 10.29.

efforts. As has been detailed before the Court on numerous occasions, the United States and the international community noted with alarm Iran's support for terrorism and its ballistic missile program over the course of many years. There is no need to repeat the extensive set of facts that accumulated over time, but the following discussion highlights some salient developments that precipitated the issuance of E.O. 13599.[284]

7.25 The United Nations has urged States to take measures to eliminate terrorism and, in particular, suppress the financing of terrorist acts.[285] With respect to Iran, in the years prior to the issuance of E.O. 13599, the U.N. Security Council warned Iran against developing its ballistic missile program and called on States to "exercise vigilance" over transactions involving "all banks domiciled in Iran," including Bank Markazi and Bank Melli, "so as to prevent such transactions contributing to Iran's proliferation-sensitive nuclear activities or to the development of nuclear weapon delivery systems."[286] The multilateral Financial Action Task Force ("FATF") includes Iran on its short list of "high-risk and non-cooperative jurisdictions," and it is one of only two States included on the "call to action" list of countries against which States are advised to take measures.[287]

7.26 Several successive developments in the months immediately preceding the February 2012 issuance of E.O. 13599 further contributed to the necessity of the measure. In late October 2011, FATF raised "urgent concern" about the risks Iran's financial sector posed to terrorism finance, stating that it was "particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international finance system."[288]

7.27 Then, on November 21, 2011, the U.S. Treasury, in consultation with the U.S. Departments of State and Justice, found Iran to be a jurisdiction of "primary money laundering concern."[289] The published finding detailed the support for this conclusion, stating:

---

[284] *See* U.S. Counter-Memorial, Chapters 5, 6, & 11.

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

[286] SC Res. 1929, prmbl. & ¶ 23, U.N. Doc. S/RES/1929 (June 9, 2010) (U.S. P.O. Annex 110); SC Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102).

[287] Financial Action Task Force (FATF), High-risk an monitored jurisdictions **(U.S. Annex 134)**.

[288] Financial Action Task Force (FATF), Public Statement – 28 October 2011 (U.S. P.O. Annex 222).

[289] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756, 72757-72758 (Nov. 21, 2011) (U.S. P.O. Annex 152) ("Iran remains the most active of the listed state sponsors of terrorism, routinely providing substantial resources and guidance to multiple terrorist organizations. . . . Iran is known to have used state-owned banks to facilitate terrorist financing.").

> As a result of the strengthened U.S. sanctions and similar measures taken by the United Nations and other members of the global community, Iran faced significant barriers to conducting international transactions. In response, Iran has used deceptive financial practices to disguise both the nature of transactions and its involvement in them in an effort to circumvent sanctions. This conduct puts any financial institution involved with Iranian entities at risk of unwittingly facilitating transactions related to terrorism, proliferation, or the evasion of U.S. and multilateral sanctions. Iranian financial institutions, including the Central Bank of Iran ("CBI"), and other state-controlled entities, willingly engaged in deceptive practices to disguise illicit conduct, evade international sanctions, and undermine the efforts of responsible regulatory agencies around the world.[290]

7.28 The U.S. Treasury also stated that the Islamic Revolutionary Guard Corps and IRGC-Quds Force continued to use deceptive financial practices to evade sanctions, engaging in "seemingly legitimate activities that provide cover for intelligence operations and support terrorist groups such as Hizballah, Hamas, and the Taliban."[291]

7.29 In addition, Treasury found that "Iran also continues to defy the international community by pursuing nuclear capabilities and developing ballistic missiles in violation of seven UNSCRs . . . . To date Iran has not complied with the UNSC resolutions regarding its nuclear and missile activities."[292]

7.30 Treasury further found that Iran had provided arms and financing to the Taliban to target Coalition Forces, including the U.S. military. Specifically, since 2006, Iran had "arranged frequent shipments to the Taliban of small arms and associated ammunition, rocket propelled grenades, mortar rounds, 107 mm rockets, and plastic explosives."[293] In April 2011, Afghan forces intercepted a shipment of ammunition, supplied by Iran to the Taliban.[294] In August 2011, three months before the Treasury finding was published, a Taliban commander claimed to have been trained in Iran and offered $50,000 by Iran officials to destroy a dam in Afghanistan.[295]

---

[290] *Id.*

[291] *Id.* at 72762.

[292] *Id.*

[293] *Id.* at 72758.

[294] Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), U.N. Doc. S/2012/395, at 27 (June 4, 2012) (U.S. P.O. Annex 114).

[295] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. at 72757-72758 (U.S. P.O. Annex 152).

7.31 Following these determinations, the U.S. Congress passed the NDAA 2012 with findings that the Central Bank of Iran transferred billions of dollars to evade sanctions and that the "entire Iranian banking sector, including the Central Bank of Iran . . . pos[ed] terrorist financing, proliferation financing, and money laundering risks for the global financial system."[296] Section 1245(c) of the NDAA 2012 accordingly required the President to block all assets of Iranian financial institutions within the United States or in possession or control of U.S. persons.

7.32 The Executive Order soon followed this legislation. It included provisions tailored to address the threat posed to the United States by the Iranian government and financial institutions. Asset freezes are recognized by the United Nations as an important method to "prevent and suppress the financing of terrorist acts," as States are required to do under U.N. Security Council Resolution 1373, "even in the absence of a link to a specific terrorist act."[297] Here, E.O. 13599 was aimed at the Iranian government and Iranian financial institutions, which had supported these threats to U.S. essential security interests and evaded existing U.S. sanctions.

7.33 In light of these developments, Iran's arguments that the Executive Order was neither timely nor tailored enough to have been "necessary" cannot stand. To support its argument that the United States has failed to show why the Executive Order was necessary in 2012, Iran cites *Military and Paramilitary Activities* for the principle that, under Article XX(1)(d), measures "must have been, at the time they were taken, . . . necessary to protect [the invoking State's] essential security interests."[298] The events now before the Court, however, are far closer in time to E.O. 13599 than those in *Military and Paramilitary Affairs,* where the Court found the United States criticized certain policies for four years before it implemented measures. Here, by contrast, the United States had responded incrementally to ongoing threats from Iran for years. The weeks specifically preceding E.O. 13599 were marked by a flurry of new pronouncements from the FATF, the U.S. Treasury, and Congress chronicling the evolving threat posed by Iran (including illicit Iranian arms trafficking that very year) and the need for an enhanced U.S. response. Indeed, contrary to Iran's characterization, the Executive

[296] National Defense Authorization Act for Fiscal Year 2012, § 1245(a), Pub. L. 112-239, 126 Stat. 2006 (IM Annex 17).

[297] S.C. Res. 1373, U.N. Doc. S/RES/1373, ¶ 1 (Sept. 28, 2001) (U.S. P.O. Annex 81); S.C. Res. 2253, U.N. Doc. S/RES/2253, prmbl. ¶ 24 (Dec. 17, 2015) (U.S. P.O. Annex 182).

[298] *Military and Paramilitary Activities*, 1986 I.C.J. 14, ¶ 281.

Order issued immediately after a U.S. government determination that Iran persisted in the use of deceptive practices to violate an array of more targeted sanctions.

7.34 In addition, the breadth of the Executive Order is not disqualifying, as Iran suggests. Rather, E.O. 13599 was broad because it was determined to be necessary to address the deceptive Iranian conduct at issue. Having tried more narrow measures, the United States was forced by Iran's repeated attempts to evade these measures to target all Iranian financial institutions.[299] Iran argues that the Executive Order "concerns the assets of untargeted and irrelevant Iranian institutions,"[300] but in reality it targeted all Iranian financial institutions because the entire sector was determined to pose a cumulative risk.

7.35 Iran further speculates in its Reply that "no State and no international organization has considered it necessary (let alone lawful and appropriate) to take measures equivalent to those indicated in E.O. 13599."[301] Even under the standard set forward by Iran in *Deutsche Telekom*, however, a measure need not be the only option available to satisfy the essential security exception.[302] The United States is likewise under no obligation to show that any other State or international organization adopted measures identical to those it deemed necessary to protect its essential security interests in its unique circumstances. Article XX(1)(d) provides flexibility to the Parties to adopt responses, including incrementally increasing responses, in response to their own essential security interests. It does not require that the Parties follow other States' decisions to act or not to act.

7.36 Thus, Article XX(1)(d) bars Iran's claims regarding E.O. 13599. The essential security exception is broad and affords a high degree of deference to the invoking State. Iran has put forward an overly constrained treaty standard that conflicts with the Court's existing jurisprudence on the interpretation of Article XX(1)(d). Still, even under Iran's restrictive standard, it is evident that E.O. 13599 was necessary as an incremental, strategic escalation of U.S. efforts to protect its essential security interests from the threats posed by Iran's continued support for terrorism, financing of nuclear weapons proliferation, and pursuit of its ballistic missile program, all furthered by Iran's money laundering.

---

[299] UNSC Res. 1803 warned States about transactions with "all banks domiciled in Iran." S.C. Res. 1803, ¶ 10, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (U.S. P.O. Annex 102).

[300] Iran's Reply, ¶ 10.34.

[301] Iran**'s** Reply, ¶ 10.32.

[302] *See Deutsche Telekom*, Interim Award ¶ 238.

Section C: The Consequences for Iran's Case of a Finding That E.O. 13599 Is Permitted Pursuant to Article XX(1)(c) and/or (d) of the Treaty of Amity

7.37 Should the Court conclude that Iran cannot assert claims with respect to E.O. 13599 under the Treaty of Amity, the primary consequence would be with respect to Iran's assertion, in the context of some Treaty articles, that the blocking of assets under E.O. 13599 alone constitutes a breach, even if those assets were not turned over to plaintiffs holding judgments against Iran.[303] Iran has not particularized its claims in this regard (by, for example, identifying specific assets that would be subject to such claims), and they are accordingly deficient for that reason alone. A finding by the Court that E.O. 13599 is within the scope of Article XX(1)(c) and/or (d) would be yet another reason to reject this category of claim.

[303] *See, e.g.*, Iran's Reply, ¶ 10.2 ("Only a small part of its complaints is linked to E.O. 13599, which blocks the property of Iran and Iranian financial institutions. By denying the separate juridical status of Iranian companies, E.O. 13599 constitutes a breach of Article III(1), V and X(1) of the Treaty of Amity, among many other breaches claimed by Iran.").

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

In Part III, the United States addresses Iran's misinterpretation and misapplication of each of the Treaty of Amity articles at issue to the challenged measures and the failure of Iran's Reply to remedy the flaws in its claims. The United States begins in Chapter 8 with a detailed discussion of the challenged measures. Next, the United States shows that the challenged measures do not breach Articles III(1) and III(2) (Chapter 9), Article IV(1) (Chapter 10), Article IV(2) (Chapter 11), or Articles X(1), V(1), and VII(1) (Chapter 12). Finally, in Chapter 13, the United States addresses Iran's misguided attempt in its Reply to avoid the conclusion that Iran has abused its rights under a treaty of friendship and commerce by invoking its provisions against a framework designed to provide recourse to victims of Iran-sponsored terrorism.

CHAPTER 8: THE U.S. MEASURES

8.1 The purpose of this chapter is to provide additional information about the legislative, executive, and judicial measures that Iran has challenged under the Treaty of Amity in order both to correct the record as to the nature of these measures and to clarify which of the U.S. measures remain at issue. This chapter provides essential context for the chapters that follow regarding Iran's claims under the individual Treaty articles.

8.2 In Section A of this chapter, the United States builds on the discussion of the legislative and executive measures in Chapter 6 of the Counter-Memorial to show that these measures were a reasonable response to sponsorship of terrorism by Iran and other States. The United States also demonstrates that, with respect to the **8** judgment enforcement actions on which Iran bases its claims, only a small number of measures apply across multiple actions and certain measures only apply to a single action.

8.3 In Section B, the United States addresses in detail the **8** judgment enforcement actions discussed in Iran's Reply. By reference to the detailed, publicly available records from these cases, the United States establishes that in the actions where Iranian entities chose to appear in court, they were given a full opportunity to present their defenses, including challenges to the same statutes that Iran attempts to challenge here. Moreover, even in the actions where Iranian entities chose not to participate, the U.S. courts took great pains to ensure that they had notice of plaintiffs' claims and an opportunity to appear. In addition, other parties to the proceedings, sometimes with the support of the U.S. government, asserted arguments regarding, *inter alia*, statutory interpretation that were aligned with the Iranian entities' interests.

8.4 In Section C, the United States addresses the complaints—which are both irrelevant and meritless—that Iran has raised in the Reply concerning the judgments against it arising out of the 9/11 attacks. As already explained in Chapter 2, Iran's claims with respect to these and other liability judgments were based on alleged violations of its sovereign immunity and the Court dismissed those claims in its Preliminary Objections Judgment. Accordingly, no claims remain in this case relating to the 9/11 judgments, and the Reply's discussion of the 9/11 judgments is therefore irrelevant to Iran's case as it now stands. The United States nevertheless feels compelled to respond to Iran's complaints about the 9/11 judgments to address important omissions in Iran's account and show why the complaints are meritless.

Section A: The U.S. Legislative and Executive Measures Were a Reasonable Response to the Sponsorship of Terrorism by Iran and Other States

8.5 The United States implemented the measures that Iran has challenged in these proceedings in response to extensive and ongoing support for terrorist attacks against U.S. citizens and interests by Iran and, in some cases, other State sponsors of terrorism. As has already been discussed, Iran seeks to avoid reckoning before the Court with its role in supporting terrorism against the United States, just as it did before U.S. courts. Iran is free to plead its claims how it wishes, but the Court cannot ignore the factual backdrop to the U.S. measures.

8.6 In particular, it is critically important for the Court to keep two points in mind regarding the three legislative measures that remain in dispute,[304] namely, Section 201 of the Terrorism Risk Insurance Act ("TRIA"), Section 1610(g) of the Foreign Sovereign Immunities Act ("FSIA"), and Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, codified as Section 8772 of Title 22 of the U.S. Code ("Section 8772").[305]

8.7 The first point is that the application of these measures against agencies and instrumentalities of the Iranian State is predicated on plaintiffs having obtained a valid judgment from a U.S. court against Iran under the terrorism exception to the FSIA. Section 201 of TRIA, enacted in 2002, authorized plaintiffs with judgments obtained under the terrorism exception to the FSIA to execute against "the blocked assets of [a] terrorist party

[304] The United States addresses the sole executive measure that remains in dispute, Executive Order 13599, below.

[305] In its Memorial, Iran also purported to challenge the terrorism exception to the FSIA, codified as 28 U.S.C. § 1605(a)(7), and certain amendments to the exception enacted in 2008 as 28 U.S.C. § 1605A, but Iran's claims as to these measures were grounded on alleged violations of Iran's sovereign immunity and were therefore dismissed by the Court's Preliminary Objections Judgment. Preliminary Objections Judgment, ¶ 80.

(including the blocked assets of any agency or instrumentality of that terrorist party)."[306] Section 1610(g) of the FSIA, enacted in 2008, permitted plaintiffs with terrorism judgments to attach the property of a foreign State agency or instrumentality to satisfy the judgment against the foreign State, regardless of whether the agency or instrumentality is juridically separate from the State and whether the assets are blocked.[307] Finally, Section 8772 made certain assets at issue in an action to enforce judgments arising primarily out of the 1983 bombing of the U.S. Marine barracks—*Peterson v. Islamic Republic of Iran*—available for attachment if the court concluded that the assets were:

> (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) . . . ; and
>
> (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad, . . .[308]

8.8 The second point is that, as already discussed, Iran did not contest the numerous judgments that plaintiffs obtained in U.S. courts, either in the liability proceedings or in the subsequent enforcement proceedings, and Iran likewise has almost nothing to say in these proceedings about the merits of the judgments or its role in the terrorist attacks at issue in those case.[309]

8.9 The Court must therefore assess the reasonableness of the U.S. measures in light of the valid, unpaid judgments against Iran. Specifically, the Court must consider whether the Treaty of Amity permits one Party that has supported terrorist attacks on the nationals of the other Party to avoid paying compensation to the victims of those attacks by placing its assets in separate juridical entities. Put another way, the Court must decide whether Treaty provisions that were intended to facilitate friendship and commerce between the Parties prescribe a

---

[306] U.S. Terrorism Risk Insurance Act of 2002, § 201(a), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (IM Annex 13). *See also* U.S. Counter-Memorial, ¶¶ 6.11-6.12.

[307] U.S. Counter-Memorial, ¶¶ 6.13-6.15. *See also* U.S. National Defense Authorization Act for Fiscal Year 2008, § 1083(b)(3)(D), Pub. L. No. 110-181, 122 Stat. 206 (2008) (IM Annex 15).

[308] U.S. Iran Threat Reduction and Syria Human Rights Act of 2012, § 502, Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified at 22 U.S.C. § 8772 (2012)) (IM Annex 16). *See also* U.S. Counter-Memorial, ¶ 6.16.

[309] The only judgments that Iran addresses in any depth in its Reply—which arise out of the 9/11 attacks—are irrelevant to Iran's claims here, as discussed below in Section C.

corporate veil so inviolable that, in the name of "amity," it shields Iran from actions responding to its own State-sponsored terrorism.

8.10 The choice before the Court regarding the sole executive measure in dispute, Executive Order 13599, is equally stark. As the Executive Order states, it was predicated on

> the deceptive practices of the Central Bank of Iran [*i.e.*, Bank Markazi] and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies of Iran's anti-money laundering regime and the weaknesses of its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities.[310]

8.11 Executive Order 13599 thus arose out of serious concerns about the Iranian financial system, which were and continue to be shared by numerous other members of the international community.[311] The justifications for Executive Order 13599 are explored in more detail in other sections of this Rejoinder, particularly Chapter 7, relating to the application of Article XX(1). The crucial point, though, is that Iran is again inviting the Court to find a breach of the Treaty in connection with a measure taken by the United States in response to conduct that cannot possibly deserve the Treaty's protection.

8.12 In addition to keeping in mind the factual backdrop for the challenged measures, it is equally important for the Court to consider how the measures have been applied in specific cases to specific assets. As discussed above, Iran has only articulated claims with respect to **8** enforcement actions and the challenged legislative and executive measures are only implicated in certain of these actions. The table below summarizes the relationship between the enforcement actions that are at issue in this case and the challenged measures:

#	Case Caption	Case Number	Measures implicated
1	*Peterson v. Islamic Republic of Iran (Peterson I)*	10-cv-4518 (S.D.N.Y.)	TRIA § 201 E.O. 13599 Section 8772

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

[311] *See, e.g.*, U.S. Counter-Memorial, ¶¶ 11.7-11.10.

#	Case Caption	Case Number	Measures implicated
2	*Peterson v. Islamic Republic of Iran (Peterson II)*	13-cv-9195 (S.D.N.Y.)	TRIA § 201 E.O. 13599[312]
3	*Weinstein v. Islamic Republic of Iran*	02-mc-00237 (E.D.N.Y.)	TRIA § 201
4	*Bennett v. Islamic Republic of Iran*	11-cv-05807 (N.D. Cal.)	TRIA § 201 FSIA § 1610(g)
5	*Levin v. Bank of New York*	09-cv-5900 (S.D.N.Y.)	TRIA § 201 FSIA § 1610(g)
6	*Heiser v. Islamic Republic of Iran*	00-cv-2329 (D.D.C.)	TRIA § 201 FSIA § 1610(g)
7	*Heiser v. Bank of Baroda, New York Branch*	11-cv-1602 (S.D.N.Y.)	TRIA § 201 FSIA § 1610(g)
8	*Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*	11-cv-1601 (S.D.N.Y.)	TRIA § 201 FSIA § 1610(g)

8.13 Four important observations can be made based on this table. *First*, the assets at issue in the *Weinstein* and *Bennett* cases—which belonged to Bank Melli—were blocked and made available for attachment *not* under E.O. 13599, which Iran has challenged here, but under an earlier Executive Order, E.O. 13382, which was issued in 2007.[313] Iran has not challenged E.O. 13382 in these proceedings (indeed, it is not mentioned at all in Iran's Memorial and mentioned only in passing in a footnote of Iran's Reply). As a result, the only question before the Court in these proceedings is whether a judgment obtained against Iran could be enforced

[312] Section 1226 of the NDAA 2020, enacted in December 2019, affects *Peterson II*, but because it was enacted after the termination of the Treaty of Amity, it cannot be subject to claims in this case. *See supra* Chapter 2. In addition, the *Peterson II* case remains pending, and the applicability of E.O. 13599 and Section 201 of TRIA to the assets at issue has not been resolved by the U.S. courts. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, Case No. 15-0690, slip op. at 67-70 (2d Cir. Nov. 21, 2017) (Iran Reply Annex 58).

[313] *See infra* Section B.i.(c) and (d).

against the assets of a State-owned bank (Bank Melli) that had been blocked pursuant to E.O. 13382.

8.14 Relatedly, the *Levin* and *Heiser* actions were all initiated before the issuance of Executive Order 13599 and concerned assets that were either not blocked or blocked on other bases. While some of these assets may also have been subject to Executive Order 13599 after it was issued, it did not cause them to be available for attachment and execution.

8.15 *Second*, Section 8772 applies only in *Peterson I*. Moreover, as will be discussed in further detail below, there was and is nothing egregious about Section 8772. It made available for attachment assets that (i) Bank Markazi repeatedly claimed as its own, and (ii) had been blocked due to Bank Markazi's deceptive practices. Though Iran attempts to depict Section 8772 as an effort by the U.S. Congress to legislate a win for plaintiffs in a case they otherwise would have lost, plaintiffs argued that these assets were also subject to attachment under preexisting law (namely, TRIA). Section 8772 provided an alternative route to attachment of the assets in the event that the District Court had found TRIA inapplicable due to Bank Markazi's interposition of intermediaries between itself and the assets (while continuing to claim ownership of them). The District Court, however, ultimately concluded that plaintiffs could attach the assets under either TRIA or Section 8772.

8.16 *Third*, the two legislative measures that are relevant to multiple actions—Section 201 of TRIA and Section 1610(g) of the FSIA—apply to all State sponsors of terrorism, not solely to Iran.

8.17 *Fourth*, while plaintiffs invoked both Section 201 of TRIA and Section 1610(g) of the FSIA in a number of the actions, every single one involved blocked assets except plaintiffs' attempt to attach a debt owed by Sprint to an Iranian telecommunications company in *Levin* (which is discussed in further detail below). Accordingly, the fact that Section 1610(g) of the FSIA applies regardless of whether the assets at issue are blocked is only relevant to the outcome of one of the enforcement proceedings at issue.

Section B: U.S. courts Treated Iran and Iranian Entities Reasonably and Did not Discriminate Against Them in Proceedings to Enforce Terrorism Judgments

8.18 In this section, the United States addresses the **8** judgment enforcement actions that Iran has identified in its Reply as the basis for its claims in this case. The United States begins with **(i)** the four proceedings in which Iranian entities appeared, namely the two *Peterson* proceedings (where Bank Markazi appeared) and the *Weinstein* and *Bennett* proceedings

(where Bank Melli appeared), before turning to **(ii)** the four proceedings in which Iranian entities chose not to appear, namely the *Levin* action and the three *Heiser* actions.

8.19 As this review will show, in each of the cases in category **(i)**, the Iranian entities that appeared had a full opportunity to present their defenses to attachment of their assets and the U.S. courts thoroughly considered those defenses. The United States also addresses certain gaps and inaccuracies in Iran's account of these cases.

8.20 As to the category **(ii)** cases, the United States establishes that the courts made extensive efforts to ensure that Iranian entities with an interest in the assets at issue had notice of the proceedings and an opportunity to appear. By contrast to Bank Markazi and Bank Melli, which appeared in the category **(i)** cases, the Iranian entities implicated in the category **(ii)** cases chose not to appear. As already discussed in Chapter 6, this choice bars Iran's claims with respect to the category **(ii)** cases because, in declining to contest the attachment of their assets in U.S. courts, these entities failed to exhaust their local remedies. In any event, the United States shows how the U.S. courts, even in the absence of any Iranian participation, proceeded to weigh the plaintiffs' evidence and to consider arguments by other parties to the proceedings in opposition to plaintiffs' applications, including arguments that would have been available to Iranian entities, had they chosen to participate.

i. Proceedings in Which Iranian Entities Appeared

8.21 Two of the four proceedings discussed in this section involve Bank Markazi (*Peterson I* and *II*) and two involve another State-owned Iranian bank, Bank Melli (*Weinstein* and *Bennett*). The discussion of *Peterson I* and *II* is without prejudice to the point, already established above, that Bank Markazi is not a "company" within the meaning of the Treaty of Amity and, accordingly, that the Court need not reach the merits of Iran's claims under Articles III(1), III(2), IV(1), IV(2), and V(1) as they relate to these two cases. Likewise, the discussion of *Bennett* and *Peterson II* is without prejudice to the point that Iran cannot assert claims with respect to judicial action, such as the April 2020 order in *Bennett* directing the turnover of the funds at issue and any potential future turnover order in *Peterson II*, that has occurred or will occur after the termination of the Treaty of Amity.[314]

[314] *See supra* Chapter 2.

(a) Peterson I

8.22 As has already been discussed, the plaintiffs in *Peterson v. Islamic Republic of Iran* were victims of the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon and their families. In finding for the plaintiffs, the court concluded based on extensive evidence and testimony that

> MOIS [*i.e.*, the Iranian Ministry of Information and Security], acting as an agent of the Islamic Republic of Iran, performed acts on or about October 23, 1983 . . . which acts caused the deaths of over 241 peacekeeping servicemen at the Marine barracks in Beirut, Lebanon. Specifically, the deaths of these servicemen were the direct result of an explosion of material that was transported into the headquarters of the 24th MAU [*i.e.*, the 24th Marine Amphibious Unit of the U.S. Marines] and intentionally detonated at approximately 6:25 a.m., Beirut time by an Iranian MOIS operative.[315]

8.23 After obtaining a judgment against Iran for its role in the bombing, the *Peterson* plaintiffs sought to attach the proceeds of bonds owned by Bank Markazi, which were being held in an account maintained by Clearstream Banking, S.A. ("Clearstream") in New York.[316] At some point in 2008, Bank Markazi transferred the bond proceeds to an account that Banca UBAE, an Italian bank, had opened at Clearstream. Bank Markazi, however, continued to claim sole ownership of the bond proceeds.[317]

8.24 Plaintiffs initially proceeded under the FSIA's terrorism judgment execution provisions but amended their complaint in 2012 to assert claims under TRIA after Bank Markazi's assets, including the assets at issue in *Peterson I*, were blocked pursuant to Executive Order 13599.[318] As discussed elsewhere, Bank Markazi's assets were blocked as a result of its own deceptive financial practices and, in particular, its role in facilitating transactions with sanctioned parties.[319]

---

[315] *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 61 (D.D.C. 2003) **(U.S. Annex 36)**. *See also* U.S. Counter-Memorial, ¶¶ 5.22-5.33 (detailing evidence of Iran's role in the bombing).

[316] Other groups of plaintiffs holding unsatisfied judgments against Iran eventually joined the *Peterson* enforcement action, but, as the U.S. Supreme Court noted, "[t]he majority . . . sought redress for injuries suffered in connection with the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1319-20 (2016) **(U.S. Annex 109)**.

[317] *Peterson v. Islamic Republic of Iran*, Case No. 10-cv-4518, 2013 WL 1155576, at **2-5 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**.

[318] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1320 n.10 (2016) **(U.S. Annex 109)**.

[319] *See supra* Chapter 7, Section B.iii.

8.25 Bank Markazi opposed plaintiffs' TRIA claims on various grounds, including that the assets at issue were not "blocked assets *of*" an agency or instrumentality of Iran, as required under TRIA, because the assets were being held in an account maintained by Clearstream, rather than Bank Markazi, in New York.[320] In other words, Bank Markazi did not contest that it was the "sole beneficial owner of the assets"—indeed, it asserted several times during the course of the litigation that the assets "belong[ed] to" it and repeatedly described them as "the property of Bank Markazi"—but claimed nevertheless that the assets were not subject to attachment under TRIA due to the way in which Bank Markazi had structured its holding of the assets.[321]

8.26 Bank Markazi also argued that permitting the plaintiffs to attach the assets would violate the Treaty of Amity,[322] and that the assets were immune from attachment under Section 1611(b) of the FSIA, because they constituted "an investment of the Bank's foreign currency reserves—a classic central banking function," and plaintiffs had failed to demonstrate otherwise.[323] As already noted in Chapter 5, Bank Markazi's position in the *Peterson* litigation is entirely at odds with Iran's position in this case, where it argues that the assets were being held for a commercial purpose in a futile effort to bring Bank Markazi within the Treaty of Amity's definition of "company."[324]

8.27 While plaintiffs' TRIA claims were pending, the U.S. Congress passed Section 8772, which provided an alternative avenue to attach the assets at issue. Plaintiffs accordingly sought turnover under this new provision as well.[325]

8.28 Courts at every level of the U.S. judiciary provided Bank Markazi a full opportunity to present its arguments in opposition to plaintiffs' attempt to attach the funds at issue under TRIA

---

[320] *Peterson v. Islamic Republic of Iran*, Case No. 10-cv-4518, 2013 WL 1155576, at **23-24 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**.

[321] *Peterson v. Islamic Republic of Iran*, Case No. 10-cv-4518, 2013 WL 1155576, at *23 & n.10 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**.

[322] Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 22-24, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Mar. 15, 2012) (U.S. P.O. Annex A05).

[323] Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 3, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Mar. 15, 2012) (U.S. P.O. Annex A05). *See also* Brief for Defendant-Appellant Bank Markazi 35-36, *Peterson v. Islamic Republic of Iran*, No. 13-2952 (2d Cir. Nov. 19, 2013) (U.S. P.O. Annex 233) ("[T]he record is entirely consistent with Bank Markazi's position throughout this litigation that the Assets at Issue were used for the classic central banking purpose of investing Bank Markazi's currency reserves."); U.S. Counter-Memorial, ¶¶ 9.12-13.

[324] *See also* U.S. Counter-Memorial, ¶¶ 9.10-15.

[325] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1320 (2016) **(U.S. Annex 109)**.

and Section 8772,[326] and gave those arguments careful consideration before ultimately rejecting them. As to Bank Markazi's arguments that the Treaty of Amity "entitle[d] it to separate juridical status from Iran and, as such, its assets cannot be seized to satisfy a judgment against the sovereign state," both the District Court and the Court of Appeals held that the Treaty did not act as an absolute bar to piercing the corporate veil.[327]

8.29 In the Supreme Court, Bank Markazi chose to focus on the argument that Section 8772 violated the principle of separation of powers under the U.S. Constitution.[328] Justice Ginsburg, writing for the six-member majority of the Court, concluded that Section 8772 "does not transgress constraints placed on Congress and the President by the Constitution."[329] In its account of *Peterson I*, Iran emphasizes Chief Justice Roberts' dissenting opinion, but the majority of the Court considered and rejected the Chief Justice's arguments regarding the statute's purported unconstitutionality.[330] As to the point quoted in Iran's Reply that Section 8772 "guarantee[d] that [plaintiffs] win,"[331] Justice Ginsburg noted that "the District Court, closely monitoring the case, disagreed" and quoted the lower court's statement that the determinations required by Section 8772 were "not mere fig leaves," but instead required the court to answer questions contested by Bank Markazi, Clearstream, and Banca UBAE about the ownership of the assets, including whether other parties might have an interest in them, and whether the assets "were located in Luxembourg, not New York."[332]

8.30 As a final point on *Peterson I*, though Iran repeatedly invokes Section 8772 in the Reply in support of its claims arising out of the *Peterson I* proceedings, the District Court concluded that plaintiffs would also have been able to attach the assets at issue under TRIA, which had been in place for a decade prior to the enactment of Section 8772. *First*, the court concluded that "Bank Markazi [was] the only owner" of the assets, as it had "repeatedly conceded at a

---

[326] Bank Markazi was joined by Clearstream and Banca UBAE in opposing plaintiffs' turnover requests at the District Court level, but these other parties settled with plaintiffs before the Court of Appeals rendered its decision affirming the District Court's opinion. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.15 (2016) **(U.S. Annex 109)**.

[327] *Peterson v. Islamic Republic of Iran*, Case No. 10-cv-4518, 2013 WL 1155576, at *25 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**. *See also Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 190-91 (2d Cir. 2014) **(U.S. Annex 233)** ("[W]e see no conflict between § 8772 and the Treaty of Amity.").

[328] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016) **(U.S. Annex 109)**.

[329] *Id.* at 1317 **(U.S. Annex 109)**.

[330] *See, e.g.*, *id.* at 1326 **(U.S. Annex 109)**.

[331] Iran's Reply, ¶ 2.96(c).

[332] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 & n.20 (2016) **(U.S. Annex 109)**.

variety of times."[333] Thus, because the United States had blocked the assets under E.O. 13599,[334] the assets constituted blocked assets of an agency or instrumentality of a terrorist party and were subject to attachment under Section 201(a) of TRIA.[335] *Second*, as the District Court noted, "TRIA's 'notwithstanding' clause . . . preempts central bank immunity" under Section 1611(b)(1) of the FSIA, independent of any provision of Section 8772.[336] The Court of Appeals and the U.S. Supreme Court ultimately declined to rule on the applicability of TRIA, choosing instead to rest their opinions on Section 8772,[337] but the District Court's analysis demonstrates that while Section 8772 might have lessened the uncertainty regarding whether the assets at issue were subject to attachment, Iran has not and cannot establish that it changed the ultimate outcome.

(b) Peterson II

8.31 Iran also purports to assert claims regarding a separate action initiated by the *Peterson* plaintiffs, which it refers to as *Peterson II*. As Iran concedes, this action is ongoing and has not resulted in the turnover of any assets to plaintiffs.[338] To the extent the U.S. courts order assets to be turned over to plaintiffs in *Peterson II* in the future, this would occur long after the termination of the Treaty of Amity and would not, therefore, give rise to a claim of breach of the Treaty.[339] In any event, Iran's claims are as meritless with respect to *Peterson II* as with respect to *Peterson I*. The U.S. courts have given detailed consideration to Bank Markazi's arguments, and those of its codefendants, in the more than seven years since plaintiffs initiated the case.[340]

---

[333] *Peterson v. Islamic Republic of Iran*, Case No. 10-cv-4518, 2013 WL 1155576, at *23 (S.D.N.Y. Mar. 13, 2013) **(U.S. Annex 108)**.

[334] *Id.* at *22 **(U.S. Annex 108)**.

[335] *Id.* at *23 **(U.S. Annex 108)**.

[336] *Id.* at *25 **(U.S. Annex 108)**.

[337] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016) **(U.S. Annex 109)**; *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 188 (2d Cir. 2014) **(U.S. Annex 233)**.

[338] Iran's Reply, ¶ 2.108.

[339] *See supra* Chapter 2. Likewise, Iran cannot assert any claim under the Treaty with respect to Section 1226 of the NDAA 2020, regardless of any effect it may have on the *Peterson II* proceedings, because it was enacted in December 2019, after the Treaty's termination.

[340] *See, e.g.*, Opinion & Order, *Peterson v. Islamic Republic of Iran*, Case No. 13-cv-9195 (S.D.N.Y. Feb. 20, 2015), ECF 166 (Iran Reply Annex 50); *Peterson v. Islamic Republic of Iran*, Case No. 15-0690, slip op. (2d Cir. Nov. 21, 2017) (Iran Reply Annex 58).

(c) Weinstein

8.32 *Weinstein v. Islamic Republic of Iran* involved claims by the family of Ira Weinstein, a U.S. citizen who died as a result of severe injuries sustained in the suicide bombing of a bus in Jerusalem carried out by Hamas, which, the court found, had received "massive material and technical support" from Iran.[341] As the court explained,

> [T]he defendants [*i.e.*, Iran, the Iranian Ministry of Information and Security, and three senior Iranian officials] not only provided the terrorists with the technical knowledge required to carry out the February 26, 1996 attack on the Number 18 Egged bus, but also gave HAMAS the funding necessary to do so.[342]

8.33 Iran provides an incomplete account of the plaintiffs' efforts to enforce the *Weinstein* judgment. While Iran focuses on the turnover of assets that occurred in 2012, it neglects to mention plaintiffs' earlier unsuccessful attempt to attach funds belonging to three Iranian banks (Bank Melli, Bank Sepah, and Bank Saderat) in accounts at the Bank of New York. In a January 2004 opinion, the District Court determined, consistent with the arguments made by the Iranian banks, that the funds at issue were not "blocked assets" under TRIA and, therefore, were not subject to attachment under TRIA.[343] Importantly, the U.S. government submitted a statement of interest, which the court quoted extensively in its opinion, siding with the Iranian banks' interpretation of TRIA.[344]

8.34 In 2007, the *Weinstein* plaintiffs made another attempt to enforce their judgment, this time with respect to real property owned by Bank Melli in Forest Hills, New York. As a result of Bank Melli's designation by the United States as "a proliferator of weapons of mass destruction under Executive Order 13,382"[345]—which Bank Melli did not challenge in the District Court[346] and does not challenge here—all of Bank Melli's "property and interests in property" in the United States had been blocked, including the Forest Hills property.[347] Bank

---

[341] *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 21 (D.D.C. 2002) **(U.S. Annex 53)**.

[342] *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 21-22 (D.D.C. 2002) **(U.S. Annex 53)**.

[343] *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 76 (E.D.N.Y. 2004) **(U.S. Annex 307)**.

[344] *Id.* at 71 **(U.S. Annex 307)** ("The [U.S.] government supports the Banks' assertion that the Banks' assets in question are not 'blocked assets' under the TRIA and, therefore, not subject to attachment under the TRIA."); *id.* at 73 ("The [U.S.] government disagrees with plaintiffs' arguments and largely agrees with Bank Melli's arguments.").

[345] *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272, 273 (E.D.N.Y. 2009) **(U.S. Annex 306)**.

[346] *Id.* at 278 **(U.S. Annex 306)**.

[347] *Id.* at 273 **(U.S. Annex 306)**.

Melli was providing banking services to entities involved in Iran's nuclear and ballistic missile programs and international terrorism, which included disguising transactions with entities identified in U.N. Security Council Resolution 1747.[348] Bank Melli conceded that the Forest Hills property was a "blocked asset" subject to attachment under TRIA and also that it is an "agency or instrumentality" of Iran, but opposed plaintiffs' attempt to attach the property on the basis that, *inter alia*, it would violate the Treaty of Amity and the U.S. Constitution.

8.35 The District Court rejected Bank Melli's arguments. With respect to Article III(1) of the Treaty, the court explained that, as the U.S. Supreme Court had already recognized, "the primary purpose" of provisions like Article III(1) "was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms."[349] Thus, "nothing in the language or purpose of Article III(1) of the Treaty of Amity . . . precludes the veil-piercing authorized by TRIA § 201(a)."[350]

8.36 The court also considered and rejected Bank Melli's argument that attachment and sale of the Forest Hills property would be a "'taking' not for public purpose and without just compensation in violation of Article IV(2) of the Treaty of Amity and the Fifth Amendment of the United States Constitution."[351] The court relied on a past opinion issued by the Court of Appeals for the Federal Circuit, which had explained that "valid regulatory measures taken to serve substantial national security interests may adversely affect individual contract-based interests and expectations, but those effects have not been recognized as compensable takings for Fifth Amendment purposes."[352] The court also noted that:

> Bank Melli's property in the United States was placed in jeopardy because the bank itself acted to proliferate weapons of mass destruction, which in turn lead to its designation and the blocking of its assets . . . . Bank Melli took the risks that its involvement with Iran's proliferation of weapons of mass

[348] Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism, hp-644, U.S. Dep't of the Treas. (Oct. 25, 2007) (U.S. P.O. Annex 147).

[349] *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272, 275 (E.D.N.Y. 2009) **(U.S. Annex 306)** (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982)).

[350] *Id.* at 275 **(U.S. Annex 306)**. The court also noted that, in the event of a conflict between TRIA and the Treaty of Amity, TRIA, as a subsequent legislative act, would prevail. However, that statement was unnecessary to the outcome because the court had already concluded that there was no conflict between TRIA and the Treaty. *Id.*

[351] *Id.* at 276 **(U.S. Annex 306)**.

[352] *Id.* at 277 **(U.S. Annex 306)** (quoting *Paradissiotis v. United States*, 304 F.3d 1271, 1274-75 (Fed. Cir. 2002)).

> destruction would result in the very consequences it now faces under the Iranian sanctions program.[353]

8.37 The District Court stayed proceedings after its ruling in order to allow Bank Melli an opportunity to appeal, first to the Court of Appeals for the Second Circuit and then to the U.S. Supreme Court. The Court of Appeals affirmed the District Court's ruling, but there can be no question that it gave Bank Melli a fair hearing. Among other things, the Court of Appeals considered two arguments, one regarding subject matter jurisdiction and one regarding the constitutionality of TRIA, that Bank Melli had not raised before the District Court.[354]

8.38 After the Court of Appeals had affirmed the District Court's ruling, the District Court granted Bank Melli's motion to stay proceedings again pending its petition for certiorari to the U.S. Supreme Court. The case remained stayed for nearly 18 months, from January 3, 2011 until shortly after the U.S. Supreme Court rejected Bank Melli's petition on June 25, 2012, and the District Court ordered the distribution of funds to plaintiffs on December 20, 2012.[355]

(d) Bennett

8.39 *Bennett*, like *Weinstein*, involved a bombing carried out by Hamas, this one in the cafeteria of Hebrew University in Jerusalem, with the material support of Iran and its Ministry of Information and Security.[356] The bombing resulted in the deaths of, among others, five U.S. citizens, including Marla Ann Bennett, a 24-year-old student from California.[357]

8.40 As already noted, *Bennett* is irrelevant to Iran's claims in this case because the court did not direct assets to be turned over to plaintiffs until April 24, 2020,[358] long after the United States terminated the Treaty of Amity on October 3, 2018.

8.41 But even if the *Bennett* enforcement proceedings were relevant to any claim before the Court, Iran's Reply provides a misleadingly incomplete description of the proceedings.

---

[353] *Id.* at 278 **(U.S. Annex 306)**. *See also Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 54 (2d Cir. 2010) **(U.S. Annex 308)** ("Here, where the underlying judgment against Iran has not been challenged, seizure of Bank Melli's property, as an instrumentality of Iran, in satisfaction of that liability does not constitute a 'taking' under the Takings Clause. Instead, Bank Melli's own conduct as a funder of weapons of mass destruction opened it to liability for judgments already entered against Iran.").

[354] *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 47, 50 (2d Cir. 2010) **(U.S. Annex 308)**.

[355] Excerpts from docket for *Weinstein v. Islamic Republic of Iran*, Case No. 12-cv-03445 (S.D.N.Y.), at 15-18 **(U.S. Annex 309)**.

[356] *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 154 (D.D.C. 2009) **(U.S. Annex 310)**.

[357] *Id.* **(U.S. Annex 310)**.

[358] Order, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Apr. 24, 2020), ECF 210 **(U.S. Annex 311)**.

Following its refusal to participate in the proceedings that led to the judgment, Iran received notice of the judgment on November 26, 2007.[359] After an earlier unsuccessful effort to enforce their judgment in the District of Columbia, the *Bennett* plaintiffs initiated an enforcement action in the U.S. District Court for the Northern District of California to attach blocked assets of Bank Melli being held by U.S. financial institutions, including Visa and Franklin Templeton.[360] As with the property at issue in *Weinstein*, these assets were blocked under Executive Order 13382 of June 28, 2005, as a result of Bank Melli's role in the proliferation of weapons of mass destruction.[361] The financial institutions holding Bank Melli's blocked assets promptly took procedural steps to include Bank Melli in the enforcement proceedings. On March 12, 2012, Bank Melli was served a summons related to the enforcement action in the U.S. District Court for the Northern District of California.[362]

8.42 Both the trial and appellate courts made numerous reasonable accommodations to ensure that Bank Melli was fully heard and able to fully present its defenses on the merits. Bank Melli initially failed to appear in the *Bennett* enforcement proceedings.[363] Over the opposition of the *Bennett* plaintiffs,[364] the trial court vacated the default of Bank Melli,[365] which allowed Bank Melli to participate fully in the proceedings. Every request by Bank Melli for an extension was granted by the appellate court, as were Bank Melli's request to file briefs that exceeded the page limits and to file additional replies not typically permitted under the rules of the court.[366]

---

[359] Affidavit of Service of Judgment upon Defendant, *Bennett v. Islamic Republic of Iran*, Case No. 03-cv-1486 (D.D.C. Jan. 24, 2011), ECF 51-1 **(U.S. Annex 312)**.

[360] Complaint, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal Dec. 2, 2011), ECF 1 **(U.S. Annex 313)**.

[361] *See* 72 Fed. Reg. 62,520 (Nov. 5, 2007) **(U.S. Annex 314)**. Bank Melli's assets within U.S. jurisdiction were blocked on October 25, 2007 because it was providing banking services to entities involved in Iran's nuclear and ballistic missile programs and international terrorism, including by disguising transactions with entities targeted by UN Security Council Resolution 1747 for nuclear or ballistic missile activities. Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism, hp-644, U.S. Dep't of the Treas. (Oct. 25, 2007) (U.S. P.O. Annex 147).

[362] Summons, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Mar. 21, 2012), ECF 45 **(U.S. Annex 315)**.

[363] Clerk's Notice of Entry of Default, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Apr. 26, 2012), ECF 79 **(U.S. Annex 316)**.

[364] *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. June 2012), ECF 100, 101, 103, 106, 107 **(U.S. Annex 317)**.

[365] Order, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. July 5, 2012), ECF 109 **(U.S. Annex 318)**.

[366] *See, e.g.*, Orders, *Bennett v. Islamic Republic of Iran*, 13-15442 (9th Cir.), ECF 16, 46, 87 **(U.S. Annex 319)**.

8.43 Apart from this process provided by the U.S. judiciary, the executive branch of the United States participated in *Bennett*-related enforcement proceedings on multiple occasions in a manner that benefited Iran. For example, on March 31, 2009, a writ of attachment by the *Bennett* plaintiffs for five Iranian properties in the District of Columbia was quashed with the participation of the United States at both the trial and appellate levels in U.S. courts.[367] Central to the U.S. legal argument were its international obligations with regard to diplomatic property.[368] The United States appeared in the litigation despite significant criticism and pressure from the *Bennett* plaintiffs, which ultimately drew a rebuke of the plaintiffs from the court.[369] Ironically, the United States has now been impleaded before this Court by Iran—the other party of interest to the *Bennett* proceedings—to defend baseless assertions that it violated international obligations based on enforcement efforts related to the same judgment.

8.44 The United States maintained its even-handed approach when asked to participate in the part of the *Bennett* enforcement efforts that Iran now complains of before this Court. For example, during the appeal of the enforcement decision of the Northern District of California, the United States expressed views on the proper interpretation of Section 1610(g) of the FSIA that were consistent with the arguments offered by Bank Melli[370] and ultimately found persuasive by the U.S. Supreme Court.[371] The United States also raised concerns about the application of California law in assessing whether the assets at issue could be attached under TRIA and/or Section 1610(g).[372] Iran may not like the (post-Treaty termination) outcome of the *Bennett* enforcement proceedings, but it has no reasonable complaints about the process afforded Bank Melli to present its case before the U.S. judiciary or the actions taken by the

---

[367] *See Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152 (D.D.C. 2009) **(U.S. Annex 310)**; s*ee, e.g.*, Motion to Quash Writs of Attachment by United States of America*, Bennett v. Islamic Republic of Iran*, Case No. 03-cv-1486 (D.D.C. July 18, 2008), ECF 34 **(U.S. Annex 320)**; Corrected Brief for Appellee United States, *Bennett v. Islamic Republic of Iran*, Case No. 09-5147 (D.C. Cir. Dec. 1, 2009), Doc. 1218295 **(U.S. Annex 321)**.

[368] *See Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d at 156 **(U.S. Annex 310)**.

[369] *See id.* at 168 **(U.S. Annex 310)** ("This Court recognizes that plaintiffs believe that the United States is misguided in its conduct of foreign policy in this instance. To all the victims in these actions, it must certainly feel as if the United States has turned against them in favor of state sponsors of terrorism. Nonetheless, counsel's rhetoric is neither accurate nor fair, . . .").

[370] *See, e.g.*, Brief for the United States as Amicus Curiae, *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) (No. 13-15442), ECF 82 **(U.S. Annex 322)**.

[371] *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) **(U.S. Annex 75)**.

[372] *See, e.g.*, Brief for the United States as Amicus Curiae, *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) (No. 13-15442), ECF 82 **(U.S. Annex 322)**.

United States during the litigation, for which the United States was criticized by the plaintiffs as protecting Iran's interests.

ii. Proceedings in Which Iranian Entities Did Not Appear

8.45 Even with respect to those enforcement proceedings in which Iranian entities chose not to appear—several actions brought by the *Heiser* plaintiffs and *Levin v. Bank of New York*—the U.S. judicial system again took care to protect those entities' interests. The *Heiser* plaintiffs were families of the servicemen killed in the Khobar Towers bombing, which the United States discussed extensively in the Counter-Memorial.[373] The *Levin* case involved the kidnapping and torture of Jeremy Levin, the bureau chief for CNN in Beirut, by Hezbollah during a period when, the court concluded, Iran "was using . . . Hizbollah directly and indirectly to commit terrorist acts against American civilians."[374]

8.46 The United States makes three primary points regarding the *Heiser* and *Levin* cases. *First*, the courts made efforts to ensure that Iran and the Iranian companies whose property was subject to attachment and execution had notice of the proceedings and had ample time to appear. *Second*, even though the Iranian companies chose not to appear, in many cases other parties to the proceedings—often the banks holding the assets that the plaintiffs were seeking to attach—asserted defenses that would have been available to those companies. *Third*, regardless of the Iranian companies' failure to appear, the courts nevertheless required plaintiffs to support their claims to the assets with evidence.

8.47 The United States has already shown that Iran cannot assert claims with respect to the *Heiser* and *Levin* cases because the Iranian entities at issue failed to appear and exhaust their local remedies.[375] But even if the Iranian entities had done so, or if exhaustion were not required, Iran's claims would still fail, as demonstrated below and in subsequent chapters.

(a) Iran and Iranian Companies Had Notice and Ample Time to Appear

8.48 Beginning with the first point, Section 1610(c) of the FSIA provides that attachment and execution cannot proceed "until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment

[373] U.S. Counter-Memorial, ¶¶ 5.34-5.43.

[374] *Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 WL 812032, at *1 (S.D.N.Y. Mar. 4, 2011) **(U.S. Annex 323)**.

[375] *See supra* Chapter 6, Section C.

and the giving of any notice required under 1608(e) of this chapter."[376] Section 1608(e) provides in relevant part that "[a] copy of any . . . default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section."[377] Accordingly, before seeking to enforce a judgment, plaintiffs were required not only to serve the judgment on Iran but also to seek a court order confirming that sufficient time had passed following such service.

8.49 The importance of complying with these procedures was emphasized by the court in the *Levin v. Bank of New York* case. In that case, multiple groups of plaintiffs claimed priority with respect to the same pool of assets, which were held at several New York banks. The court concluded that one plaintiff group's writs of execution were invalid because the plaintiffs had *not* obtained a court order pursuant to Section 1610(c) prior to seeking to enforce their judgment.[378] As the court explained:

> The order referred to in 1610(c) has been found to be mandatory by a number of courts reviewing attachments of the assets of foreign sovereigns. According to a House Report on the FSIA, the procedures mandated by 1610(c) are in place to ensure that sufficient protection is afforded to foreign states that might be defendants in actions in United States Courts[.][379]

8.50 By contrast, the court upheld writs of execution obtained by two other groups of plaintiffs, finding that they had priority to the assets at issue because they *had* timely obtained the necessary order under Section 1610(c).[380]

8.51 The same is true for the *Heiser* enforcement actions. The *Heiser* case involved two judgments, and plaintiffs gave notice of both to Iran pursuant to Section 1608(e).[381]

8.52 In addition to ensuring that Iran had notice of the judgments against it before permitting plaintiffs to pursue enforcement of those judgments, the courts in *Levin v. Bank of New York* and the *Heiser* actions also took steps to provide notice to all parties—including Iranian

---

[376] 28 U.S.C. § 1610(c) (IM Annex 6).

[377] 28 U.S.C. § 1608(e) (IM Annex 6).

[378] *Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 WL 812032, at *11 (S.D.N.Y. Mar. 4, 2011) **(U.S. Annex 323)**. Plaintiffs had, however, served their judgment on Iran "through the court and diplomatic channels" on October 14, 2009. *Id.*, at *2.

[379] *Levin*, 2011 WL 812032, at *7 (citations omitted) **(U.S. Annex 323)**.

[380] *Levin*, 2011 WL 812032, at *13 **(U.S. Annex 323)**.

[381] Order ¶ 2, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Feb. 7, 2008), ECF 137 **(U.S. Annex 324)**; Order ¶ 2, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. May 10, 2010), ECF 158 **(U.S. Annex 325)**.

parties—with a potential interest in the assets that plaintiffs sought to attach in aid of enforcement.

8.53 In *Levin v. Bank of New York*, the proceedings were separated into multiple phases. The Phase One assets were held by three financial institutions: JPMorgan Chase Bank, N.A., Bank of New York Mellon ("BNY Mellon"), and Citibank, N.A. (together, the "New York Banks"). On January 11, 2010, just weeks after plaintiffs' commencement of the action, the court entered an order authorizing the New York Banks to initiate "third-party actions in order to bring before the Court as Third-Party Defendants certain persons who are not now parties . . . but who may have an interest in the [assets at issue]."[382] According to BNY Mellon, the purpose of the third-party actions was to ensure that individuals and entities with an interest in the Phase One assets "had notice of this proceeding and an opportunity to appear and advise the Court of any objections they might have to turnover of the funds . . . in Phase 1 to the Plaintiffs or to other judgment creditors of the Islamic Republic of Iran."[383]

8.54 Though the New York Banks served "third-party complaints on all those individuals and/or entities who they had reason to believe may assert or have an interest in the Phase 1 assets,"[384] no Iranian entities appeared to contest plaintiffs' efforts to attach the assets at issue or the evidence that they had submitted in support of those efforts.[385] The same process

[382] Order Regarding Notice and Service of Process at 1-2, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Jan. 25, 2010), ECF 40 **(U.S. Annex 326)**; *Levin*, 2011 WL 812032, at *2 **(U.S. Annex 323)**. *See also* Order Regarding Notice and Service of Process at 3-6, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Jan. 25, 2010), ECF 40 **(U.S. Annex 326)** (specifying the documents to be served and the acceptable modes of service).

[383] Declaration of J. Kelley Nevling, Jr. in Support of the Bank of New York Mellon's Response to Plaintiffs' Motion for Partial Summary Judgment ¶ 7, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Sep. 15, 2010), ECF 264 **(U.S. Annex 327)**. *See also* JP Morgan's Third-Party Complaint against Wire Transfer Parties ¶¶ 28-29, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Dec. 31, 2009), ECF 61 **(U.S. Annex 328)** (explaining that the third-party actions were necessary because such persons might be able to establish, for example, that they "are not agencies or instrumentalities of Iran" or that the assets "are not subject to execution under applicable law."); Bank of New York Mellon's Third-Party Complaint against Wire Transfer Parties ¶¶ 19-20, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Dec. 31, 2009), ECF 62 **(U.S. Annex 329)** (same).

[384] Memorandum of Law of Citibank, N.A. and JPMorgan Chase Bank, N.A. in Response to Plaintiffs' Partial Motion for Summary Judgment at 10-11, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Sep. 15, 2010), ECF 265 **(U.S. Annex 330)**. *See also* Declaration of J. Kelley Nevling, Jr. in Support of the Bank of New York Mellon's Response to Plaintiffs' Motion for Partial Summary Judgment ¶ 7, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Sep. 15, 2010), ECF 264 **(U.S. Annex 327)**; *Levin*, 2011 WL 812032, at *4 **(U.S. Annex 323)**.

[385] *Levin*, 2011 WL 812032, at *4 **(U.S. Annex 323)**; Memorandum of Law of Citibank, N.A. and JPMorgan Chase Bank, N.A. in Response to Plaintiffs' Partial Motion for Summary Judgment at 10-11, *Levin v. Bank of New York*, Case No. 09-cv-5900 RPP (Sep. 15, 2010), ECF 265 **(U.S. Annex 330)**.

repeated in Phase Two of the *Levin* action, with the same result.[386] While no Iranian entities appeared to oppose plaintiffs' motion for turnover of the Phase Two assets, the central bank of another State (Nigeria)—which was the originator of one of the electronic fund transfers ("EFTs") that plaintiffs were attempting to attach—did appear[387] and, as will be discussed below, successfully contested the attachment.

8.55 Iranian entities also had notice of the *Heiser* enforcement proceedings prior to the turnover of assets. For example, in *Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, Bank of Tokyo Mitsubishi made a joint motion with plaintiffs in August 2011 to establish procedures for serving notice (including Farsi translations of relevant documents) on third parties who may have a claim to the assets at issue.[388] As the court reported in a January 2013 opinion, "[t]hese entities all have been served with notice of petitioners' claims, but have filed no responses and have not appeared in this action."[389]

---

[386] *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2013 WL 5312502, at *1 (S.D.N.Y. Sep. 23, 2013) **(U.S. Annex 331)** (The New York Banks (together with Société General, which also held assets at issue in Phase Two) identified "over two hundred . . . persons or entities with potential rights or claims to the [Phase Two assets]" and "served each of these potential third-party Defendants.").

[387] *Id.* **(U.S. Annex 331)**.

[388] Order Concerning Notice To and Service On Third-Parties at 2, *Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, Case No. 11-cv-1601 (S.D.N.Y. Aug. 24, 2011), ECF 25 **(U.S. Annex 333)**.

[389] *Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 414 (S.D.N.Y. 2013) **(U.S. Annex 334)**. As to the other *Heiser* actions: **(i)** in *Heiser v. Bank of Baroda, New York Branch*, the bank sought in April 2011 to interplead entities (including Iranian financial institutions) and individuals who might have an interest in the blocked EFTs that plaintiffs had attempted to attach and, in August 2011, the court entered an order specifying procedures for service. Third-Party Petition in Interpleader ¶¶ 6-7, *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Apr. 11, 2011), ECF 11 **(U.S. Annex 335)**; *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602, 2013 WL 4780061, at *1 (S.D.N.Y. July 17, 2013) **(U.S. Annex 336)**; Order Concerning Notice to and Service on Third-Parties ¶¶ 1-2, *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Aug. 9, 2011), ECF 39 **(U.S. Annex 337)**; **(ii)** in proceedings against Bank of America, N.A. and Wells Fargo, N.A. that occurred as part of *Heiser v. Islamic Republic of Iran*, the court granted the banks' request to interplead Iranian entities with a potential interest in the assets at issue in August 2012 and, subsequent to this ruling, the parties went through an elaborate service exercise that was not completed until May 2015. Order Granting Unopposed Motion for Judgment against Garnishees Bank of America, N.A. and Wells Fargo Bank, N.A. for Turnover of Funds, and for Interpleader Relief for Such Garnishees at 2-3, *Heiser v. Islamic Republic of Iran*, Case No. 00-cv-2329 (D.D.C. June 9, 2016), ECF 275 **(U.S. Annex 130)**; and **(iii)** in proceedings against Sprint Communications Company LP ("Sprint") that also occurred in *Heiser v. Islamic Republic of Iran*, plaintiffs sought to attach a debt owed by Sprint to the Telecommunications Infrastructure Company of Iran ("TIC"). Though the court denied Sprint's request to interplead TIC on the grounds that such a procedure was not available under applicable law, it noted that TIC was "surely on notice" of the proceedings due to Sprint's failure to pay TIC the funds it owed since January 2010. *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 24 (D.D.C. 2011) **(U.S. Annex 338)**.

(b) Even Though Iranian Companies Chose Not to Appear, Other Parties Often Asserted Defenses That Would Have Been Available to Those Companies

8.56 Turning to the second point, even though the Iranian companies chose not to appear in these enforcement proceedings, the holders of the assets at issue (or other interested parties) raised defenses that would have been available to such companies, sometimes with support from the U.S. government. Frequently, the asset holders either urged the court to consider whether plaintiffs had satisfied all necessary prerequisites for obtaining turnover of the assets at issue and/or argued that they had not done so. For example, Bank of Baroda asserted that "the Court should consider whether Petitioners have established all of the elements necessary to obtain relief under [TRIA]" and "[t]he Court should determine whether the Judgments were entered on default and if so, whether copies were served on Iran in the manner required by FSIA § 1608(a) in order to comply with FSIA § 1608(e)."[390]

8.57 In both *Heiser* and *Levin* actions, the banks also argued that many of the EFTs at issue could not be attached under applicable law. In *Levin*, the New York Banks unsuccessfully made the argument in the first phase of the proceedings[391] and then reiterated the argument in the second phase, taking the position that developments in the law mandated a different outcome.[392] While the District Court again rejected the New York Banks' argument in a

---

[390] Answer of Bank of Baroda ¶¶ 41-42, *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Apr. 8, 2011), ECF 10 **(U.S. Annex 339)**. *See also* Answer of Sprint ¶ 9, *Heiser v. Islamic Republic of Iran*, Case No. 00-cv-2329 (D.D.C. June 21, 2010), ECF 165 **(U.S. Annex 340)** (Sprint arguing that "TIC was not an agency or instrumentality of the Iranian government or any of the Iranian government defendants at the time of service of the Writ [of Attachment], while the debt which is sought to be garnished was incurred, or at the time the underlying suit was commenced, and thus is not subject to levy for the debts of the defendants under the Foreign Sovereign Immunities Act."). Société Générale, Citibank, JPMorgan, and BNY Mellon all raised defenses questioning whether plaintiffs had fulfilled the requirements of TRIA and the FSIA. Answer of Citibank ¶¶ 64-65, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF 44 **(U.S. Annex 341)**; Answer of Société Générale ¶¶ 61-62, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF 45 **(U.S. Annex 342)**; Answer of JP Morgan ¶¶ 63-65, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF 54 **(U.S. Annex 343)**; Answer of BNY Mellon ¶¶ 63-65, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF 56 **(U.S. Annex 344)**.

[391] *Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 WL 812032, at *14 (S.D.N.Y. Mar. 4, 2011) **(U.S. Annex 323)** ("In their joint response Memorandum of Law and at oral argument, Citibank and JP Morgan suggest that under the applicable Second Circuit precedent and state law, these intercepted EFTs are not the property of the originator or the beneficiary, and therefore are not susceptible to attachment."), *18 ("Based on this Court's reading of TRIA, section 1610(f)(1)(A) and the applicable sanctions regulations, the [EFTs] are subject to attachment.").

[392] *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2013 WL 5312502, at *3 (S.D.N.Y. Sep. 23, 2013) **(U.S. Annex 331)** ("[T]he banks argue that the Court should reconsider the holding of its Phase One Opinion with respect to the proceeds of blocked wire transfers held by intermediary banks in light of the Supreme Court's subsequent decision in *Board of Tr. Of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S.Ct. 2188 (2011) ('Stanford'), and application of that decision by other district courts.").

September 2013 opinion,[393] the Second Circuit Court of Appeals had the opportunity the following year to consider the circumstances under which midstream EFTs could be attached and, in two 2014 opinions, *Calderon-Cardona* and *Hausler*,[394] the Court of Appeals reached a different conclusion than the *Levin* court. The Court of Appeals held that midstream EFTs could only be attached where "either the state itself or an agency or instrumentality thereof . . . transmitted the EFT directly to the bank where the EFT is held pursuant to the block."[395] The Court of Appeals' rulings had three important consequences for the *Levin* case.

8.58 *First*, while the New York Banks chose not to appeal the District Court's September 2013 decision, the Central Bank of Nigeria—which, as noted, was the originator of one of the EFTs at issue—did so, and its appeal was still pending when the Court of Appeals issued its opinions in *Calderon-Cardona* and *Hausler*. On the basis of these opinions, the Court of Appeals reversed the judgment of the District Court, preventing plaintiffs from attaching the EFT originated by the bank.[396]

8.59 *Second*, in August 2015, the District Court relied on *Calderon-Cardona* and *Hausler* in denying plaintiffs' motion for summary judgment as to a single Phase Two asset that remained in dispute.[397] Importantly, the U.S. government brought the two 2014 Court of Appeals opinions to the District Court's attention in connection with the briefing on plaintiffs' motion.[398]

8.60 *Third*, in October 2017, the District Court rejected an effort by plaintiffs to amend their complaint to assert a claim to an EFT in which Bank Saderat allegedly had an interest. The court reasoned that such an amendment would be futile (as JPMorgan, the bank holding the EFT, had argued) because, under *Calderon-Cardona* and *Hausler*, the proceeds of the EFT did not belong to Bank Saderat, even though it may have had an interest falling short of ownership.

---

[393] *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2013 WL 5312502, at *8 (S.D.N.Y. Sep. 23, 2013) **(U.S. Annex 331)**.

[394] *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014) **(U.S. Annex 345)**; *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014) **(U.S. Annex 299)**.

[395] *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1002 (2d Cir. 2014) **(U.S. Annex 345)**; *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014) **(U.S. Annex 299)**.

[396] *Levin v. Bank of New York*, 602 F. App'x 37 (May 11, 2015) **(U.S. Annex 346)**.

[397] Order ¶ 3, *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900 (S.D.N.Y. Aug. 20, 2015), ECF 1065 **(U.S. Annex 347)**.

[398] Letter from U.S. Department of Justice to Hon. Robert P. Patterson, *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 28, 2014), ECF 1035 **(U.S. Annex 348)**.

Instead, the EFT was deemed to belong to the entity (Lloyd's Bank) that transmitted the funds to JP Morgan.[399] The Court of Appeals affirmed the District Court's ruling.[400]

8.61 In *Heiser*, Bank of America and Wells Fargo successfully made a similar argument about certain of the EFTs at issue in that case. The United States government also submitted a statement of interest that sided with the banks on the question of whether TRIA Section 201(a) and FSIA Section 1610(g) require that the judgment debtor (here, Iran) or one of its agencies or instrumentalities own the property that plaintiffs had targeted for attachment or execution.[401] Ultimately, the District Court gave weight to the U.S. statement of interest[402] and ruled in the banks' favor, concluding that plaintiffs could not attach the challenged EFTs because the Iranian entities' interest in the funds fell short of ownership.[403] The Court of Appeals for the D.C. Circuit subsequently affirmed the District Court's ruling.[404]

(c) Plaintiffs Were Obligated to Come Forward With Evidence to Support the Elements of Their Claims

8.62 As to the third and final point, the U.S. courts also made clear that, even where banks or other third parties did not contest plaintiffs' enforcement efforts, plaintiffs were still obligated to come forward with evidence to support the elements of their claims for relief. For example, when the plaintiffs in *Heiser v. Bank of Tokyo Mitsubishi* sought summary judgment in their favor and an order compelling the bank to turn over the funds at issue, the court explained that "[i]t is the burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, sufficient to demonstrate that he or she is entitled to relief as a matter of law."[405] Accordingly, "[t]he Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences

---

[399] *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2017 WL 4863094, at **3-4 (S.D.N.Y. Oct. 27, 2017) **(U.S. Annex 349)**.

[400] *Levin v. JPMorgan Chase Bank, N.A.*, 751 F. App'x 143 (2d Cir. 2018) **(U.S. Annex 350)**.

[401] Statement of Interest of the United States, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Aug. 3, 2012), ECF 230 **(U.S. Annex 351)**. Plaintiffs argued "that the United States' assertions with respect to TRIA and section 1610(g)(1) should be afforded little weight given the Executive Branch's well-documented efforts to thwart the good faith efforts of terrorism victims to collect upon their judgments." Response to the Statement of Interest of the United States at 2, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Aug. 17, 2012), ECF 231 **(U.S. Annex 352)**.

[402] *Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d. 429, 441 (D.D.C. 2012) **(U.S. Annex 353)**.

[403] *Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d. 429, 437-49 (D.D.C. 2012) **(U.S. Annex 353)**. Specifically, the Iranian entities were acting as banks for the beneficiaries of the blocked EFTs. *Id.* at 447-48.

[404] *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) **(U.S. Annex 354)**.

[405] *Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 415 (S.D.N.Y. 2013) **(U.S. Annex 334)**.

in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party."[406] The court emphasized that plaintiffs' burden must be fulfilled even where their motion was unopposed:

> Though the respondent does not oppose the motion, petitioners still must establish that they are entitled to judgment as a matter of law. If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied even if no opposing evidentiary matter is presented.[407]

iii. Conclusion

8.63 As the foregoing sections have shown, U.S. courts treated Iranian entities fairly when they chose to appear and, when those entities did not appear, took precautions to ensure that such entities had adequate notice of the proceedings and to assess whether plaintiffs' claims were supported by sufficient evidence. Moreover, in several cases where Iranian entities chose not to appear, other parties to the proceedings successfully resisted the turnover of assets by asserting arguments that would have been available to such Iranian entities. These points bear on a number of aspects of the U.S. case, including the exhaustion of local remedies, discussed above, and Iran's claims under Articles III and IV, which will be discussed in the chapters that follow.

8.64 Before leaving the topic of U.S. judicial proceedings, the United States turns now to address the 9/11 proceedings, to which Iran has devoted significant attention in its Reply despite being entirely peripheral to the claims that remain before the Court.

Section C: The Court Has Dismissed Iran's Claims Regarding the 9/11 Judgments and, In Any Event, Its Complaints About These Judgments Are Meritless

8.65 As noted at the outset of this chapter, Iran's surviving claims relate to plaintiffs' attempts to enforce their judgments against the assets of Iran's agencies and instrumentalities, which were the subject of the preceding Section B. Iran has nevertheless devoted a significant portion of its Reply to complaints about a particular set of judgments against it, namely those relating to the September 11, 2001 terrorist attack. The Court should disregard these

---

[406] *Id.* **(U.S. Annex 334)**.

[407] *Id.* **(U.S. Annex 334)**. *See also Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 WL 812032, at *19 (S.D.N.Y. Mar. 4, 2011) **(U.S. Annex 323)**; *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2013 WL 5312502, at *9 (S.D.N.Y. Sep. 23, 2013) **(U.S. Annex 331)**.

complaints because they are not connected to any of Iran's remaining claims. In any event, Iran's complaints are meritless.

8.66 As an initial matter, some of Iran's complaints relate less to the specifics of particular proceedings than to the type of judicial system in the United States, a common-law jurisdiction where "courts are constrained by the principle of party presentation, which is 'basic to our adversary system.'"[408] In the 9/11 litigation, as in all the litigation that resulted in terrorism judgments against Iran, Iran did not appear and present its case. Yet, Iran's complaints about U.S. judicial proceedings never address the effects of Iran's failure to participate.

8.67 Iran's discussion of the 9/11 proceedings is primarily focused on *Havlish v. bin Laden*,[409] a case brought by the family members and legal representatives of victims of the 9/11 attacks against various persons and foreign sovereigns, including Iran and several Iranian entities, for providing material support to Al Qaeda.[410]

8.68 Contrary to Iran's characterizations, U.S. judges did not find Iran liable for perpetrating or sponsoring the 9/11 attacks.[411] As an initial point, contrary to Iran's assertions,[412] U.S. judges do not make accusations. Parties bring and defend cases. In the *Havlish* case, a U.S. court entered a default judgment of liability based on uncontroverted evidence that Iran provided material support to Al Qaeda that was reasonably connected to the 9/11 attacks.[413] The alleged support varied depending upon the Iranian entity concerned but included activities such as facilitating trainings and obscuring the travel of Al Qaeda operatives to and from Afghanistan.[414] Beyond mischaracterizing the judgment, Iran uses its Reply to collaterally

---

[408] *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1109 (2019) **(U.S. Annex 355)** (citing *Wood v. Milyard*, 566 U.S. 463, 472 (2012)); *see also Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) **(U.S. Annex 356)** (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003)) (Scalia, J., concurring in part and concurring in the judgment)) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter . . . . 'Our adversary system is designed around the premise that the parties . . . are responsible for advancing the facts and arguments entitling them to relief.'").

[409] No. 03-cv-9849-GBD-SN (S.D.N.Y); *see also In re Terrorist Attacks on September 11, 2001*, No. 03-md-01570-RCC (S.D.N.Y.).

[410] Iran also makes passing reference to other 9/11 proceedings, primarily to note that they were somehow deficient because the courts permitted the plaintiffs to rely on the same evidence that established Iran's guilt in *Havlish*. *See* Iran's Reply, ¶ 2.55. Iran does not explain why this is problematic or how it affected these proceedings in light of Iran's decision to default.

[411] *See* Iran's Reply, ¶ 2.42.

[412] *Id.*

[413] *Havlish v. bin Laden* (*In re Terrorist Attacks on September 11, 2001*), Case No. 03-cv-9849-GBD-SN, 2011 WL 13244047, at **39-41 (S.D.N.Y. Dec. 22, 2011) **(U.S. Annex 357)**.

[414] *Id.*

attack the *Havlish* proceedings based on propriety of service, the standard of liability, and the sufficiency of and type of evidence admitted by the U.S. court in the proceedings. Each of these topics is taken in turn below.

i. Iran Was Properly Served

8.69 Iran's claims concerning a lack of or improper service in various instances are both misleading and misplaced.[415] In reality, Iran was served in both English and Farsi, by international courier and through diplomatic channels, with summons and notice of process. The summons included a copy of the complaint and notified Iran "that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint."[416] Consistent with special rules that the United States has put in place to protect foreign sovereigns from inadvertent defaults,[417] the Foreign Interest Section of the Embassy of Switzerland in Tehran served Iran and its applicable political subdivision with the summons and complaint in *Havlish* on October 9, 2002.[418] Iran was served through diplomatic channels yet again in 2005.[419]

8.70 To comply with yet another protective measure for foreign sovereign defendants in U.S. civil litigation,[420] the *Havlish* plaintiffs mailed the default judgment and a notice of rights to appeal in both English and Farsi to Iran and the Iranian entities (along with the court's earlier memorandum decision and the report and recommendation by the magistrate judge) by international courier (DHL) on November 15, 2012,[421] and then again through diplomatic

---

[415] *See, e.g.*, Iran's Reply, ¶ 2.48.

[416] FED. R. CIV. P. 4(a)(1)(E) **(U.S. Annex 428)**. *See also Havlish v. bin Laden* (*In re Terrorist Attacks on September 11, 2001*), Case No. 03-cv-9849-GBD-SN, 2011 WL 13244047, at **37-39 (S.D.N.Y. Dec. 22, 2011) **(U.S. Annex 357)** (describing plaintiffs' service of process on Iranian defendants).

[417] The Federal Rules of Civil Procedure require that "[a] foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608," a section of the Foreign Sovereign Immunities Act. FED. R. CIV. P. 4(j)(1) **(U.S. Annex 428)**. Section 1608(a) of the Foreign Sovereign Immunities Act requires a foreign sovereign to be served a summons and complaint (1) by special arrangements consented to by the foreign sovereign, (2) in accordance with an applicable international convention, (3) by mail requiring a signed receipt from the court clerk to the foreign minister of the foreign sovereign, or (4) through diplomatic channels between the U.S. Department of State and the foreign sovereign. *See* 28 U.S.C. § 1608(a) (IM Annex 6).

[418] Affidavit of Service, Exh. C., *Havlish v. bin Laden*, Case No. 1:02-cv-00305-JR (D.D.C. Nov. 1, 2002), ECF 35-3 **(U.S. Annex 358)**.

[419] Clerk's Certificate of Mailing of Summons & Complaint, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Mar. 18, 2005), ECF 21 **(U.S. Annex 359)**.

[420] *See* 28 U.S.C. § 1608(e) (IM Annex 6) (requiring service of a default judgment in the same manner as the service of summons before such judgment can be enforced); *see also supra* ¶ 8.48.

[421] *See* Clerk's Certificates of Mailing, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Nov. 15, 2012), ECF 319-334 **(U.S. Annex 359)**.

channels on January 14-15, 2013,[422] after Iran and the Iranian entities chose to not accept delivery from the international courier.

8.71 In addition to being factually inaccurate, Iran's assertions about improper service are misplaced. Iran could have challenged the *Havlish* judgment in U.S. court on the basis of improper service but chose not to do so. To the extent that Iran believes that such a challenge would have been futile, recent precedent shows that belief to be unreasonable. In 2019, after Sudan re-evaluated its decision to default and began participating in the litigation, the U.S. Supreme Court upheld a challenge by Sudan to a default judgment that was based on the plaintiffs' alleged failure to properly serve Sudan with notice of the proceedings.[423] In short, with the heightened service protections afforded to foreign sovereigns, a lack of notice is not the issue when a foreign sovereign defaults. Further, as demonstrated by the case of Sudan, defaulting sovereigns have ample protections in the U.S. system if service was improper.

ii. Plaintiffs Were Held to the Same Standard of Proof That Would be Applicable in the Case of Any Other Sovereign Default, Including a Default by the United States Itself

8.72 Also contrary to Iran's assertions,[424] the standard for liability in the *Havlish* proceedings was not substantially and retroactively relaxed by the enactment of Section 1605A of the FSIA. Iran argues that differences between the second and third amended complaints in the *Havlish* proceedings demonstrate that enactment of Section 1605A allowed victims of the 9/11 attacks to add claims based on "aircraft sabotage, hostage taking and generally the provision of material support or resources for terrorist acts," which had not been available under the Torture Victims Protections Act.[425] However, Iran fails to acknowledge that the second amended complaint expressly makes claims for provision of "material support and resources to Al

[422] *See* Clerk's Certificates of Mailing, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Jan. 14, 2013), ECF 340-354 **(U.S. Annex 359)**.

[423] *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019) **(U.S. Annex 298)**. At the time of the decision, Sudan remained designated as a state sponsor of terrorism under U.S. law and ruled by a dictator with a long history of animosity toward the United States. The Solicitor General of the United States submitted briefs that were generally consistent with the positions taken by Sudan at both the petition (May 22, 2018) and merits (August 22, 2018) stages of the proceeding before the Supreme Court. *See* Brief for the United States as Amicus Curiae, *Harrison*, 139 S. Ct. 1048 (2019) (No. 16-1094) **(U.S. Annex 360)**; Brief for the United States as Amicus Curiae Supporting Petitioner, *Harrison*, 139 S. Ct. 1048 (2019) (No. 16-1094) **(U.S. Annex 360)**. The United States also participated in oral arguments in support of Sudan's position on the proper interpretation of 28 U.S.C. § 1608. *See* Motion of the Solicitor General for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument, *Harrison*, 139 S. Ct. 1048 (No. 16-1094) **(U.S. Annex 361)**.

[424] *See* Iran's Reply, ¶¶ 2.42-2.47.

[425] *See id.* ¶ 2.47.

Qaeda, Bin Laden and the Hijackers" and "air piracy" and other claims with substantially similar coverage as Section 1605A based on other federal and state laws.[426] Even assuming, *arguendo*, that Iran's characterization of the difference between the second and third amended complaints were correct, Iran fails to explain how this would be a violation of the Treaty.

8.73 Iran also suggests that a judicial acknowledgement of a substantial overlap between the evidence required to establish jurisdiction and liability in terrorism-related cases under Section 1605A proves that the standard for liability was lax or insufficient.[427] However, the substantial overlap between the elements required to establish jurisdiction and liability under Section 1605A demonstrates the robust protections provided by the former and not, as Iran suggests, the laxity of the latter. Aside from Iran's faulty understanding of the evidence required, Iran's critique generally ignores the evidence—uncontroverted by Iran—that provided the factual basis for a judgment against Iran for providing material support for terrorism.

8.74 Contrary to Iran's suggestions,[428] the court found that the plaintiffs presented sufficient, admissible evidence to support the default judgment in *Havlish*. Again, Iran's description of the 9/11 cases fails to account for Iran's decision to default, which in the normal course would be an admission of plaintiffs' well-pled allegations.[429] As such, even if the judgments against

---

[426] *See, e.g.*, Second Amended Complaint ¶¶ 384, 404, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Sept. 7, 2006), ECF 214 **(U.S. Annex 362)**. Iran also confusingly associates what it describes as the ability of plaintiffs "to avail themselves with the more advantageous 28 U.S.C. § 1605A" in an amended complaint with *dicta* from the damages recommendation of a magistrate judge, which Iran characterizes as "commend[ing]" the impact of § 1605A. *See* Iran's Reply, ¶ 2.46. Leaving aside the fact that the claims in the new complaint substantively overlapped with those in the old complaint, the magistrate judge's description of the effect of § 1605A at most highlights the judicial efficiency of having a single federal cause of action for all claims. *See* R. & R. to the Hon. George B. Daniels at 5, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. July 30, 2012), ECF 314 **(U.S. Annex 363)**.

[427] *Id.* ¶ 2.50 n.129.

[428] *See, e.g.*, Iran's Reply, ¶ 2.53. The gravamen of Iran's claim that the judgments were not based on evidence is that Iran did not agree that about the appropriateness or sufficiency of the evidence. Iran found particularly problematic the willingness of U.S. courts to accept affidavits and expert testimony. *See id.* ¶ 2.52. Had Iran participated in the litigation, it could have challenged these or other aspects of the proceedings that it found problematic. For example, the U.S. judicial system has transparent rules governing the admissibility of evidence, including expert testimony. The Federal Rules of Evidence, which govern the general admissibility of evidence in U.S. courts, are publicly available and readily accessible at https://www.uscourts.gov/. Article VII of the Rules governs the qualification of an expert witness, the admissibility of expert testimony, and the disclosure of what may be the otherwise inadmissible basis for an expert's testimony. *See also* FED. R. EVID. 602 **(U.S. Annex 428)**.

[429] Under Federal Rule of Civil Procedure 8(b)(6) "[a]n allegation . . . is admitted if a responsive pleading is required and the allegation is not denied." This rule is not specific to the U.S. judicial system; in the normal course in common-law jurisdictions, the entry of default is an admission by the defaulting party of the well-pleaded allegations in the complaint. *See, e.g.*, *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 107 (2d Cir. 2006) **(U.S. Annex 364)** ("Rule 55 'tracks the ancient common law axiom that a default is an admission of all well-pleaded allegations against the defaulting party.'" (quoting *Vt. Teddy Bear Co. v. 1–800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004)). Courts have explained that the rationale for this treatment of defaulting parties "is

Iran were not based on evidence, this would be typical in the default context. Regardless, Iran's suggestion that the judgments in the 9/11 cases were not based on evidence is incorrect. Section 1608(e) of the FSIA provides heightened protections to defaulting foreign sovereigns, such as Iran, by imposing an evidentiary burden on plaintiffs who are seeking default judgments.[430] The additional protections provided to foreign sovereigns by Section 1608(e) "is the same standard that applies to default judgments against the United States under [Federal Rule of Civil Procedure] 55(d)."[431]

8.75 Written evidence was provided to the trial court on May 19, 2011, July 13, 2011, and August 19, 2011.[432] The trial court then had an evidentiary hearing on December 15, 2011.[433] The findings of facts by the trial court summarizes and extensively cites to this evidence. To the very limited extent that Iran's Reply addresses the voluminous evidence presented of its material support for terrorism, the gravamen of Iran's complaint appears to be that the Court accepted as evidence affidavits or testimony from persons not immediately involved in providing material support to the terrorists.[434] However, Iran identifies no bias or other impropriety with respect to the process by which the evidence was admitted. Consistent with typical practice for admitting such evidence in civil litigation in U.S. courts, the court made specific findings as to the admissibility of affidavits and expert evidence. Iran was therefore

---

to prevent absentee defendants from escaping liability by refusing to participate in judicial proceedings." *See, e.g.*, *Amaya v. Logo Enterprises, LLC*, 251 F. Supp. 3d 196, 199 (D.D.C. 2017) **(U.S. Annex 365)**.

[430] Section 1608(e) of the Foreign Sovereign Immunities Act specifies that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." (IM Annex 6). As U.S. courts have noted, "[t]his provision's 'protection against an unfounded default judgment' does not altogether 'relieve[] the sovereign from the duty to defend' but, nonetheless, requires that the plaintiff offer 'admissible evidence' sufficient to 'substantiate [the] essential element[s]' of her claim." *Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323, 357 (D.D.C. 2020) **(U.S. Annex 366)**. The heightened standard for defaulting foreign sovereigns pursuant to 28 U.S.C. § 1608(e) "does not require a court to step into the shoes of the defaulting party and pursue every possible evidentiary challenge," *see Owens v. Republic of Sudan*, 864 F.3d 751, 785 (D.C. Cir. 2017) **(U.S. Annex 367)**, but it does require plaintiffs to present admissible evidence to a court prior to obtaining a default judgment, which is not the case in the context of non-sovereign defaulting parties.

[431] *Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323, 336 (D.D.C. 2020) **(U.S. Annex 366)**; *see also Jerez v. Republic of Cuba*, 775 F.3d 419, 423 (D.C. Cir. 2014) **(U.S. Annex 301)** (Section 1608(e) "provides foreign sovereigns a special protection akin to that assured the federal government."). FED. R. CIV. P. 55(d) specifies that "[a] default judgement may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." **(U.S. Annex 428)**.

[432] *See, e.g.*, List of Exhibits, Plaintiffs' First Memorandum of Law in Support of Motion for Entry of Judgment by Default Against Sovereign Defendants, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. May. 19, 2011), ECF 276 **(U.S. Annex 368)**.

[433] *Havlish*, 2011 WL 13244047, at *2 **(U.S. Annex 357)**.

[434] *See, e.g.*, Iran's Reply, ¶¶ 2.50-.52.

treated no differently than any other litigant in this regard.[435] To the extent that the U.S. court did not consider all of the objections that Iran seeks now to raise in these proceedings, it is solely because Iran chose not to appear and raise them.

iii. The Court's Findings Regarding Liability and Damages

8.76 In addition to its admissibility-related critiques of the *Havlish* proceedings, Iran asserts that the plaintiffs did not mention or sufficiently demonstrate the material support for terrorism provided by the Iranian agencies and instrumentalities that were found liable.[436] In reality, the plaintiffs submitted extensive evidence concerning the material support provided by Iranian entities and, in the case of non-ministry entities and government officials, whether such entities were acting as agencies and instrumentalities of Iran.[437]

8.77 Moving beyond the liability judgment, Iran's contention that the damages awarded in *Havlish* lacked a factual and legal basis is also demonstrably false and fails to assert a claim under the Treaty.[438] The magistrate judge who made the initial damages assessment expressly described the basis for his recommendation as the "legal principles found in the Restatement of Torts and other leading treatises."[439] With respect to the factual basis, although Iran identifies the October 3 and October 12, 2012 Orders concerning damages for 9/11 victims,[440] Iran omits to mention that the October 3, 2012 Memorandum Decision and Order, from which the October 12, 2012 Order and Judgment was calculated, adopted and summarized the contents of a 19-page report and recommendation from a magistrate judge that explained the evidentiary basis for the District Court accepting the report and recommendation.[441] The magistrate's report and recommendation was itself based on a legal analysis and hundreds of

---

[435] *See, e.g.*, *Havlish*, 2011 WL 13244047, at *36 **(U.S. Annex 357)** ("1. The Court finds the affidavits offered by plaintiffs[] as expert testimony to be admissible pursuant to FED. R. EVID. 702 and 703. Each of the proffered witnesses are qualified experts by their knowledge, skill, experience, training and/or education on the subject matters of terrorism, the Iran–Hizbollah-al Qaeda connection, and the 9/11 terrorist attacks.")

[436] *See* Iran's Reply, ¶ 2.50-2.51.

[437] *See, e.g., Havlish*, 2011 WL 13244047, at **3-4, ¶¶ 6-20, 34 **(U.S. Annex 357)** (concerning individuals acting as officials, employees, or agents); *id.* at **4-7, ¶¶ 22-37, 39-43 (concerning political subdivisions); *id.* at **6-9, ¶¶ 38, 44-56 (concerning the other entities acting as agencies and instrumentalities of Iran).

[438] *See* Iran's Reply, ¶ 2.54.

[439] R. & R. to the Hon. George B. Daniels at 5, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. July 30, 2012), ECF 314 **(U.S. Annex 363)**.

[440] *See* Iran's Reply, ¶ 2.54 n.147. The orders were issued in the 9/11 multi-district litigation that includes, among numerous other cases, the *Havlish* proceedings.

[441] Memorandum Decision and Order at 2, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. Oct. 3, 2012), ECF 316 **(U.S. Annex 369)**; *see* R. & R. to the Hon. George B. Daniels, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. July 30, 2012), ECF 314 **(U.S. Annex 363)**.

pages of factual evidence documenting the horrors experienced by the victims, including their economic losses and pain and suffering.[442]

iv. Iran Could Have Sought to Set Aside the Default Judgments Against it in U.S. Courts

8.78 Even after a judgment (with damages) has been issued by the court, defendants who initially default have an opportunity to have a court set aside a default judgment based on meritorious defenses because, in general, in U.S. courts, "strong policies favor resolution of disputes on their merits."[443] Once again, defaulting foreign sovereigns, like Iran, are afforded heightened protections by the U.S. judicial system because "[c]ourts go to great lengths . . . to permit [default judgments against foreign sovereigns] to be set aside."[444] Given the relatively generous standard afforded to the arguments of defaulting parties who seek to have a default judgment set aside, and Iran's many complaints about the judgments at issue in this case, it is notable that Iran has not sought to have any of these judgments set aside by U.S. courts, as other sovereigns, including sovereigns designated as State sponsors of terrorism, have successfully done. Just as Iran's efforts in this case to avoid discussing the merits of the *Peterson* proceedings shine a light on Iran's inability to address claims concerning its complicity in the Marine barracks bombings, its failure to request set aside of the other default judgments against it shows the emptiness of Iran's collateral attacks on the propriety of these judgments.[445]

---

[442] R. & R. to the Hon. George B. Daniels, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. July 30, 2012), ECF 314 **(U.S. Annex 363)**. *See also Plaintiffs' Proposed Findings of Fact and Conclusions of Law With Respect to Damages, Plaintiff's Amended Damages Inquest Memorandum, and Addendum, Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. Feb. 2012), ECF 302-303 & 306 **(U.S. Annex 370)**. The magistrate's report and recommendation and much of the supporting evidence is readily accessible from the same docket and proximate in both time and docket placement to the items that Iran has annexed to its Reply.

[443] *Republic of Kazakhstan v. Stati*, 325 F.R.D. 507, 509 (D.D.C. 2018) **(U.S. Annex 371)** (citing *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980)). The Federal Rules of Civil Procedure expressly provide that a "court may set aside an entry of default for good cause" and default judgments for, *inter alia*, "any . . . reason that justifies relief." *See* FED. R. CIV. P. 55(c) & 60(b)(6) **(U.S. Annex 428)**. A primary consideration for a court deciding whether to set aside a default judgment is the existence of any meritorious defenses, and "any doubts must be resolved in favor of the party seeking relief from the default." *Republic of Kazakhstan v. Stati,* 325 F.R.D. at 509 (citing *Jackson v. Beech*, 636 F.2d at 837).

[444] *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda–Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989) **(U.S. Annex 372)**.

[445] *See Friends Christian High School v. Geneva Financial Consultants*, 321 F.R.D. 20, 22 (D.D.C. 2017) **(U.S. Annex 373)**.

v. The 9/11 Proceedings Do Not Support a Claim Against the United States

8.79 In sum, Iran's complaints about the 9/11 proceedings are as meritless as they are irrelevant. Iran presents the court with a story about *Havlish* and the other 9/11 proceedings that neither accurately identifies the nature of Iran's liability nor accounts for the legal and practical effects of Iran's decision to default. In fact, Iran received the heightened protections typically afforded defaulting foreign sovereigns by the U.S. judicial system, which are similar to those afforded to the United States when it defaults in U.S. courts. Accurately described and contextualized, the 9/11 proceedings provide no support for any claim that the United States violated the Treaty of Amity.

Section D: Concluding Observations

8.80 In the preceding chapter, the United States has shown the reasonableness of its legislative, executive, and judicial actions. *First*, the United States showed that the legislative measures at issue in this case were reasonably enacted and reasonably applied in light of the numerous uncontested and unpaid judgments that plaintiffs have obtained against Iran as a result of its support for terrorism. *Second*, the sole executive measure at issue, Executive Order 13599, was a reasonable response to the deceptive conduct of Bank Markazi and other Iranian financial institutions. *Third*, the United States addressed in detail the **8** judgment enforcement actions that are the subject of Iran's claims to demonstrate that the Iranian entities involved, whether they chose to appear or not, were treated fairly by the U.S. courts. *Fourth*, the United States responded to Iran's complaints about the 9/11 judgments, establishing that not only are these complaints entirely unrelated to any of Iran's surviving claims, they are also entirely without merit.

CHAPTER 9: IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE III

9.1 The deficiencies of Iran's claims under Article III are symptomatic of its flawed interpretations of the Treaty, contrary to its terms. Iran's claim under Article III(1) is that the Treaty requires that Iranian companies be recognized as "separate from their shareholders including the Iranian State," and that the United States violated this alleged "separateness" requirement by allowing the attachment of assets of Iranian companies for judgments rendered against the Iranian State.[446] Iran's claim under Article III(2) is that, by "abrogating defences which would otherwise have been available to [Iranian] companies"—namely, the defense of immunity—the United States has violated the right of those companies to have "freedom of access to the courts" of the United States.[447] In its Counter-Memorial, the United States explained that the text and negotiating history of the Treaty make clear that it does not give rise to the rights of "separateness" or immunity, which Iran claims to have been violated under, respectively, Article III(1) and III(2).[448] The correct interpretation of Article III, as applied to the undisputed facts, must therefore lead to the dismissal of Iran's claims.

9.2 In response to the United States' detailed explanation of Article III's meaning, Iran attempts in its Reply to salvage its claims by creating new, even broader interpretations of Article III, but in doing so Iran only underscores its baseless efforts to read words into the Treaty that are not there. Rather than offer any textual analysis or negotiating history to support its invention of new requirements of "separateness" and "independence" rights under Article III(1), Iran's Reply argues for a vague, self-defining standard under which Iranian law is somehow the source of these rights. Iran's strained interpretation of Article III(2) fares even worse, as its broad and non-textual standard of "meaningful" access to the courts contradicts the Court's own interpretation of the provision. None of Iran's new arguments can sustain its claims under Article III.

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

9.3 In its Memorial, Iran argued that its claim under Article III(1) arose from its alleged entitlement to "the recognition of the *separate* juridical status of its companies . . . ."[449] The United States demonstrated in its Counter-Memorial, through analysis of the text and

[446] Iran's Reply, ¶¶ 4.11, 4.13.

[447] Iran's Reply, ¶ 5.39.

[448] U.S. Counter-Memorial, Chapter 13.

[449] Iran's Memorial, ¶ 4.1 (emphasis added).

negotiating history, that Article III(1) simply requires that "companies" have their "juridical status" be recognized such that they qualify for the protections afforded under the other substantive provisions of the Treaty, and that Iran's interpretation is flawed because it invents—without citing to any support—a "separateness" requirement that is not provided for by Article III(1).[450] The United States also explained that Article III(1) includes an explicit limitation that precludes the creation of implicit rights, such as Iran's alleged "separateness" right. This provision of Article III(1) states: "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."[451]

9.4 In its Reply, Iran does not disavow its invention of the "separateness" requirement, but instead goes even further in inventing new requirements. Iran now argues that the phrase "juridical status" not only guarantees that a company and its property be treated separately and independently from its owners, but also that this phrase somehow incorporates the entire range of rights afforded under Iranian law to Iranian companies. This baseless expansion reveals Iran's willingness to advance any argument, however divorced from the text of the Treaty, in an attempt to advance its claim.

i. Iran's Interpretation of Article III(1) Is Contradicted by Both the Text and the Negotiating History of the Provision

9.5 Iran's Reply presents for the first time the argument that Article III(1) somehow "provides that Iranian companies shall have *their* juridical status, *i.e. the juridical status they possess under Iranian laws and regulations*, recognised within the U.S. territory, i.e. given legal effect within this territory."[452] Iran now relies upon this assertion—rather than upon the text of the Treaty—as alleged support for its argument that Article III(1) requires that corporate entities be treated as "separate from their shareholders including the Iranian State."[453] This attempt to use domestic law to override the terms of the Treaty, contrary to the very terms of the Treaty, defies fundamental principles of treaty interpretation and cannot sustain Iran's claim.

[450] U.S. Counter-Memorial, ¶¶ 13.13-13.17.

[451] Treaty of Amity, Art. III(1) (emphasis added).

[452] Iran's Reply, ¶ 4.7 (emphasis in original).

[453] Iran's Reply, ¶ 4.11.

9.6 In building to its central new argument regarding Iranian law, Iran asserts in its Reply that the United States failed to interpret Article III(1) properly "on four basic points."[454] None of these four interrelated arguments withstand scrutiny.

9.7 First, Iran creates a strawman—and a distraction from the text of Article III(1)—by arguing that the United States has conflated "juridical status" with "legal personality."[455] In its Memorial, Iran itself referred to "separate legal personalities" when discussing "juridical status."[456] More importantly, Iran's argument about terminology wholly ignores the context of the United States' explanation regarding the meaning of "juridical status," namely that the Treaty's *travaux préparatoires*—a communication sent directly from the United States to Iran during the negotiations—set forth the Parties' understanding that "juridical status" required merely recognition of "corporate entities" or "corporate status" with legal personality on the same footing as individuals.[457] Iran nowhere engages with this important context.

9.8 Moreover, Iran makes only passing reference to the negotiation of parallel friendship, commerce, and navigation ("FCN") treaties, arguing that these "hardly find a place in the application of any sound method of treaty interpretation to the Treaty of Amity."[458] This bare assertion is incorrect and contradicted by Iran's own prior arguments. Consistent with the customary international law principle reflected in Article 32 of the Vienna Convention of the Law of Treaties, both the United States and Iran have previously relied on these types of materials in interpreting the Treaty of Amity,[459] as has the Court.[460] Specifically, the Court referred in *Oil Platforms* to a U.S. State Department memorandum regarding the FCN treaty with China and "discussions in the United States Senate that preceded the ratification" of FCN treaties with China, Ethiopia, Iran, and Oman and Muscat.[461] The Court's decision to reference

---

[454] Iran's Reply, ¶ 4.6.

[455] Iran's Reply, ¶ 4.6(a).

[456] Iran's Memorial, ¶ 4.23.

[457] U.S. Counter-Memorial, ¶¶ 13.8-13.9.

[458] Iran's Reply, ¶ 4.2.

[459] *See, e.g.*, Iran's Memorial, *Oil Platforms (Iran v. United States)*, ¶¶ 2.25-2.27 & n.190; Iran's Observations and Submissions on the U.S. Preliminary Objections, *Oil Platforms (Iran v. United States)*, ¶¶ 1.27, 3.09, 3.14; *Oil Platforms (Iran v. United States)*, Preliminary Objections Judgment, 1996 I.C.J. 803, 882 (Dec. 12) (Diss. Op. Schwebel).

[460] *Oil Platforms (Iran v. United States)*, Preliminary Objections Judgment, 1996 I.C.J. 803, 814-15, ¶ 29 (Dec. 12).

[461] *Id.*

such materials in its *Oil Platforms* judgment supports the conclusion that they are also relevant to the Court's analysis of the same Treaty here.

9.9 In any event, it is Iran that turns interpretive principles on their head by largely ignoring the text and context of the Treaty itself, and instead relying on wholly separate and distinct international treaties as alleged support for its interpretation. The shortcomings of Iran's arguments are obvious. While taking issue with the United States for referring to the *travaux préparatoires*, and to the contemporaneous negotiation of other FCN treaties with terms closely paralleling the Treaty, Iran cites to the 1961 Convention Relating to the Status of Refugees and the international law of the sea.[462] Iran does not even attempt to explain why these inapposite areas of law have any relevance to interpreting a bilateral Treaty of Amity. It is self-evident that the "juridical status" of refugees under a multilateral treaty—relating to matters such as "artistic rights"—and the "juridical status of waters" or "of the EEZ" are irrelevant to the proper interpretation of Article III(1) of this now-terminated Treaty. The weakness of these arguments is only clearer in light of Iran's near silence regarding the negotiating history of the very Treaty at issue in this case.

9.10 Iran's second, third, and fourth arguments each relate to its new theory that Article III(1) requires the United States "to give legal effect to Iranian laws on its territory governing the establishment of Iranian companies . . . ."[463] The Treaty, however, says no such thing. Nor do the *travaux préparatoires* or other context support such an interpretation. Iran therefore again resorts to inventing new terms out of whole cloth. Iran argues that "the juridical status of an entity that is recognised as a legal being under its domestic law is broader than the mere establishment of the legal personality of this entity, since *it also provides for the essential legal rights and duties attached to this legal person.*"[464] Article III(1) nowhere mentions or even implies a protection of "essential legal rights." To the contrary, Article III(1) expressly states that "recognition of juridical status *does not of itself confer rights* upon companies to engage in the activities for which they are organized" (emphasis added). Iran attempts to portray this statement as a "qualification" that is only necessary because "juridical status" does not have an identical meaning with "legal personality,"[465] but this only proves the United States' point: the express disavowal of conferring any right as part of "juridical status" leaves no doubt,

[462] Iran's Reply, ¶ 4.6(a)(i).

[463] Iran's Reply, ¶ 4.6(b)-(d).

[464] Iran's Reply, ¶ 4.6(a)(ii) (emphasis added).

[465] Iran's Reply, ¶ 4.6(a)(iii).

consistent with the Parties' negotiation history, that recognition of "juridical status" does not imply a host of other rights. In other words, the Treaty states that "juridical status" does not confer rights upon companies—whether "essential legal rights" or "basic rights" or "basic legal features," as Iran variously alleges. The phrase "to engage in activities for which they are organized" does not limit the express exclusion of additional rights in Article III(1); instead, this phrase encompasses a broad range of corporate purposes.

9.11 Iran also argues that because the Treaty refers to "*their* juridical status" rather than "*a* juridical status," this somehow means that the "United States commits to give legal effect to Iranian laws on its territory governing the establishment of Iranian companies . . . ."[466] If, however, the Parties had intended to incorporate domestic law in the sweeping way that Iran argues, they could have done so easily in express terms. They did not do so by a single-word substitution, and accordingly did not leave the meaning of the Treaty—and particularly the rights of companies—to be self-defined by one party's own domestic law. It is also beside the point that the companies in question must be constituted under Iranian law—that baseline requirement cannot be expanded into a catch-all that "encompass[es] independence and separateness,"[467] much less a guarantee that companies be insulated from judgment enforcement actions.

9.12 Iran repeats its reliance on *Barcelona Traction* and *Diallo* but wholly fails to address the United States' observation that these cases did not relate to *any* treaty, much less the Treaty at issue. As the United States has already explained (and which Iran largely ignores), both *Barcelona Traction* and *Diallo* arose under very different circumstances from the instant case, and are entirely irrelevant to Iran's Article III(1) claim. Those cases concern the parameters under which a State can, under customary international law, file a claim for diplomatic protection on behalf of individuals or corporations. The primary issue addressed by the Court in those cases is whether the right that was being invoked was indeed a right of a national or corporation of the claimant State in circumstances where the corporate ownership and structure were complex and involved multiple States. Neither *Barcelona Traction* nor *Diallo* arose under a treaty provision similar to Article III(1). Nor did they concern the much simpler question of what it means to recognize companies' legal personality. These cases, therefore, provide no insight into the meaning of Article III(1).

[466] Iran's Reply, ¶ 4.6(b)-(c).

[467] Iran's Reply, ¶ 4.8.

9.13 Moreover, Iran has failed to muster evidence of Iranian law in support of its sweeping and flawed reasoning. Iran offers only cursory citations for its position that Bank Markazi and the Export Development Bank of Iran are "independent" institutions.[468] Iran also asserts without support or analysis that "all other Iranian companies concerned" have the same status with "juridical personality" pursuant to the Iranian Commercial Code.[469] This is beside the point and cannot change the meaning of the Treaty.

9.14 In sum, Iran's Reply has failed to put forward any argument that can salvage its attempt to add new terms such as "independence and separateness" to Article III(1). If anything, Iran's new arguments only illustrate its willingness to ignore the text and context of the Treaty.

ii. The U.S. Measures Complied with Article III(1)'s Requirement of Recognizing the Iranian State-Owned Companies' "Juridical Status"

9.15 Once Iran's flawed interpretation of Article III(1) is set aside, the only question that remains is whether the United States has complied with its obligation to recognize the "juridical status" of the Iranian companies in the territory of the United States. The answer is yes, it has so complied. As the United States explained in its Counter-Memorial, none of the U.S. measures interferes with or denies recognition of the Iranian companies' juridical status as companies.[470]

9.16 Iran's Reply offers no rebuttal to this straightforward application of Article III(1), other than to repeat its flawed interpretation by asserting that Iranian companies were not treated as "separate and independent" from Iran.[471] In other words, Iran's argument is that the United States violated Article III(1) by holding the Iranian companies "liable for execution of a judgment against its shareholders, including when the shareholder is the State or Iran . . . ."[472] As explained above, however, the Treaty cannot be distorted to impose any such prohibition against an execution of judgment.

9.17 Moreover, Iran has failed to address the point that nothing in Article III prohibits or limits the well-settled practice of piercing the corporate veil for the ends of justice. Iran has no real answer to the authorities relied upon by the United States in its Counter-Memorial in

[468] Iran's Reply, ¶ 4.12.

[469] Iran's Reply, ¶ 4.12 & n.367.

[470] U.S. Counter-Memorial, ¶ 13.20.

[471] Iran's Reply, ¶¶ 4.11-4.17.

[472] Iran's Reply, ¶ 4.13.

support of this practice. Iran claims that the *Bancec* decision by the U.S. Supreme Court is irrelevant except in that the U.S. measures were intended to "override the five *Bancec* factors."[473] Iran misses the point. The fact that the U.S. measures pursued equity for terrorist victims by directly allowing enforcement against Iranian companies is in principle no different than courts applying the *Bancec* factors to reach the same result. The issue, as Iran's own quotation of Senator Specter makes clear, is "the legal standard of the Bancec doctrine" under which "families of the brave servicemen who died at the Marine Corps Barracks in Beirut, Lebanon, [could] collect court-ordered damages against state-sponsors of terrorism such as Iran."[474] The fundamental point remains unaltered: the U.S. measures served the ends of justice to compensate victims of Iran's terrorist acts consistent with well-established principles of piercing the corporate veil, which is in no way limited by Article III(1).

9.18 Iran also fails in its Reply to grapple with the comprehensive academic article cited in the U.S. Counter-Memorial, which summarized the international law regarding veil-piercing. This article cannot, as Iran argues, be dismissed as having "no relation at all with [the practice] of the United States with respect to Iranian companies."[475] Rather than engage with this principle of international law, Iran's Reply argues only that the Court's holding in *Barcelona Traction* was limited to "'lifting the corporate veil' or 'disregarding the legal entity' . . . when 'forms of corporation and their legal personality' have 'not been employed for the sole purposes they were originally intended to serve.'"[476] The Court's analysis, however, had no need to address other circumstances in which lifting the corporate veil might be appropriate and instead stated the broad principle that "the law has recognized that the independent existence of the legal entity cannot be treated as an absolute."[477] In the underlying cases at issue here, and consistent with that broad principle, the assets of the Iranian companies were attached due to Iran's support of terrorist activity.[478] Nothing in Article III(1) prevents measures to enable such attachment, which as explained below in Section B, were reasonable in these circumstances.

---

[473] Iran's Reply, ¶ 4.23.

[474] Iran's Reply, ¶ 4.24 (quoting Iran Reply Annex 5).

[475] Iran's Reply, n.376.

[476] Iran's Reply, ¶ 4.28.

[477] *Barcelona Traction, Light and Power Company*, Judgment, 1970 I.C.J. 3, 39, ¶ 56 (Feb. 5).

[478] As the United States noted in its Preliminary Objections, the Financial Action Task Force (FATF) had issued a series of warnings regarding the risk of terrorism-finance posed by Iran. U.S. Preliminary Objections, ¶ 4.9-4.11.

9.19 Against the backdrop of this equitable principle, and the facts of this case, it is clear that Article III in no way prevents the United States from taking measures directing that the corporate form of Iran's State-owned companies be set aside in order to facilitate recovery of compensation for victims of Iranian-sponsored terrorism. Ultimately, Iran's Reply only highlights the reasonableness of the U.S. measures by completely ignoring its own support of terrorism that gave rise to those measures.

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

9.20 Iran's claim under Article III(2) cannot stand following the Court's Preliminary Objections Judgment, and nothing in Iran's Reply alters this inevitable conclusion. In its Memorial, which was submitted prior to the Preliminary Objections Judgment, Iran attempted to interpret Article III(2)—and its requirement of "freedom of access to the courts"—as an "essentially procedural" provision that protected Iranian companies' right to assert immunity "as a matter of customary international law."[479] On the basis of that interpretation, Iran argued that the United States' alleged "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" violated the companies' right to freedom of access.[480] The United States explained the flaws of Iran's argument in the Counter-Memorial, following from the Court's conclusion in its Preliminary Objections Judgment, that Article III(2) "*does not seek to guarantee the substantive or even the procedural right* that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party . . ."[481] Accordingly, in light of the undisputed facts that the Iranian companies not only had access to but also did in fact appear and present arguments in U.S. courts, no basis remains for Iran's claim under Article III(2).

9.21 In its Reply, Iran attempts to sidestep the significance of the Court's Preliminary Objections Judgment by arguing that international case law supports a broad interpretation of Article III(2) such that the United States is allegedly "prohibited from interfering with such access, including by abrogating defences which would otherwise have been available to those companies . . . ."[482] Iran's Reply, however, is notably silent as to which "defense" has allegedly

[479] Iran's Memorial, ¶ 5.6.

[480] Iran's Memorial, ¶ 5.9.

[481] U.S. Counter-Memorial, ¶ 13.25 (quoting Preliminary Objections Judgment, ¶ 70 (emphasis added)).

[482] Iran's Reply, ¶ 5.39.

been violated, because the only relevant defense is immunity, which the Court has already found not to be engaged by the Treaty. Moreover, the case law that Iran presents is either inapposite here or in fact supports the U.S. interpretation of Article III(2), as discussed further below. The fact remains that the Iranian companies in question enjoyed and availed themselves of "access to the courts" of the United States, and Iran's claim should therefore be dismissed.

i. Iran's Overbroad Interpretation of Article III(2) Is Contradicted by the Text of the Treaty As Well As the Court's Own Analysis of That Text

9.22 Iran effectively ignores the Court's reasoning in its Preliminary Objections Judgment. In sustaining the U.S. objection that Article III(2) does not provide a basis for claims predicated on the denial of sovereign immunity, the Court concluded that Article III(2) "does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have."[483]

9.23 In its Reply, Iran attempts to confine this interpretation to a "specific and limited context,"[484] but the Court's analysis plainly has broader impact, as by its own explanation the Court found that Article III(2) "does not seek to guarantee the substantive or even the procedural rights" of a company—regardless of which rights a company invokes.[485] As the U.S. Counter-Memorial explained, this reasoning leaves no margin of doubt that Article III(2) simply grants a company the right of access to the courts to protect whatever other rights the company claims to have, and it does not do anything more.[486]

9.24 To attempt to sidestep the text of Article III(2), and the Court's reasoning, Iran now invokes in its Reply certain international arbitral and judicial decisions to argue that "freedom of access" must be "meaningful" and somehow includes a "prohibit[ion] from interfering with such access, including by abrogating defences which would otherwise have been available to those companies . . . ."[487] None of these cases support Iran's interpretation.

[483] Preliminary Objections Judgment, ¶ 70.

[484] Iran's Reply, ¶ 5.13 n.401.

[485] Preliminary Objections Judgment, ¶ 70.

[486] U.S. Counter-Memorial, ¶¶ 13.25-13.27.

[487] Iran's Reply, ¶ 5.39.

9.25 *First*, the cases from the European Court of Human Rights ("ECtHR") are clearly inapposite. The applicable provision in these cases is Article 6(1) of the European Convention on Human Rights ("ECHR"), which provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to *a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*" (emphasis added). Article III(2) of the Treaty does not include any of the type of procedural rights enumerated in ECHR Article 6, such as the right to "a fair and public hearing within a reasonable time." Moreover, even if these decisions of the ECtHR were relevant, they do not support Iran's position. In *National & Provincial Building Society*, for example, the ECtHR found no breach because the State had "compelling public-interest motives,"[488] just as the United States does here—regardless of how studiously Iran attempts to ignore the facts that gave rise to the U.S. measures. In *Stran Greek Refineries*, the ECtHR found a violation with respect to Greece's legislation to void a final arbitration award that had been rendered against it. The ECtHR found that this self-dealing did not satisfy "the notion of fair trial enshrined in [ECHR] Article 6."[489] The case Iran has brought involves no such self-dealing to avoid liability, nor questions of a "fair trial" under the ECHR. Accordingly, the decisions of the ECtHR provide no support to Iran's flawed interpretation of Article III(2).

9.26 *Second*, the decisions in *Van Bokkelen* and *Ambatielos* involve distinct treaties and inapposite facts, and thus have little to no relevance in this case. If anything, *Van Bokkelen* serves only to illustrate the extreme circumstances that might sustain a violation of a "freedom of access" provision. The case involved an individual who suffered from "harsh treatment and protracted imprisonment" following the courts of Haiti misapplying the relevant law to the individual.[490] By contrast, in this case the U.S. courts properly applied U.S. law after consideration of the Iranian entities' arguments submitted in the court proceedings (where they chose to appear). The analysis of the Arbitral Commission in *Ambatielos* in fact supports the United States' interpretation of Article III(2), and shows the error of Iran's interpretation, because it confirms that "free access to the courts" in no way ensures a particular outcome or guarantees a company's immunity from enforcement. Instead, as the Commission explained,

---

[488] *National & Provincial Building Society v. the United Kingdom*, App. No. 21319/93, ¶ 112 (Oct. 23, 1997), http://hudoc.echr.coe.int/fre?i=001-58109.

[489] *Stran Greek Refineries v. Greece*, App. No. 13427/87, ¶ 49 (Dec. 9, 1994), http://hudoc.echr.coe.int/eng?i=001-57913.

[490] J.B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1852 (1898) (Iran Reply Annex 112).

"[t]he modern concept of 'free access to the Courts' represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court," and such "appearance" entails basic legal advocacy such as "to deliver any pleading . . . to engage Counsel; to adduce evidence . . .; [and] to lodge appeals . . . ."[491] Iran omits this pivotal text from its quotation of *Ambatielos*, which confirms the United States' interpretation of and compliance with Article III(2).

9.27 In sum, Iran's new case law arguments cannot salvage its erroneous interpretation of Article III(2), particularly in light of the Court's holding regarding that provision in its Preliminary Objections Judgment.

ii. The Iranian Companies Enjoyed Freedom of Access to the Courts of the United States

9.28 The facts remain undisputed regarding the Iranian companies' access to the U.S. courts. Iran has never contested, nor could it, that the Iranian companies not only enjoyed "access to" but also in numerous instances actively participated in the U.S. court proceedings at issue. Even applying Iran's invented standard, the Iranian companies had "meaningful" access to the courts in that the companies appeared in the proceedings with representation of counsel and submitted written and oral arguments in accordance with applicable procedural law.

9.29 Notwithstanding these uncontested facts, Iran's Reply suggests that the United States somehow violated Article III(2) by "interfering with such access."[492] There is no foundation to this new argument. *First*, the Treaty contains no right against "interference." This is merely another backdoor attempt by Iran to add new terms to the "freedom of access" provision. *Second*, the United States did not interfere with the Iranian companies' access to the U.S. courts, as demonstrated in Chapter 8 and as proven by the companies' continued participation in the courts *after* the U.S. measures in question had been adopted. To the extent that Iranian entities chose not to appear in the proceedings against them, notwithstanding the comprehensive notice procedures adopted by the U.S. courts to try to engage them, their absence is obviously not the result of any wrongdoing by the United States. Iran's grievance with the substantive provisions of U.S. law, and with the outcome of some of the enforcement

[491] *The Ambatielos Claim (Greece, United Kingdom of Britain, and Northern Ireland)*, XII *R.I.A.A.* 111 (Mar. 6, 1956) **(U.S. Annex 121)**.

[492] Iran's Reply, ¶ 5.39.

proceedings, are outside the scope of Article III(2) because, as the Court has explained, Article III(2) does not "guarantee the substantive or the procedural rights" of Iranian companies.

9.30 Finally, Iran seeks to shield itself from scrutiny for its terrorist activities by arguing that the most-favored nation provision should not involve an assessment of companies in "like circumstances" but instead is without qualification. This argument makes no sense whatever. If Iran were correct, the Treaty would bar the United States from treating companies differently regardless of whether they in fact differed in fundamental ways, including, for example, companies that engaged in fraud or other criminal behavior versus law-abiding companies.[493] In addition, Iran's suggestion that Bank Markazi has been treated differently from any other central bank ignores the facts.[494] Both TRIA and Section 1610(g) of the FSIA are applicable to central banks (among other agencies and instrumentalities) of *all* State sponsors of terrorism, not solely to Bank Markazi.[495] While Section 8772 applied only to the Bank Markazi assets at issue in *Peterson I*, these were assets that Bank Markazi had repeatedly claimed as its own but was attempting to shield from attachment based on the way in which it had structured its holding.[496] Section 8772 did not, therefore, represent a fundamental break from the framework established in TRIA and Section 1610(g). Section 8772 simply sought to extend this framework to ensure that certain Bank Markazi assets would not effectively retain their immunity from attachment and execution, contrary to the goals of TRIA and Section 1610(g), as a consequence of being held through an intermediary. Nor, in any event, has Iran identified another situation in which the central bank of a State sponsor of terrorism sought to protect assets from attachment and execution in a similar way. In the absence of a similarly situated central bank, Iran cannot establish a breach of the most-favored nation provision.

Section C: Concluding Observations

9.31 In sum, Iran's interpretation of Article III(1) is untenable and unsupported by the text of the Treaty. Article III(1) obligates each Party to recognize the juridical status of the other's companies but expressly states that this recognition of *status* does not itself confer any *rights*, let alone the purported right to "separateness" on which Iran's claims hinge. Iran's Reply does

---

[493] *See also infra* Chapter 12, Section B.iii.

[494] Iran's Reply, ¶ 5.40.

[495] U.S. Counter-Memorial, ¶¶ 6.11-6.15. *See also supra* Chapter 8, Section A.

[496] *See supra* Chapter 8, Sections A and B.i(a). *See also* U.S. Counter-Memorial, ¶ 6.16.

nothing to remedy the flaws in its Article III(1) claims, nor could it. The right that Iran seeks to invoke under Article III(1) is nonexistent and Iran's claims must therefore be rejected.

9.32 Iran's Article III(2) claims are similarly flawed. Again, Iran attempts to expand this provision well beyond the ordinary meaning of its terms. As the Court has already recognized, Article III(2) protects a company's *access* to courts but does not "guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party . . . ."[497] Iran cannot circumvent this dispositive ruling. Nor are the arbitral awards and ECtHR decisions that Iran has identified in its Reply, which involved different treaties and different facts, any help to its case. Accordingly, Iran's claims under Article III(2) must likewise fail.

[497] Preliminary Objections Judgment, ¶ 70.

CHAPTER 10: IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE IV(1)

10.1 There are two primary disputes between the Parties concerning the interpretation of Article IV(1). The first is whether Article IV(1) reflects the international minimum standard of treatment under customary international law or an autonomous standard. The second is whether, if the applicable standard is the international minimum standard, it includes obligations in addition to denial of justice and the other international minimum standard of treatment obligations set forth expressly in Articles III(2) and IV(2) of the Treaty of Amity.

10.2 In addressing the first question in Section A below, the United States shows that the standard applicable under Article IV(1) is the international minimum standard of treatment and that Iran has failed in its Reply to establish otherwise. In addressing the second question in Section B, the United States responds to Iran's argument that the international minimum standard of treatment has evolved to encompass a panoply of obligations that go beyond denial of justice. As the United States demonstrates, Iran has not provided the evidence of State practice and *opinio juris* that would be necessary to substantiate such a radical evolution. In Section C, the United States shows that none of the measures Iran has challenged constitute a denial of justice and, therefore, none are in breach of Article IV(1).

10.3 In Section D, the United States identifies the many flaws in the eight-pronged autonomous standard that Iran has purportedly derived from Article IV(1)'s three clauses. Next, the United States shows why even under Iran's proposed standard the challenged measures nevertheless do not breach the article.

10.4 Finally, in Section E, the United States offers concluding observations on the proper interpretation and application of Article IV(1).

Section A: Article IV(1) Includes All the Rules of the International Minimum Standard of Treatment Under Customary International Law That Are Not Set Forth Elsewhere in the Treaty

10.5 Article IV(1)'s fair and equitable treatment obligation includes all the rules of the international minimum standard of treatment under customary international law that existed at the time the Treaty was concluded but are not set forth elsewhere in the Treaty, plus any rules falling under the international minimum standard of treatment proven to have crystallized under customary international law through State practice and *opinio juris* after the Treaty was concluded. While the obligation not to deny justice had crystallized as part of the customary international law minimum standard of treatment at the time the Treaty was concluded, Iran

has not shown that additional obligations have since crystallized to form part of the minimum standard of treatment under customary international law. Specifically, although Iran contends that the fair and equitable treatment obligation contains four additional distinct obligations beyond the obligation not to deny justice, it has provided no evidence of State practice or *opinio juris* to support the existence of these purported rules.

10.6 The Court has already ruled that Article IV reflects the international minimum standard of treatment,[498] making this observation twice in its Preliminary Objections Judgment.[499] To recall, when addressing whether sovereign immunity was included within the scope of the term "international law," as used in Article IV, the Court rejected Iran's argument that it was, and explained that "[t]he 'international law' in question in this provision is that which defines the *minimum standard of protection for property* belonging to 'nationals' and 'companies' of one Party engaging in economic activities within the territory of the other . . . ."[500] That is unmistakably a reference to the international minimum standard of treatment. And shortly following that statement, the Court reiterated that "the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature."[501] In response to these statements, Iran argues in cursory fashion that the Court was not referring to the international minimum standard of treatment, but rather to autonomous protections in the Treaty.[502] It provides no rationale for such a reading, notwithstanding the Court's explicit statement that the "international law" in question refers to the "minimum standard of protection for property." The Court's meaning was clear: Article IV sets forth the international minimum standard of treatment under customary international law.

10.7 Historical materials further confirm the conclusion that the fair and equitable treatment provision found in Article IV(1)'s first clause was intended to reflect the international minimum standard of treatment, and that the remaining clauses were intended to inform the interpretation of any rules falling within the scope of the fair and equitable treatment obligation, but not to set forth independent obligations.

---

[498] U.S. Counter-Memorial, ¶ 14.7.

[499] Preliminary Objections Judgment, ¶¶ 57, 58.

[500] Preliminary Objections Judgment, ¶ 57 (emphasis added).

[501] Preliminary Objections Judgment, ¶ 58.

[502] Iran's Reply, ¶ 6.8.

10.8 Not long after the Treaty was concluded, the Organisation for Economic Co-operation and Development ("OECD") published a Draft Convention on the Protection of Foreign Property, which was first proposed in 1963 and revised in 1967. The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that the standard reflected the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States"[503]:

> *The phrase 'fair and equitable treatment' . . . indicates the standard set by international law* for the treatment due by each State with regard to the property of foreign nationals. The standard requires that . . . protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. *The standard required conforms in effect to the 'minimum standard' which forms part of customary international law*.[504]

10.9 In addition, in 1984 the OECD's Committee on International Investment and Multinational Enterprises surveyed the OECD member States on the meaning of the phrase "fair and equitable treatment." The committee confirmed that the OECD's members continued to view the phrase as referring to principles of customary international law.[505]

10.10 Thus, historically the term "fair and equitable treatment," as used in international agreements governing investment, was intended as a shorthand reference to the principles of customary international law governing the responsibility of a State for its treatment of the nationals of another State with respect to their economic rights or interests. It was not intended as an articulation of some other, free-standing concept of uncertain content. It is in this sense, moreover, that the United States has incorporated "fair and equitable treatment" into not only

---

[503] OECD, 1967 Draft Convention on the Protection of Foreign Property, reprinted in 7 I.L.M. 117, 119 (1968) **(U.S. Annex 374)**.

[504] *See id.* at 120 **(U.S. Annex 374)** (emphases added).

[505] OECD, Committee on International Investment & Multinational Enterprises, Intergovernmental Agreements Relating to Investment in Developing Countries, at 12 (¶ 36), Doc. No. 84/14 (May 27, 1984) **(U.S. Annex 375)** ("According to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated . . . .").

its FCN treaties, but also its various bilateral investment treaties and trade agreements with investment chapters.

10.11 International materials with respect to the "effective means" clause,[506] both historic and more recent, also support the U.S. interpretation that the clause is not an independent obligation, but rather subsumed within the denial of justice obligation within the fair and equitable treatment provision. Iran simply had no response to much of the evidence the United States introduced in its Counter-Memorial demonstrating this point.[507]

10.12 Instead of addressing these authoritative sources, Iran quibbles with the language of another similar source, a 1926 report of the Committee of Experts for the Progressive Codification of International Law, convened under the auspices of the League of Nations. Iran argues that the Committee was discussing a different obligation than "effective means," because the report refers to "necessary means" instead of "effective means." It makes the same argument regarding the views expressed by the United Kingdom in commenting on the Committee's report in 1930, which also used the term "reasonable means."[508] But "reasonable means" was referring to the same concept as "effective means." In certain instances, concepts falling within the international minimum standard of treatment are expressed using somewhat different words without changing the meaning. Iran itself has cited to arbitral awards interpreting the term "full protection and security" to interpret the differently-worded term "constant protection and security" used in Article IV(2),[509] and further criticizes the United States (wrongly) for allegedly not interpreting the "arbitrary and discriminatory measures" provision of the U.S.-Italy FCN treaty consistently with Article IV(1)'s differently-worded

---

[506] As a preliminary matter, the United States notes that Iran has mischaracterized the U.S. position on the proper interpretation of the "effective means" and "unreasonable or discriminatory measures" clauses. Iran argues that it is "common ground between the Parties" that the "protection afforded by the obligation to assure effective means for lawful contractual rights" and the "protection against 'unreasonable or discriminatory measures'" both include an obligation not to deny justice. Iran's Reply, ¶¶ 6.50, 6.45. The United States' position is just the opposite of how it is described by Iran. The denial of justice obligation does not fall within the scope of the unreasonable or discriminatory measures and effective means clauses; rather, those clauses (which do not provide independent obligations) inform the proper interpretation of any customary international law rules included within the scope of the fair and equitable treatment provision.

[507] To recall, the United States introduced evidence of Alwyn Freeman's 1938 treatise entitled "The International Responsibility of States for Denial of Justice," the Special Rapporteur on Diplomatic Protection of the International Law Commission from 2002, as well as the 1987 Advisory Opinion from the Inter American Court of Human Rights, all supporting the U.S. position that "effective means" was a component of denial of justice. U.S. Counter-Memorial, ¶¶ 14.29, 14.30.

[508] Iran's Reply, ¶ 6.55(a).

[509] *E.g.*, Iran's Reply, at 172, n.616 (citing to paragraph 482 of the Award in *Anglo American PLC v. Bolivarian Republic of Venezuela*, which interprets Article 2(2) of the bilateral investment treaty between the United Kingdom and Venezuela, which refers to "full protection and security").

"unreasonable or discriminatory measures" provision in the Treaty.[510] There is no merit to Iran' argument that the 1926 Committee Report and the 1930 United Kingdom comments thereon were referring to a concept other than the effective means one.

10.13 With respect to Article IV(1)'s "unreasonable or discriminatory measures" clause, Iran argues that the U.S. position that this clause is encompassed by the fair and equitable treatment obligation is somehow inconsistent with the U.S. position interpreting the "arbitrary and discriminatory measures" provision in the *ELSI* case.[511] That is wrong. In *ELSI*, the United States was interpreting its FCN treaty with Italy, which does not have a general investment "fair and equitable treatment" provision. Rather, the FCN treaty with Italy has three fair and equitable provisions, all of which are directed to specific areas: two are related to where a Party maintains a monopoly or agency related to specific activities, and the third relates to the awarding of concessions and other contracts and the purchasing of supplies.[512] Thus, the arbitrary and discriminatory measures provision could not inform a general, investment-wide fair and equitable treatment obligation in the FCN treaty with Italy, because there was no such obligation in that treaty.

Section B: The International Minimum Standard of Treatment Can Evolve, but Iran Has Adduced No Evidence That, as Reflected in the Treaty, It Has Evolved Beyond Denial of Justice

10.14 Customary international law, including the international minimum standard of treatment, has the capacity to evolve. As the Court has held, new rules of law form or "crystallize" over time through a general and consistent practice of States that is adhered to from a sense of legal obligation (*opinio juris*).[513] To the extent that any new rules relating to the international minimum standard of treatment are proven to have crystallized through this process, then those rules would fall within the scope of the fair and equitable treatment obligation in Article IV(1).

---

[510] Iran's Reply, ¶ 6.48.

[511] Iran's Reply, ¶ 6.48.

[512] Treaty of Friendship Commerce and Navigation, arts. XVIII(1) and XVIII(2), U.S.-Italy, Feb. 2, 1948, TIAS 1965, 79 U.N.T.S. 171 **(U.S. Annex 376)**.

[513] U.S. Counter-Memorial, ¶¶ 14.16, 14.17.

10.15 As such, Iran is wrong when it argues that the U.S. position is that the fair and equitable treatment clause "must" be interpreted as it was understood at the time it was concluded.[514] That is not the U.S. position. Rather, the U.S. position is that this clause must be interpreted as including the denial of justice rule that fell within the scope of the clause at the time the Treaty was concluded *plus* any additional rules falling under the international minimum standard of treatment that have been proven to have crystallized under customary international law through State practice and *opinio juris* since the Treaty was concluded.

10.16 The burden is on the claimant to establish the existence of a rule of customary international law.[515] "The Party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[516] The claimant also bears the burden of demonstrating that the State has engaged in conduct that has violated that rule.[517]

10.17 It is not sufficient for a claimant merely to assert that a new rule of customary international law has crystallized. As the tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged,

---

[514] Iran's Reply, ¶ 6.25. Iran points to two statements in the U.S. Counter-Memorial in its attempt to support its mischaracterization of the U.S. position, but selectively quotes the relevant U.S. statements thereby distorting the meaning. Iran first points to a statement that the United States made describing the international minimum standard of treatment as it existed at the time the Treaty was concluded, but this passage nowhere states that this standard could not evolve. The United States was simply describing how the Treaty came to include the obligations that the Parties agreed to, but nowhere denied that the relevant customary international law could evolve. *Id.* (citing U.S. Counter-Memorial, ¶ 14.3). Second, Iran alleges that the United States argued that the international minimum standard of treatment had "crystallized" and could thus not evolve. *Id.* ¶ 6.29 (citing U.S. Counter-Memorial, ¶ 14.8). The United States made no such statement. Rather, the statement regarding "crystallization" simply referred to the formation of individual customary international law rules that fell within the umbrella concept that is the international minimum standard of treatment, not to the overall international minimum standard of treatment concept itself.

[515] *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Aug. 27).

[516] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20).

[517] *See, e.g., Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award ¶ 74 (Apr. 29, 1999) **(U.S. Annex 377)** ("[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim . . . . A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.") (internal quotation marks omitted); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 334 (1987) **(U.S. Annex 378)** ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) **(U.S. Annex 379)** ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence." (quoting United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Adopted 23 May 1997, WT/DS33/AB/R, at 14)).

> *the proof of change in a custom is not an easy matter to establish*. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[518]

10.18 The Court has previously described in some detail what is required to establish new rules of customary international law, which the United States reviewed in its Counter-Memorial.[519] In sum, the relevant State practice must be widespread and consistent, and accompanied by a sense of legal obligation. These two requirements must both be identified to support a finding that a relevant rule of customary international law has emerged.[520]

10.19 Although Iran's primary argument is that the fair and equitable treatment provision is an autonomous one, as is discussed below, Iran argues in the alternative that in the event the provision reflects customary international law, customary international law contains the exact same obligations that purportedly exist under Iran's proffered autonomous standard.[521] Specifically, Iran argues that under customary international law the fair and equitable treatment provision sets forth rules concerning the following kinds of conduct: (a) arbitrary, grossly unfair, unjust or idiosyncratic; (b) discriminatory; (c)(i) lacking in due process and leading to an outcome which offends judicial propriety including (but not limited to) through (ii) a denial of justice; and (d) legitimate expectations.[522] And yet, in this case Iran has made no effort to identify any State practice or *opinio juris* for its purported rules. Rather, Iran seeks to escape the Court's judgments on how customary law is to be identified.

10.20 While the United States readily agrees that the denial of justice obligation is part of the international minimum standard of treatment, Iran has introduced no evidence of any State practice or *opinio juris* for its four other purported rules, flouting this Court's rulings on how customary international law is to be identified as well as the Court's Statute.[523] Rather, Iran attempts to excuse this failure by simply citing to arbitral awards to support its five-obligation

---

[518] *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 273 (Sept. 18, 2009) **(U.S. Annex 380)** (emphases added).

[519] U.S. Counter-Memorial, ¶¶ 14.16, 14.17.

[520] U.S. Counter-Memorial, ¶ 14.16.

[521] *Compare* Iran's Reply, ¶ 6.9 (setting forth Iran's proffered autonomous legal standard), *with* Iran's Reply, ¶ 6.21 (setting forth Iran's proffered legal standard under customary international law).

[522] Iran's Reply, ¶ 6.21.

[523] Article 38(1)(b) of the Court's Statute.

test.[524] When discussing the *Waste Management II* arbitral decision, Iran readily concedes that that decision did not review the two requirements to establish a change in international custom, but attempts to excuse this failure by explaining that the tribunal's conclusion "was based on a careful survey of NAFTA arbitral awards."[525] That is no answer. Citing to arbitral decisions that do not identify State practice or *opinio juris*, but rather merely cite to *other* arbitral decisions that likewise do not identify State practice or *opinio juris*, simply compounds the problem. This approach would render irrelevant the Court's judgments on the requirements of proving custom, and mean that *ad hoc* arbitrators would in effect have authority to establish rules of law that bind States in the name of custom.

10.21 Iran attempts to justify this approach by arguing that it is authorized under Article 38(1)(d) of the Court's statute, which includes "judicial decisions" as a "subsidiary means." Iran points to the International Law Commission's Draft Conclusion 13(1) on identification of customary international law, which states that decisions of international courts and tribunals qualify under Article 38(1) as "subsidiary means for the determination of such rules."[526] However, Comment 1 to Draft Conclusion 13 clarifies that such decisions may only serve as subsidiary means "when they themselves examine the existence and content of [customary international law] rules."[527] Further, Comment 3 states that "[t]he value of such decisions varies greatly, however, depending both on the quality of the reasoning (*including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law*) . . . ."[528]

10.22 Arbitral awards relying on other arbitral awards that do not examine the existence of State practice or *opinio juris* do not qualify as subsidiary sources of law under Article 38(1)(d) of the Statute of the Court, whereas arbitral awards which provide adequate direct evidence of State practice and *opinio juris* will.[529] The alternative approach of allowing arbitral tribunals

---

[524] Iran's Reply, ¶¶ 6.22-24.

[525] Iran's Reply, ¶ 6.24(b).

[526] Iran's Reply, ¶ 6.24(c).

[527] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Draft Conclusion 13, Comment 1, U.N. Doc. A/73/10 (2018) **(U.S. Annex 381)**.

[528] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Draft Conclusion 13, Comment 3, U.N. Doc. A/73/10 (2018) **(U.S. Annex 381)** (emphasis added).

[529] *See* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 854 (Andreas Zimmerman et al. eds., 2d ed. 2012) **(U.S. Annex 382)** ("[I]n marked contrast to the sources listed in the previous sub-paragraphs, jurisprudence and doctrine are not sources of law—or, for that matter, of rights and obligations for the contesting States; they are documentary 'sources' indicated where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs.").

to decide what customary international law should be without examining the existence of the two requirements of custom as stated by this Court would not only eviscerate the Court's jurisprudence and requirements, but would also, as a practical matter, open the door to a potentially enormous universe of decisions to be considered. In contrast, requiring evidence of State practice and *opinio juris*—as the Court has done—provides concrete parameters within which parties and the Court can operate.

10.23 Because Iran is unable to adduce any evidence to show that State practice and *opinio juris* exist for its four other purported rules of customary international law, the Court should reject Iran's claims based on these purported rules.[530]

10.24 In this regard, in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, the Court stated that the purported "legitimate expectation" rule in particular was not part of general international law simply because arbitral tribunals had concluded that it was.[531] And yet, Iran construes the Court's statement to mean the opposite: that the Court should apply legitimate expectations in this case as if it *were* a settled principle of international law.[532] The Court should reject Iran's invitation to revisit the Court's conclusion on this matter.

10.25 However, even if the Court were to revisit the issue and conclude that "legitimate expectations" is part of general international law, the Court would have to reject its opposability to the United States, as the United States has been a persistent objector to this so-called rule. This point was demonstrated in the U.S. Counter-Memorial and has drawn no response from Iran.[533]

10.26 Moreover, the United States is not the only State that has objected to the proposition advanced by Iran that the purported "legitimate expectations" rule is part of customary

[530] In the event that the Court concludes that Iran has established that these four rules form part of the international minimum standard of treatment, the United States' defense is set forth in Section D below.

[531] U.S. Counter-Memorial, ¶ 14.20.

[532] Iran's Reply, ¶ 6.43.

[533] U.S. Counter-Memorial, ¶ 14.22.

international law. For example, Argentina,[534] Canada,[535] Costa Rica,[536] El Salvador,[537] Honduras,[538] and Mexico[539] have all made submissions (either as a respondent or a non-disputing Party) that no such obligation exists under customary international law. Further, eleven States (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) have signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), which explicitly rejects the notion that merely because a State acts in a manner inconsistent with an investor's expectation that the international minimum standard of treatment has been breached.[540] Additionally, the United Kingdom has formally requested to commence accession negotiations to the CPTPP.[541]

Section C: The United States Did Not Deny Justice to Any Iranian Companies

10.27 The United States discussed the standard for denial of justice in detail in its Counter-Memorial. In sum, the standard is a high one requiring conduct related to the administration of justice that is notoriously unjust or egregious for a breach to be established.[542] There is nothing unreasonable, let alone unjust or egregious, about a law that ensures that innocent victims of violent terrorist acts are able to enforce valid judgments against the assets of a State that is complicit in those acts, including assets of agencies and instrumentalities of that terrorist State with a different juridical personality, thereby piercing the corporate veil.

---

[534] *National Grid PL.C v. Argentine Republic*, UNCITRAL/Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments, Award ¶ 163 (Nov. 3, 2008) **(U.S. Annex 383)**.

[535] *Eli Lilly & Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Counter-Memorial of Canada ¶ 275 (Jan. 27, 2015) **(U.S. Annex 384)**.

[536] *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Respondent's Post-Hearing Brief ¶¶ 742-747 (Mar. 13, 2017) **(U.S. Annex 385)**.

[537] *Spence Int'l Invs. v. Costa Rica*, ICSID Case No. UNCT/13/2, Submission of El Salvador ¶¶ 8-12 (Apr. 17, 2015) **(U.S. Annex 386)**.

[538] *Teco Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of Honduras, ¶ 10 (2012) **(U.S. Annex 387)**.

[539] *Eli Lilly & Co. v. Government of Canada*, Case No. UNCT/14/2, Submission of Mexico ¶ 15 (Mar. 18, 2016) **(U.S. Annex 388)**.

[540] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Chapter 9 (Investment), art. 9.6(2) & (4), Mar. 8, 2018 **(U.S. Annex 389)**. Article 9.6 of CPTPP expressly states that the minimum standard of treatment provision of the treaty is intended to be coextensive with the minimum standard of treatment under customary international law. The CPTPP is in force for Australia, Canada, Japan, Mexico, New Zealand, Singapore, and Vietnam. UNCTAD, Investment Policy Hub, Status of CPTPP (last visited on March 25, 2021) **(U.S. Annex 390)**.

[541] Formal Request to Commence UK Accession Negotiations to CPTPP, Feb. 1, 2021 **(U.S. Annex 391)**.

[542] U.S. Counter-Memorial, ¶¶ 14.33-14.37.

10.28 Yet in the cases where Iran complains that its companies were denied justice, the Iranian companies were fully able to engage in the same legal process available to all other litigants in the United States. The laws in question did not prevent Iranian companies from examining witnesses, presenting documentary evidence, hiring counsel, or pursuing appeals. And Iran does not allege otherwise. Indeed, the courts systematically went through and carefully considered the evidence that was presented, and often took steps to ensure Iran's rights were protected even when Iran or an Iranian entity chose not to participate, as detailed in Chapter 8. And of course, when Iran or Iranian entities did participate, they had some successes.[543]

10.29 Iran does not complain that U.S. courts somehow misapplied the law in any way, let alone an egregious way, an argument frequently raised in denial of justice cases, and it concedes that it can no longer ground its denial of justice claims in an alleged non-recognition of sovereign immunity by U.S. courts.[544] Rather, Iran sets out "[t]hree aspects" of its remaining denial of justice claims: Iranian companies were allegedly (a) denied a so-called right to raise a defense based on separate juridical status; (b) subject to enforcement proceedings and execution to satisfy liability judgments rendered against the Iranian State in relation to which the companies were allegedly not parties and to which no findings of liability were made against them; and (c) retroactively denied the right to rely on three defenses (*res judicata*, limitations of actions, and *collateral estoppel*).[545] The first two theories are both a variation on the theme that the United States could not pierce the corporate veil.

10.30 Not all the measures Iran complains of include all these aspects, nor were all the measures relevant in every case Iran lists in Attachment 2 to its Reply. To the contrary, as demonstrated in more detail in Chapters 2 and 8, there are only **8** enforcement actions on which Iran bases its claims, and as demonstrated by the chart in paragraph 8.12, none of these cases involved all of the measures that Iran challenges. Indeed, some only involve one such measure. Further, Iran has not provided the Court with a clear statement of which cases are subject to its Article IV(1) claim.[546] When the Court considers whether a denial of justice occurred in any

---

[543] *Supra* Chapter 8, Section B.i(c) (the *Weinstein* case) and U.S. Counter-Memorial, ¶ 14.41 (the *Rubin* case).

[544] Iran's Reply, ¶ 1.2.

[545] Iran's Reply, ¶ 6.60.

[546] In response to the United States pointing to the *Rubin* case as an example where Iran hired lawyers, participated in the proceedings, and won the case as a result (U.S. Counter-Memorial, ¶ 14.41), Iran argues this was irrelevant because "Iran's Memorial does not refer to Attachment 2 with respect to its claims under Article IV(1) of the Treaty[.]" Iran's Reply, at 158, n.572. But *none* of Iran's four Attachments are referred to in Iran's discussion of the alleged breaches of Article IV(1) in its Memorial. Iran's Memorial, ¶¶ 5.42-5.51.

particular case, it will need to ascertain (i) whether any of the relevant measures were applied, and (ii) if these measures actually caused the outcome of the case to change in a way that meets the denial of justice standard. If the answer to either of these questions is no, then no denial of justice occurred. To help with this assessment, the United States addresses below each measure invoked by Iran as a basis for its claims and shows how, either standing alone or in combination with the others, the measures did not result in a denial of justice.

i. Designation of Iran as a State Sponsor of Terrorism

10.31 In January 1984, the United States designated Iran as a State sponsor of terrorism following the Secretary of State's determination that Iran repeatedly provided support for international acts of terrorism.[547] This measure applied only to the Iranian State, not to any Iranian nationals or companies. Because Article IV(1) does not apply to the Iranian State, Iran may not ground any of its denial of justice claims in the application of this measure.

ii. Executive Order 13599

10.32 In 2012, as a further response to the national emergency declared with respect to Iran, taken in light of deceptive conduct by Bank Markazi and other Iranian banks to conceal transactions prohibited by international and U.S. sanctions, the President of the United States issued Executive Order 13599. The Executive Order blocked all property and interests in property of the Government of Iran, including Bank Markazi, as well as of Iranian financial institutions subject to U.S. jurisdiction.[548] As it applies to Iran, including Bank Markazi, the Executive Order may not serve as grounds for any of Iran's denial of justice claims, because Bank Markazi is not a "company" under Article IV(1), and the provision imposes no obligation on the United States with respect to the Iranian State. Further, as noted above in Chapter 7, to the extent the Executive Order is a basis for any of the rest of Iran's claims, it addresses matters which fall within the exceptions created by Treaty Article XX(1)(c) because it regulates arms production, arms trafficking, and military supplies, and Article XX(1)(d) because it is necessary to protect U.S. essential security interests.

10.33 There are three additional reasons why the Executive Order cannot serve as a basis for asserting a denial of justice claim. *First*, the measure does not purport to deny the Iranian institutions any right to a defense, either based on their juridical status or otherwise. Rather,

[547] U.S. Counter-Memorial, ¶¶ 6.3-6.6.

[548] U.S. Counter-Memorial, ¶¶ 6.7, 6.8 and Chapter 11.

the measure simply blocked (*i.e.*, froze on a non-permanent basis) assets of the financial institutions. Had Iran ceased the conduct that gave rise to the measure, the designation could have been lifted without Iran experiencing the consequences of the measure. *Second*, although Iran argues that this measure "targets" Iranian companies,[549] the United States has imposed financial sanctions on other non-Iranian persons that support foreign terrorists, a point discussed in the Counter-Memorial,[550] but not addressed by Iran. *Third*, there is nothing about blocking assets of entities that posed an unacceptable risk of terrorist financing, proliferation financing, and money laundering that engages the administration of justice in a notoriously unjust or egregious manner, and would thus meet the denial of justice standard. In fact, this measure does not implicate the administration of justice in any fashion whatsoever.

iii. Piercing the Corporate Veil Pursuant to Section 201(a) of TRIA and Section 1610(g) of the FSIA

10.34 Section 201(a) of TRIA authorizes blocked assets to be attached and executed against for compensatory damages in judgments against "terrorist parties," including blocked assets of agencies or instrumentalities of terrorist parties.[551] Terrorist parties are defined to include State sponsors of terrorism, such as Iran, but also individual terrorists as well as terrorist organizations. Thus, the measure did not "target" Iranian companies, but rather applied to a wide range of terrorist actors. Further, the measure was not retroactive.

10.35 Section 1610(g) of the FSIA was passed as part of the 2008 National Defense Authorization Act.[552] It helps facilitate enforcement of judgments against a State sponsor of terrorism, including by authorizing enforcement against such a State's agencies or instrumentalities. Since it applies to all States designated as sponsors of terrorism, it does not "target" Iranian companies. Nor is it retroactive. The measure allows the corporate veil to be pierced in circumstances similar to Section 201(a) of TRIA. There is nothing unlawful about this aspect of these measures, for the reasons discussed below.

10.36 Piercing the corporate veil[553] exists in numerous contexts, and yet Iran has submitted no authority even hinting that piercing the corporate veil has ever given rise to a denial of

[549] Iran's Reply, ¶ 6.85(a).

[550] U.S. Counter-Memorial, ¶ 6.7.

[551] U.S. Counter-Memorial, ¶¶ 6.11, 6.12.

[552] U.S. Counter-Memorial, ¶¶ 6.13-6.15.

[553] "Piercing the corporate veil" is sometimes referred to as "lifting the corporate veil" or "disregarding the legal entity." *Barcelona Traction, Light and Power Company, Limited*, 1970 I.C.J. 3, 39, ¶ 56 (Feb. 5, 1970).

justice claim in any context. As a threshold matter, Iran argues that the United States has the burden of proving that there "is an established basis for the application of the doctrine" of piercing the corporate veil in this case.[554] This argument fails for two reasons. *First*, it turns burden of proof on its head. As discussed above, Iran, as the claimant, has the burden of proving its claim, including that any measure which it complains of is contrary to applicable international law. The burden is not on the United States to prove that its measures are lawful. *Second*, Iran's argument fundamentally mischaracterizes how international law functions. A State is allowed to engage in any conduct that is not prohibited under applicable international law. It does not need to first find an "established basis" to engage in specific conduct in order to lawfully engage in such conduct. Rather, as long as the conduct is not prohibited, the conduct is lawful.[555]

10.37 When it comes to piercing the corporate veil, States engage in this conduct in a variety of contexts without the suggestion that it constitutes a denial of justice. In *Barcelona Traction*, the Court held that piercing the veil is lawful in a diplomatic protection context.[556] Additionally, it is permissible in circumstances of (i) fraud, illegality, contravention of contract, public wrong, inequity; (ii) failure to maintain separate identities of the company and its owners/shareholders; (iii) failure to adequately capitalize the company; and (iv) failure to follow corporate formalities, among other circumstances.[557] In international investment arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"), it has also been used to determine whether foreign control of an investment exists such that jurisdiction is proper under Article 25 of the ICSID Convention, sometimes to the extent that even more than one layer of the corporate form will be pierced.[558] In both

[554] Iran's Reply, ¶ 6.76; *see also*, *id.* ¶ 6.71.

[555] *E.g.,* Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. 2(b) & cmt. 1 (2001) **(U.S. Annex 254)** (explaining that a State cannot commit a wrongful act in the absence of an obligation); *Methanex Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C at 11, ¶ 25 (Aug. 3, 2005) **(U.S. Annex 392)** ("In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens.").

[556] U.S. Counter-Memorial, ¶ 14.43 (discussing the relevant portion of from *Barcelona Traction*).

[557] Fletcher Cyclopedia on the Law of Corporations § 41 (2020) **(U.S. Annex 393)**.

[558] *E.g.*, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/05, Award ¶¶ 147-48, 160 (Dec. 19, 2008) **(U.S. Annex 394)**.

international[559] and domestic arbitration,[560] it may be used in certain circumstances to require entities to arbitrate disputes even if the entities are not parties to the arbitration agreement. As one of the leading treatises on international arbitration notes, "'[t]he concept of piercing the corporate veil is equitable in nature and courts will pierce the corporate veil to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.'"[561] To give another example, the Court of Justice of the European Union ("CJEU") ruled in the *Vantaan kaupunki* case that damages for violation of European Union ("EU") competition law were the responsibility of a group of companies which had not themselves violated EU competition law, but which had acquired certain other companies that had gone through a liquidation process and which had violated EU competition law.[562] The CJEU ruled as such notwithstanding that the acquiring companies were legally independent from the companies they had acquired and the claim for damages had not been lodged during the liquidation proceedings.[563]

10.38 With so many examples, it is no wonder that a treatise on piercing the veil of State enterprises has stated that the principle is sufficiently widespread that it is considered a general principle of international law as that term is used by Article 38(1)(c) of the Court's statute.[564] Against this backdrop, Iran attempts to excuse its inability to find a single instance of a denial of justice resulting from the corporate veil being pierced by arguing that "[t]he absence of direct authority merely highlights the extreme nature of the U.S. measures . . . ."[565] But it is Iran's extreme conduct of repeatedly sponsoring violent terrorist attacks on U.S. and other citizens—bombings such as the Marine barracks in Lebanon and the Khobar Towers in Saudi Arabia, kidnappings, assassinations and aircraft hijackings[566]—which forced the United States to consider other ways in which victims could obtain justice, namely, through enforceable damages claims before U.S. courts. Far from being "extreme," as Iran alleges, this response to

---

[559] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, § 10.02(D), 1431-44 (2nd ed. 2014) **(U.S. Annex 395)**.

[560] *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC,* 140 S. Ct. 1637, 1643–44 (2020) **(U.S. Annex 396)**.

[561] BORN at 1431-32 **(U.S. Annex 395)**.

[562] *See* Case C-724/17, *Vantaan kaupunki v. Sansk Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, ECLI:EU:C:2019:204 (March 14, 2019) **(U.S. Annex 397)**.

[563] *See id.* ¶¶ 7-9, 11, 49-51 **(U.S. Annex 397)**.

[564] ALBERT BADIA, PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 48-49 (2014) ("In our view, we can affirm that veil-piercing is a general principle of law.") **(U.S. Annex 186)**.

[565] Iran's Reply, ¶ 6.68.

[566] U.S. Counter-Memorial, Chapter 5.

Iran's repeated attacks on innocent victims and its unwillingness to compensate them for the deaths and injuries caused by its conduct, was restrained.

iv. Section 8772 of Title 22 of the U.S. Code (Codifying Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012)

10.39 Section 8772 facilitated the attachment of certain assets that Bank Markazi was holding through intermediaries to satisfy certain terrorism related judgments under certain conditions.[567] Because this measure applies only to Bank Markazi, which is part of the State of Iran,[568] Iran may not ground a breach of Article IV(1) in Section 8772 because the provision does not apply to the Iranian State. As such, the Court should not consider this measure in the context of Article IV(1). Further to this point, Iran grounds its Article IV(1) claims in allegations that this and the other challenged measures target both *Iran* and Iranian companies.[569] Iran is wrong on both accounts. However, even if a measure did "target" *Iran*, such a measure could not serve as a ground for Iran's claim, because Article IV(1) does not apply to the Iranian State. Thus, the "targeting" discussion below is limited to explaining why Iranian companies were not targeted.

(a) Section 8772 Did Not Deny Justice to Any Iranian Entity

10.40 Even if, *quod non,* Bank Markazi could be considered a company for purposes of Article IV(1), Section 8772's application would nevertheless not constitute a denial of justice. Iran can point to no flaw in the proceedings; it simply dislikes the substance of the law that the U.S. Congress passed. The statute required a different substantive legal standard be applied by the U.S. District Court to determine whether certain assets could be attached. It did not, however, direct the court to order the assets in question to be turned over to the plaintiffs. Rather, it simply required the U.S. District Court to apply the law to the facts to determine whether or not the new legal standard was satisfied.[570] As discussed in Chapter 8, the statute left "plenty" of issues to litigate, as the U.S. Supreme Court concluded. Key terms in the statute ("beneficial interest" and "equitable title") were left undefined, and the statute required the U.S. District Court to determine who the owner of the assets was, whether a party other than the owner had a constitutionally protected interest in the assets, and whether the assets were

[567] Section 8722 is discussed in Chapter 8 above; *see also* U.S. Counter-Memorial, ¶ 6.16.

[568] U.S. Counter-Memorial, Chapter 9 and *supra* Chapter 5 (explaining that Bank Markazi does not qualify as a "company" under the Treaty).

[569] Iran's Reply, ¶¶ 9.14, 9.31, 12.3; Iran's Memorial, ¶¶ 1.19, 6.20.

[570] *Bank Markazi v. Peterson,* 136 S. Ct. 1310, slip op. at 18 (Apr. 20, 2016) (IM Annex 66).

located in the United States.[571] All these issues were disputed,[572] and although Bank Markazi ultimately lost on these points there were no procedural improprieties that might call into question whether a denial of justice occurred. The statute did not prevent Bank Markazi from calling or cross-examining witnesses, presenting documentary evidence, hiring counsel, or making legal argument.

(b) Iranian Entities Were Not Targeted

10.41 Iran argues that Section 8772 targets its Central Bank because there is no analogous provision that applies to the Central Banks of other State Sponsors of Terrorism.[573] But not every measure that applies to a single entity constitutes targeting or unlawful discrimination, and Iran has offered no support for such a proposition. To the contrary, different conduct justifies different treatment, as has been held by various international tribunals.

10.42 As the *Urbaser* tribunal put it:

> The Tribunal basically agrees with a position stating that measures affecting an investor are discriminatory if they are clearly less favourable tha[n] those accorded to other investors operating under the same or similar circumstances, they intend to harm the foreign investor and cause actual damage, *and if they are not justified by sufficient reasons*.[574]

10.43 As another tribunal stated: "Treating different categories of subjects differently is not unequal treatment."[575] And as a third tribunal reasoned when rejecting a claim of discrimination: "The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors."[576]

10.44 Indeed, even Iran has conceded that differential treatment is not the same as discrimination.[577]

---

[571] *See supra* Chapter 8, Section B.i.(a).

[572] *Id.*, slip op. at 17 n.20 (Apr. 20, 2016) (IM Annex 66).

[573] Iran's Reply, ¶ 6.95.

[574] *Urbaser S.A. v. Argentine Republic*, Spain-Argentina BIT/ICSID Case No. ARB/07/26, Award ¶ 1088 (Dec. 8, 2016) **(U.S. Annex 398)** (emphasis added).

[575] *Metalpar S.A. v. Argentine Republic*, Chile-Argentina BIT/ICSID Case No. ARB/03/5, Award ¶ 162 (June 6, 2008) **(U.S. Annex 191)**.

[576] *Enron Creditors Recovery Corp. v. Argentine Republic*, U.S.-Argentina BIT/ICSID Case No. ARB/01/3, Award ¶ 282 (May 22, 2007) **(U.S. Annex 192)**.

[577] Iran's Memorial, ¶ 5.31.

10.45 In this case, Iran has continued to avoid satisfying valid judgments against it, and Congress's focus was ensuring that victims of Iran's brutal terrorism with valid judgments could have these judgments satisfied, thereby making Iran accountable for its conduct and providing victims compensation. Had another State engaged in the acts that Iran did—killing and maiming peacekeepers and civilians, avoiding satisfying its resulting court judgments, and structuring its investments in an effort to evade its judgment creditors[578]—the same measures would have undoubtedly been imposed on that State as well.

(c) Retroactivity Does Not Render Section 8772 Contrary to the Denial of Justice Obligation

10.46 Undoubtedly recognizing the weakness of its claims, when discussing the retroactive aspect of Section 8772 Iran continues to ground its claims in the allegation that sovereign immunity was abrogated retroactively.[579] And yet the Court has already ruled that it has no jurisdiction to consider Iran's immunity claims.

10.47 Moreover, with respect to the three technical defenses that Section 8772 addresses (*res judicata*, limitations of actions, and collateral estoppel), Iran's theory of the case is that because the United States allegedly "prevented [Iranian entities] from raising applicable defenses" "from which there can be no departure as a matter of international law,"[580] the United States was thus in breach when it removed them from an active case. But notwithstanding that it has cloaked its claims in the language of *jus cogens*,[581] Iran has produced no authority suggesting these are required to be provided under international law or cannot be removed, let alone are *jus cogens.* The *National & Provincial Building Society* ("*NPBS*") decision undercuts Iran's position that once a case is active changes cannot be made to the governing law.

10.48 In *NPBS*, the ECtHR rejected claims by three building societies that retroactive tax legislation imposed by the United Kingdom had violated various provisions of the ECHR (including regarding denial of access to court in breach of a right to a fair trial).[582] Iran takes great pains to try to distinguish the case, to no avail.[583] In *NPBS* the three applicants were

---

[578] *See supra* Chapter 8, Section B.i(a).

[579] Iran's Reply, ¶ 6.81(a).

[580] *See* Iran's Memorial, ¶ 5.33.

[581] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted[.]").

[582] U.S. Counter-Memorial, ¶¶ 14.48-14.49.

[583] Iran's Reply, ¶¶ 6.82-6.85.

given less favorable tax treatment than a fourth building society, which was not made subject to the retroactive legislation, and yet the ECtHR still concluded that this was not a case of unlawful targeting, as Iran is forced to admit.[584]

10.49 Iran also attempts to distinguish the case on the grounds that the measure at issue in *NPBS* was a mere "technical deficiency" and what was at stake (the finances of the United Kingdom) was a "compelling public interest."[585] But, if even a technical deficiency regarding public finances can give rise to a compelling public interest, then surely providing accountability and redress for innocent victims of brutal terrorist attacks must also qualify as a compelling public interest, and much more so. Iran also relies on the fact that the ECtHR states that the three applicants in *NPBS* were attempting to frustrate the U.K. Parliament's intent regarding the statute.[586] But here too, Iran was attempting to frustrate the purpose of the relevant court judgments by structuring transactions to avoid satisfying its liabilities. The *NPBS* case is highly persuasive authority that the retroactivity in this case does not effect a denial of justice.

10.50 As the tribunal in *Mondev Int'l Ltd. v. United States* also concluded, it is "normally a matter for local courts to determine whether and in what circumstances to apply new decisional law retrospectively."[587] In the *Peterson* case, Iran was able to challenge the retroactivity aspect of Section 8772, and it litigated this aspect of the legislation all the way to the U.S. Supreme Court. As that court noted, absent certain exceptions grounded in the U.S. Constitution, "congressional power to make valid statutes retroactively applicable to pending cases has often been recognized . . . ."[588] It further stated that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts."[589] Were the law otherwise, the international law reporters would be littered with denial of justice cases stemming from all corners of the globe. Iran's argument cannot be sustained.[590]

---

[584] *Id.* ¶ 6.82.

[585] *Id.* ¶ 5.20.

[586] *Id.* ¶ 6.84.

[587] *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 137 (Oct. 11, 2002) **(U.S. Annex 176)**.

[588] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, slip op. at 16 (Apr. 20, 2016) (IM Annex 66).

[589] *Id.*, at 17 (IM Annex 66).

[590] Regarding Iran's piercing the corporate veil arguments, they do not lead to the conclusion that a denial of justice occurred for Section 8772 for the same reasons that Section 201(a) of TRIA and Section 1610(g) of the FSIA do not.

v. Section 1226 of the NDAA 2020

10.51 In its Reply, Iran introduces a new measure in which it grounds its claims, Section 1226 of the NDAA 2020.[591] The Court has no jurisdiction to consider this measure because, as explained in Chapter 2, the measure entered into force after the Treaty had already been terminated. Further, no court has ordered any Iranian assets to be turned over to plaintiffs pursuant to Section 1226, which would also necessarily occur, if ever, after the Treaty was no longer in force.[592]

Section D: Even Under Iran's Deeply Flawed Proposed Legal Standard, the United States Did Not Breach Article IV(1)

i. Iran's Proposed Legal Standard Is Deeply Flawed

10.52 Iran's proffered interpretation of Article IV(1) is at odds with the ordinary meaning of Article IV(1). Iran argues that a provision with three clauses actually contains *eight* discrete obligations, some of which exactly or substantially duplicate each other. It is inconceivable that this was intended or agreed to by the Parties.

10.53 Beginning with the first clause of Article IV(1) ("fair and equitable treatment"), Iran argues that it contains five discrete obligations regarding the following types of treatment: (a) arbitrary, grossly unfair, unjust, or idiosyncratic; (b) discriminatory; (c)(i) lacking in due process and leading to an outcome which offends judicial propriety including (but not limited to) through (c)(ii) a denial of justice;[593] and (d) legitimate expectations.[594] Next, Iran contends that Article IV(1)'s second clause ("unreasonable or discriminatory measures") contains two discrete obligations: one prohibiting unreasonable conduct, and the other prohibiting discriminatory conduct. Finally, Iran's eighth proffered obligation is the "effective means" provision in Article IV(1)'s third clause.

10.54 Iran's interpretation of Article IV(1) is flawed for a number of reasons. *First*, Iran interprets the purported discrimination obligation contained within the fair and equitable treatment provision to be exactly the same as the discrimination obligation within the

[591] Iran's Reply, ¶ 6.83(b); *id.* ¶¶ 2.103, 2.107, 2.108.

[592] In any event, even if the Treaty had still been in force on the date Section 1226 entered into force, it would not have effectuated a denial of justice for the same reasons that Section 8772 did not effectuate one.

[593] Iran clarified in its Reply that it considers prong (c) to constitute two separate obligations. Iran's Reply, ¶¶ 6.34-6.36, 6.58.

[594] *Id.* ¶ 6.9.

unreasonable or discriminatory measures provisions.[595] But there is no reason why the Parties would ever have agreed to include the exact same obligation in two different clauses.

10.55 *Second*, Iran interprets the fair and equitable treatment clause to contain two obligations related to the judiciary, one being denial of justice and the other being an obligation which "*might* not be as grave as" the standard for denial of justice yet still "*might* equally qualify as a kind of conduct resulting in liability."[596] Although Iran does not explain when the described conduct "might" or might not constitute a violation of its proffered lower standard, Iran is clear that this undefined standard includes conduct that is not serious enough to constitute a denial of justice. But if that were the case, what would be the purpose of a denial of justice obligation? If less egregious judicial conduct would breach Iran's lower standard, there is no reason to have the denial of justice obligation as well.

10.56 *Third*, Iran's interpretation of the "effective means" clause as being yet another independent standard related to the judiciary, but one that is "potentially less demanding . . . compared to denial of justice," means that Iran considers that Article IV(1) contains three judicial obligations. This further reinforces the point that there would simply be no purpose in having the denial of justice obligation included within Article IV(1) if the provision included two other judicial obligations with lower legal standards.

10.57 *Fourth*, and finally, Iran interprets the purported "unreasonable" obligation in Article IV(1)'s second clause to be less stringent than the purported "arbitrary, grossly unfair, unjust or idiosyncratic" standard obligation in the first clause.[597] But if a lower standard of conduct would breach Iran's "unreasonable" obligation, the purportedly higher "arbitrary" standard would be completely superfluous.

10.58 Iran's interpretation of Article IV(1) is utterly flawed. The Court should reject Iran's invitation to revisit its prior ruling that Article IV provides for the international minimum standard of treatment.

ii. In Any Event, Even Under Iran's Standard, the United States Did Not Breach Article IV(1)

10.59 Though Iran's primary argument is that Article IV(1) imposes an eight-part autonomous standard, Iran's alternative argument is that customary international law also includes this exact

[595] *Id.* ¶ 6.33.

[596] *Id.* ¶ 6.35 (emphases added) (footnote and internal quotation omitted).

[597] Iran's Memorial, ¶ 5.38(b).

same eight-part standard.[598] For the reasons explained above, both these contentions are wrong. However, in the event the Court adopts one of these positions, the United States demonstrates below why there is still no breach of Article IV(1).

(a) Fair and Equitable Treatment

10.60 As discussed above, Iran argues that Article IV(1)'s first clause, containing the fair and equitable treatment provision, contains five discrete obligations regarding the following types of treatment: (a) arbitrary, grossly unfair, unjust, or idiosyncratic; (b) discriminatory; (c)(i) lacking in due process and leading to an outcome which offends judicial propriety including (but not limited to) through (ii) a denial of justice;[599] and (d) legitimate expectations.[600]

1. Arbitrary, Grossly Unfair, Unjust, or Idiosyncratic Treatment

10.61 Iran argued in its Memorial that the definition of "arbitrariness" the Court set forth in *ELSI* should govern how the purported "arbitrary, grossly unfair, unjust or idiosyncratic" obligation should be understood.[601] However, Iran apparently has concluded that its claims do not meet that standard, and in its Reply Iran has jettisoned that standard and relies instead on one that is more lenient. Iran now argues that there is a two-part test for arbitrariness, and that a measure will not be arbitrary "[1] if is reasonably related to [2] a rational policy."[602] Further, Iran contends the Court is required to "consider the proportionality of the given measure" when determining the reasonableness in the first step.[603] Iran points to investment arbitral awards, as well as administrative law courts and human rights courts, in support of the "proportionality" test.[604]

10.62 As a threshold matter, the measures that Iran complains about were all part of a response to global terrorism, including Iran's unrelenting support for terrorist acts directed at U.S.

---

[598] *Compare* Iran's Reply, ¶ 6.9 (setting forth Iran's proffered autonomous legal standard), *with* Iran's Reply, ¶ 6.21 (setting forth Iran's proffered legal standard under customary international law); *see also* Iran's Memorial, ¶ 5.26 (stating that "on any view" the same five-part standard applies autonomously or under customary international law).

[599] Iran clarified in its Reply that it considers prong (c) to constitute two separate obligations. Iran's Reply, ¶¶ 6.21, 6.34-6.36, 6.58.

[600] *Id.* ¶ 6.9.

[601] Iran's Memorial, ¶ 5.29 (quoting the Court's decision in *ELSI* for the standard being "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.").

[602] Iran's Reply, ¶ 6.31.

[603] *Id.*

[604] *Id.* ¶ 6.32.

nationals and U.S. interests. Iran first contends that the U.S. policy behind the measures is not rational because it was "underpinned" by the State sponsor of terrorism designation, which it contends was "unilateral and political."[605] But contrary to Iran's position, a unilateral measure is not *per se* arbitrary. Moreover, the designation of Iran as a State sponsor of terrorism was based on an objective statutory standard and overwhelming evidence. The designation and all other measures adopted by the United States were perfectly rational responses to Iran's sustained conduct supporting terrorism aimed at U.S. nationals and interests. Regarding the second prong of its test, Iran contends that the measures were not reasonably related to the policy because the Iranian companies were not alleged to have had any involvement in Iran's terrorist acts.[606] But the Iranian entities at issue were all agencies or instrumentalities of the Iranian State. The measures in question did not authorize the assets of private Iranian companies to be attached to satisfy the judgments. The assets that were attached were thus indirectly owned by the Iranian State (and in the case of Bank Markazi, directly owned). As such, the measures were reasonably related to the policy, because Iran was the ultimate owner of the assets.

10.63 Finally, with respect to whether the measures were proportionate, Iran has not addressed this aspect of its test. However, in light of the fact that the funds in question were subject to attachment and execution pursuant to valid court judgments, and because the judgments themselves were for horrific violence, resulting in the killing and maiming of individuals, there can be no question that the measures were proportionate. Iran's theory of breach rests on an assumption that the United States should have had no response to Iran's sustained support for acts of terrorism directed at the United States, which resulted in the killing of its citizens.

10.64 For all the reasons described above, none of the challenged measures were arbitrary, grossly unjust, unfair, or idiosyncratic.[607]

---

[605] *Id.* ¶ 6.89.

[606] *Id.* ¶ 6.91.

[607] As for the "discrimination" component of its fair and equitable treatment claim, Iran argues that it is the same as "discrimination" claim under Article IV(1)'s "unreasonable or discriminatory" clause, and it has not briefed the two separately. Thus, the United States addresses this claim when addressing Article IV(1)'s second clause. Iran's Reply, ¶ 6.33.

2. (i) Lack of Due Process Leading to an Outcome Which Offends Judicial Propriety (ii) Including Through Denial of Justice

10.65 As discussed above, Iran clarified in its Reply that it considers the fair and equitable treatment obligation to contain two distinct obligations related to the judiciary, (i) one of which is related to due process that is a less serious violation than denial of justice, and (ii) the second of which is denial of justice.[608]

10.66 When discussing the lower standard, Iran has provided virtually no guidance on how to determine when it would be satisfied. Aside from citing to an investment arbitration decision stating that measures which "interfere[] with the legitimate exercise of rights of the protected individual *might* equally qualify as a kind of conduct resulting in liability[,]"[609] Iran provides no guidance. Nor does Iran explain when such interference "might" or might not lead to liability. There is simply no way for the United States to respond to this entirely undeveloped standard, and the Court should dismiss Iran's claim under this standard for vagueness.

10.67 In any event, none of the measures in question prevented Iranian companies from examining witnesses, presenting documentary evidence, hiring the counsel of their choice, or pursuing appeals. Rather than complain about some procedural defect, Iran's complaint relates to the substance of the laws in question. Thus, Iran's "lack of due process" claim should be rejected as failing on its face under any standard, as Iranian companies were not denied any process.[610]

3. Legitimate Expectations

10.68 As noted above, there is no doctrine of legitimate expectations that is part of the fair and equitable treatment obligation. But even if international law had evolved to include such a rule, the United States has been and is a persistent objector to any such rule.[611] Any such rule would not apply to the United States. Iran chose not to address the U.S. "persistent objector" argument in its Reply, and the U.S. position is therefore uncontested. The Court could dispose of Iran's "legitimate expectations" claim on this ground alone.

---

[608] *Id.* ¶¶ 6.34-6.36, 6.58.

[609] *Id.* ¶ 6.35 (emphasis added).

[610] The United States denial of justice discussion in Section C applies to Iran's claims whether under a customary international law standard or an autonomous one.

[611] Iran contends that the Treaty has evolved under both its "autonomous" and customary international law theories, such that legitimate expectations is part of the fair and equitable treatment obligation under either theory. *Id.* ¶¶ 6.25-6.29. Thus, the United States' persistent objector argument applies in either event. U.S. Counter-Memorial, ¶ 14.22.

10.69 In any event, Iran has failed to make out a "legitimate expectations" claim as an evidentiary matter even under its own purported standard. There are two components to such a claim under Iran's theory: *first*, the Iranian nationals or companies must have actually had subjective expectations; and *second*, these expectations would have to be "legitimate," or reasonable under all the circumstances.[612] Iran's claim fails for two reasons.

10.70 *First*, as a factual matter, Iran has not established that any of the relevant companies had any relevant expectations with regards to the measures it now complains about. There are no contemporaneous documents reflecting alleged expectations. Iran has submitted arguments in litigation as to what the alleged expectations were, but that is insufficient to establish a claim.[613] Thus, Iran's claim fails for a lack of evidence.

10.71 *Second*, arbitral tribunals applying the legitimate expectations doctrine have ruled that, for the doctrine to apply the host State must have made a specific representation to the investor regarding a particular matter with which a subsequent measure interfered. Without such a representation by the State, there can be no breach of legitimate expectations under such a theory.[614] Iran has identified no such representations by the United States in this case, and thus even if the Iranian companies had submitted evidence of their expectations, those expectations would not have been protected under this so-called doctrine.

(b) Unreasonable or Discriminatory Measures

10.72 In Article IV(1)'s second clause, Iran considers there to be two discrete obligations: prohibitions on (a) unreasonable measures, and (b) discriminatory measures.[615] Iran's claims under both these theories fail for the reasons discussed below.

10.73 In its Reply, Iran argues that the test to determine whether a measure is "reasonable" contains two parts: (i) whether there was a rational policy, and (ii) whether the U.S. measures were reasonably connected to that policy.[616] This is the same test that Iran proffers for its

---

[612] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award ¶ 304 (Mar. 17, 2006) **(U.S. Annex 399)** (explaining that an investor's subjective expectations were not enough to make out a claim, but rather that the expectations also had to be reasonable) (cited to by Iran in its Memorial, ¶ 5.36 n.274).

[613] Iran's Memorial, ¶¶ 5.36, 5.47.

[614] *E.g.*, *PSEG Global Inc. v. Republic of Turkey*, U.S.-Turkey BIT/ICSID Case No. ARB/02/5, Award ¶ 241 (Jan. 19, 2007) **(U.S. Annex 400)**; *Micula v. Romania*, Sweden-Romania BIT/ICSID Case No. ARB/05/20, Award ¶ 688 (Dec. 11, 2013) **(U.S. Annex 401)**; *Total, S.A. v. Argentine Republic*, France-Argentina BIT/ICSID Case No. ARB/04/01, Decision on Liability ¶ 121 (Dec. 27, 2010) **(U.S. Annex 402)**.

[615] Iran's Memorial, ¶ 5.38(a).

[616] Iran's Reply, ¶ 6.87.

"arbitrary" standard under the fair and equitable treatment clause, except that unlike its standard for arbitrariness, Iran does not contend that "proportionality" is a part of the second prong of the test.[617] As such, for the same reasons that the challenged measures are not arbitrary (discussed above in Section D.ii.(a).1), the measures are not unreasonable.

10.74 With respect to Iran's discrimination claim, the United States explained why it was baseless in its Counter-Memorial.[618] Iran's response is nothing more than three short sentences, effectively abandoning its claim for most of the challenged measures.[619] The only measures that Iran specifically refers to in its section discussing the alleged breaches of the "discrimination" obligation are Section 8772 and Section 1226 of the NDAA 2020.[620] With respect to Section 8772, the United States explained above in Section C.iv why this measure did not unlawfully target or discriminate against Iran, and those reasons apply here. With respect to Section 1226 of the NDAA 2020, as the United States explained above in Chapter 2, the Court has no jurisdiction to consider this measure as it post-dated the termination of the Treaty of Amity. In any event, as noted above, it would not constitute discriminatory treatment for the same reasons that Section 8772 does not. Additionally, in cursory fashion Iran generally refers to the measures which purportedly "abrogated the *Bancec* presumption" in its discrimination section, although it does not identify for the Court in this section which measures it considers to be the offending ones. Earlier in its Reply, Iran alleges that Section 201(a) of TRIA and Section 1610(g) of the FSIA abrogated the *Bancec* factors.[621] However, as discussed in Section C.iii above, these measures do not constitute unlawful targeting or discrimination because they are applicable to all States similarly situated and are not limited to Iran.

(c) The United States Did Not Deny Effective Means of Contract Rights

10.75 As noted in the U.S. Counter-Memorial, Iran has provided very little guidance to the Court or to the United States regarding the content of its claimed autonomous legal standard of Article IV(1)'s third clause.[622] In its Reply, Iran provides virtually no additional guidance in this regard, arguing that the effective means obligation is "a distinct and *potentially* less

[617] *See supra* Section D.ii.(a).1.

[618] U.S. Counter-Memorial, ¶¶ 14.54-14.59.

[619] Iran's Reply, ¶¶ 6.95-6.96.

[620] *Id*.

[621] Iran's Reply, ¶¶ 2.74(b), 4.25.

[622] U.S. Counter-Memorial, ¶ 14.60.

demanding test, compared to denial of justice in customary international, which requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case."[623] As a preliminary matter, it is simply of no help to the Court or to the United States for Iran to say that the test is "potentially" less demanding, but then not explain under what circumstance it is less demanding and under what circumstances it is not. And if it is less demanding, what would the legal standard be? Again, Iran's claim should be dismissed for vagueness of the purported legal standard on which it seeks to rely.

10.76 In any event, as has already been demonstrated in Chapter 8, the United States has a system of laws and institutions which worked effectively in the cases Iran invokes as the basis of its claims. U.S. courts went out of their way to ensure Iran's interests and the interests of Iranian entities were protected even when they did not appear in proceedings.

10.77 Moreover, although the effective means clause explicitly applies only to "contractual rights," Iran's argument is that the United States breached this provision by allowing the corporate veil to be pierced and not providing Iranian entities with sovereign immunity.[624] But nowhere does it allege that Iranian companies were precluded from using U.S. courts to enforce lawful contract rights, or even that they attempted to do so. Instead, Iran provides three short paragraphs claiming in cursory fashion that it has made out an effective means claims, but not citing to a single piece of evidence.[625] This is not a serious claim.

Section E: Concluding Observations

10.78 As demonstrated above, Article IV(1), along with other relevant parts of the Treaty, set forth the international minimum standard of treatment as provided by customary international law, as this Court has already ruled. The "fair and equitable treatment" clause contained in Article IV(1) is a shorthand reference to this standard, and thus requires the Parties to adhere to any rules contained within this umbrella concept not found elsewhere in the Treaty. While any obligations that evolved as a matter of customary international law would fall within the provision, Iran has failed to establish that the minimum standard of treatment extends beyond the obligation not to deny justice. The United States has not denied justice to any Iranian

[623] Iran's Reply, ¶ 6.53 (emphasis added) (internal quotations and citation omitted).

[624] Iran's Memorial, ¶ 5.41 (arguing that the effective means clause "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 contract rights.'").

[625] Iran's Reply, ¶¶ 6.98-6.100. For example, Iran has not even submitted the alleged contracts at issue into the record.

entities; moreover, none of the measures which apply to the Iranian State may serve as grounds for Iran's claims because Article IV(1) does not apply to the Iranian State. Finally, even under Iran's purported legal standard, Iran has failed to establish any breach by the United States.

CHAPTER 11: IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE IV(2)

11.1 Iran has asserted breaches of both the "most constant protection and security" obligation in Article IV(2)'s first sentence and the conditions imposed in the remainder of the article on the taking of property. The United States showed in the Counter-Memorial that Iran's expansive reading of the "most constant protection and security" obligation is unsupported and incorrect.[626] In its Reply, Iran attempts to shore up its position by reference to a handful of arbitral awards, but these awards are no help to Iran, as discussed in Section A below. Iran's reading of the clause must be rejected, and so must Iran's claims, as they are entirely dependent on its overbroad interpretation.

11.2 With respect to Article IV(2)'s expropriation provisions, the U.S. Counter-Memorial demonstrated that the challenged legislative and executive measures do not "take" Iranian property and that, even if they did, they are *bona fide*, non-discriminatory regulations, enacted as an exercise of U.S. police powers, and are therefore not in breach of Article IV(2).[627] In its Reply, Iran appears to acknowledge the existence of the police powers doctrine, but argues that the U.S. has not satisfied its requirements. Iran's argument, however, is based on bare assertions, rather than evidence. By contrast, the United States has explained in detail why the measures it has enacted were a justified and, as discussed in the preceding chapter, a non-discriminatory response to Iran's longstanding support for terrorism and other destabilizing acts.

11.3 As to Iran's claim that the U.S. judiciary expropriated the property of Iranian companies, the United States pointed out in the Counter-Memorial that decisions by domestic courts acting in the role of neutral and independent arbiters of legal rights do not give rise to a claim for expropriation.[628] In its Reply, Iran identifies instances in which arbitral tribunals have sustained claims of judicial expropriation, but Iran fails to acknowledge that these few examples all involved an element of illegality either in the conduct of the court or the events leading to the court's decision, which is entirely absent here. Accordingly, even if the Court were to accept Iran's argument that judicial expropriation may occur in certain circumstances, Iran has not established such a claim in this case.

---

[626] U.S. Counter-Memorial, ¶¶ 14.64-14.73.

[627] U.S. Counter-Memorial, ¶¶ 14.87-14.93.

[628] U.S. Counter-Memorial, ¶¶ 14.81, 14.94.

11.4 As discussed in further detail in Section B, Iran's expropriation claims, whether with respect to legislative, executive, or judicial measures, therefore fail.

Section A: Most Constant Protection and Security

11.5 The key question for the Court concerning the "most constant protection and security" obligation in Article IV(2)'s first sentence is whether, as Iran contends, it requires a State to provide something more than protection from physical harm. If it does not, Iran's claims must be rejected because Iran has not alleged any failure by the United States to provide physical security to the property of its companies and nationals.

11.6 But even if the Court were to accept that Article IV(2)'s first sentence could, in certain circumstances, require a State to provide some form of legal—in addition to physical—security, this would not save Iran's claims because the challenged U.S. measures do not breach the standards for legal security, such as they are, articulated in the few authorities that Iran has supplied in support of its position.

i. Iran Has Failed to Establish That "Most Constant Protection and Security" Requires Anything More Than Physical Security and Its Claims for Breach of This Provision Must Therefore Fail

11.7 Iran contends that Article IV(2)'s first sentence requires more than protection against physical harm, either because the international law minimum standard of treatment entails a wider scope of protection or because the Article's text goes beyond what is required under international law. Iran is wrong on both counts.

11.8 Beginning with the international law minimum standard of treatment, there is no dispute that it "require[s] States to provide protection against physical harm."[629] The burden is on Iran to establish, through evidence of State practice and *opinio juris*, that it extends further.[630] Iran has manifestly failed to carry this burden.

11.9 Iran references three arbitral decisions as purported evidence of the evolution of the standard to encompass more than protection against physical harm,[631] but they are entitled to little weight in assessing the state of customary international law. The reasoning in each case

[629] U.S. Counter-Memorial, ¶ 14.65.

[630] *See supra* Chapter 10, Section B.

[631] *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award ¶ 482 (Jan. 18, 2019); *AES Summit Generation Limited and AES-Tisza Erömü KFT v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award ¶ 13.3.2 (Sep. 23, 2010); *Mohammed Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), Partial Award on Jurisdiction and Liability ¶ 246 (Sep. 2, 2009). *See also* Iran's Reply, at 172 n.616.

is brief and summary, and none of the decisions engages in any analysis of State practice and *opinio juris*.[632]

11.10 Iran also relies on the Court's judgment in *ELSI* but this reliance is misplaced, as the United States showed in its Counter-Memorial.[633] *First*, Iran's reading of *ELSI* draws unwarranted implications from the judgment rather than resting on any express statements by the Court about the scope of the "most constant protection and security" obligation. The Court did not accept that this obligation extended beyond physical security and, indeed, rejected the U.S. claims for breach of this obligation in their entirety. *Second*, the Court did not conduct any review of State practice or *opinio juris* in rejecting the U.S. claims.[634] Thus, *ELSI* does not, standing alone, provide evidence of customary international law.

11.11 In any event, even Iran does not contend that its position on the scope of the "most constant protection and security" obligation was universally accepted at the time that the Parties signed the Treaty or that it has become so now.[635] Indeed, as Iran acknowledges,[636] the United States identified in its Counter-Memorial a number of arbitral awards that have rejected the expansion of this obligation beyond physical security.[637] Given what is, at most, partial support

---

[632] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Draft Conclusion 13, Comment 3, U.N. Doc. A/73/10 (2018) **(U.S. Annex 381)** ("The value of such decisions [*i.e.*, decisions of courts and tribunals] varies greatly . . . depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law.").

[633] U.S. Counter-Memorial, ¶¶ 14.66-14.73.

[634] *See, e.g.*, *Elettronica Sicula S.p.A. (ELSI)*, 1989 I.C.J. 15, 65, ¶ 108; *id.*, 66, ¶ 111.

[635] Indeed, the failure of efforts under the auspices of the League of Nations in the 1920s and 1930s and the International Law Commission in the 1950s to codify the standard of treatment that States owe to foreign nationals in their territory suggests to the contrary an enduring lack of consensus on this and other elements of the standard. *See, e.g.,* Pitman B. Potter, *International Legislation on the Treatment of Foreigners*, 24 AM. J. INT'L L. 748, 749 (1930) **(U.S. Annex 403)** ("At Paris last winter, at The Hague in March, in Geneva this spring, the story has been the same: the nations find it almost impossible either to codify the old law or replace it with new."); Edwin M. Borchard, *"Responsibility of States," at the Hague Codification Conference*, 24 AM. J. INT'L L. 517, 540 (1930) **(U.S. Annex 404)** ("[T]he conclusion seems inescapable that the subject of international responsibility of states for injuries to aliens is not ripe for codification[.]"); JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 36 (2013) **(U.S. Annex 405)** ("Work began in 1956 . . . . At this time, the ILC . . . was particularly focused on state responsibility for injury to aliens and their property, that is to say the content of the substantive rules of law in that sub-field. Six reports were submitted between 1956 and 1961, but the ILC barely considered them . . . . It was felt that the disagreement and division that this conception of the field of responsibility attracted would stunt progress, and the topic was set aside . . . . This false start was reversed in 1962, when an intercessional subcommittee of the ILC . . . recommended a focus not on injuries to aliens in particular, but rather on 'the definition of the general rules governing the international responsibility of the state'.").

[636] Iran's Reply, ¶ 7.4.

[637] U.S. Counter-Memorial, ¶ 14.65 n.450.

by international tribunals—and *no* support in the form of State practice and *opinio juris*—the Court cannot conclude that this position has crystallized as customary international law.

11.12 Thus, Iran has not established that the international law minimum standard of treatment extends beyond physical security. Iran's claims under Article IV(2)'s first sentence must therefore be rejected unless it can show that the text of the provision requires protection in excess of the international law standard. Iran has attempted to do so, but its arguments likewise fail.

11.13 Iran's primary argument is based on the wording of Article IV(2)'s first sentence. Iran notes that the last clause of the sentence—specifying that the protection afforded must be "in no case less than that required by international law"—indicates that international law "operates as a floor" and also observes that the phrase "most constant protection and security" is "without any qualification."[638]

11.14 There is, however, nothing in the phrase "most constant protection and security" that indicates or implies a standard of treatment in excess of international law. To the contrary, a cable sent during the negotiation of the FCN treaty with Ethiopia—which served as the model for the Treaty of Amity[639]—shows that the United States considered the phrase "most constant protection and security" to be declaratory of international law and did not believe that it required anything more:

> QTE Most constant protection and security UNQTE time-honored treaty language. . . . [C]lause to be given reasonable not strictest interpretation. In DEPT'S view, *provision declaratory of INTERNATL law, not more severe rule than INTERNATL law* . . . . RE liability, DEPT'S view is that party obligated exercise QTE due diligence UNQTE make assurance effective, and that liability arises in case failure exercise due diligence.[640]

11.15 As for Iran's argument that the Parties would have included an express qualification limiting the protection in Article IV(2)'s first sentence to physical security if they had intended such a limitation, there is no basis for this whatever. The meaning of the phrase was clear and well understood when the Treaty was concluded. The Parties intended the meaning that was

---

[638] Iran's Reply, ¶ 7.2.

[639] Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations, 84th Cong. 3 (1956) (statement of Thorsten V. Kalijarvi, Dep't of State) **(U.S. Annex 1)**.

[640] Telegram from U.S. Department of State to U.S. Embassy, Addis Ababa, at 2 (Aug. 28, 1951) (emphasis added) **(U.S. Annex 406)**.

understood. Iran is now endeavoring to bootstrap a different meaning into the phrase with hindsight. The debate about whether this type of protection extends to legal security as well as to physical security is a twenty-first century development[641] and nothing should be read into the Parties' failure to anticipate it when negotiating the Treaty of Amity in the 1950s.

11.16 Finally, Iran also argues that the inclusion of "interests in property" in the definition of "property" in Article IV(2)'s first sentence supports extending protection beyond physical security. Specifically, Iran contends that "interests in property" equates to "intangible property," and that because the latter "cannot be subjected to physical interference"[642] the scope of protection afforded by Article IV(2)'s first sentence must extend to some form of legal security. Iran does not, however, provide any justification for equating interests in property and intangible property in this context. An interest in property may be an interest in physical property, which obviously *can* be subject to physical interference. Physical security therefore remains a meaningful concept, even where interests in property are concerned. Indeed, the *travaux* show that the inclusion of "interests in property" was intended to ensure that indirect, as well as direct, investments were covered.[643] There is nothing to suggest that it was meant to alter the type of protection the Parties were required to provide to property.

11.17 This is further supported by the authorities that the United States submitted with its Counter-Memorial in which the tribunals adopted the "traditional" interpretation of the "most constant protection and security" obligation as limited to physical security. All of these awards involved treaties that contained definitions of "investment" that included a wide range of intangible rights and interests.[644] Accordingly, there is no dispositive connection of the sort

---

[641] *See, e.g.*, JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 236 (2d ed. 2015) **(U.S. Annex 197)** ("Traditionally, tribunals have interpreted provisions guaranteeing protection and security as protecting investors and their investments from *physical* injury caused by the actions of host governments, their agents, or third parties . . . . *At the beginning of the twenty-first century*, a few cases have sought to expand the term's scope to include protection against allegedly unjustified governmental actions that injure an investor's legal rights but cause no physical injury." (second emphasis added)).

[642] Iran's Reply, ¶ 7.2.

[643] Telegram from U.S. Department of State to U.S. Embassy, Tehran at 1 (Nov. 13, 1954) **(U.S. Annex 407)**.

[644] U.S. Counter-Memorial, ¶ 14.65, n.450. The United States relied upon (i) *Suez and Vivendi Universal v. Argentine Republic*, which proceeded under the France-Argentina BIT (Agreement on the reciprocal promotion and protection of investments, art. 1(1), France-Argentina, July 3, 1991, 1728 U.N.T.S. 298), the Argentina-Spain BIT (Agreement on the reciprocal promotion and protection of investments, art. I(2), Argentina-Spain, Oct. 3, 1991, 1699 U.N.T.S. 202), and the U.K.-Argentina BIT (Agreement for the Promotion and Protection of Investments, art. 1(a), United Kingdom-Argentina, Dec. 11, 1990, 1765 U.N.T.S. 34); (ii) *BG Group Plc v. Argentina*, which proceeded under the U.K.-Argentina BIT at issue in *Suez*; and (iii) *Saluka Investments B.V. v. Czech Republic*, which proceeded under the Czech Republic-Netherlands BIT (Agreement on encouragement and reciprocal protection of investments, art. 1(a), Netherlands-Czech and Slovak Federal Republic, Apr. 29, 1991, 2242 U.N.T.S. 224). The relevant excerpts from the treaties are compiled in **U.S. Annex 408**.

that Iran asserts between the scope of property that is protected by a given treaty and the scope of protection that a State party to that treaty is obligated to provide.

11.18 Thus, Iran has failed to establish that Article IV(2)'s first sentence requires anything more than physical security and Iran's claims under this provision must be rejected because Iran has not alleged a failure by the United States to provide physical security to Iranian companies and nationals.

ii. Even If "Most Constant Protection and Security" Included Some Form of "Legal Security," Iran's Claims Would Still Fail

11.19 In the alternative, if the Court were to accept that Article IV(2)'s first sentence requires something more than physical security, those few authorities that Iran has referenced in its Reply provide no support for—and, in at least one case, contradict—the novel "legal security" standard that Iran has proposed, which would bar "any executive or legislative measures *formulated specifically* to remove legal protections."[645] Iran's authorities accordingly do not support a finding of breach by the United States.

11.20 To briefly summarize the authorities in Iran's Reply, (i) *Anglo American PLC v. Venezuela* articulates no specific standard for legal security, let alone the standard that Iran advocates;[646] (ii) *AES Summit Generation Ltd. v. Hungary* makes clear that legal security does not imply stabilization of the applicable legal regime, as Iran argues, but instead leaves room for changes in the law including for the purpose of reasonable regulation;[647] (iii) *Al-Bahloul v. Tajikistan* suggests that a "miscarriage of justice" might constitute a breach of a legal security obligation;[648] and (iv) *ELSI*, at most, supports the notion that a delay in providing legal relief for an interference with physical property might breach such an obligation.

11.21 The *Anglo American* award is thus no help to Iran (or the Court); the analysis in *Al-Bahloul* is questionable because it would imply that a denial of justice is actionable under both Article IV(1) and the first sentence of Article IV(2) (and, in any event, as the United States has established in connection with Article IV(1), there has been no denial of justice); and, with

---

[645] Iran's Reply, ¶ 7.10 (emphasis in original; quoting Iran's Memorial, ¶ 5.57; internal quotation marks omitted).

[646] *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award ¶ 482 (Jan. 18, 2019).

[647] *AES Summit Generation Limited and AES-Tisza Erömü KFT v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award ¶¶ 13.3.2, 13.3.5 (Sep. 23, 2010).

[648] *Mohammed Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), Partial Award on Jurisdiction and Liability ¶ 246 (Sep. 2, 2009).

respect to the *ELSI* judgment, Iran has not identified any physical invasion of its companies' property or any delay by the U.S. courts in ruling on claims arising out of such an invasion, as would be necessary to establish the sort of breach alleged (but not sustained) in *ELSI*.

11.22 Even more problematic for Iran, the *AES Summit* award directly undermines its position. As the *AES Summit* tribunal explained, a "most constant protection and security" clause "certainly does not protect against a state's right . . . to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals."[649] The tribunal also expressly rejected claimants' attempt to transform this provision into a stability clause: "To conclude that the right to constant protection and security implies that no change in law that affects the investor's rights could take place, would be practically the same as to recogniz[e] the existence of a non-existent stability agreement as a consequence of the full protection and security standard."[650]

11.23 Accordingly, even accepting that "most constant protection and security" requires the Parties to provide some form of legal protection and taking Iran's authorities at face value, the challenged measures do not breach that obligation. As discussed further in Chapter 10 in connection with Article IV(1), the United States has acted reasonably to provide victims of Iran-sponsored terrorism with a legal avenue to enforce judgments that Iran itself has refused to pay.

Section B: Expropriation

11.24 Following the submission of Iran's Reply, there are two doctrinal issues for the Court to decide in connection with Article IV(2)'s provisions on expropriation: *first*, the standard for a non-compensable exercise of a State's police power and, *second*, whether decisions made by a State's courts, when acting as neutral and independent arbiters of legal rights, may nevertheless be expropriatory.

11.25 As to the first issue, the Parties are in agreement that, for an exercise of the police power to fall within this doctrine, it must be non-discriminatory and must have a legitimate policy aim. The Parties, however, disagree on whether the Court should also consider the proportionality of the challenged measure as part of its assessment. As demonstrated below,

---

[649] *AES Summit Generation Limited and AES-Tisza Erömü KFT v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award ¶ 13.3.2 (Sep. 23, 2010).

[650] *Id.*, at ¶ 13.3.5.

Iran has not established that proportionality, however conceived, is part of the test under international law for a compensable taking. Moreover, Iran has offered no support whatsoever for its uniquely strict conception of proportionality.

11.26 Turning to the second issue, Iran contends that there is no meaningful distinction between acts by the judiciary, on the one hand, and acts by the executive and the legislature, on the other, in assessing whether an expropriation has occurred. The authorities that Iran has referenced in its Reply, however, support a contrary conclusion, namely that a claimant alleging a judicial expropriation must show an element of illegality—either in the court proceedings or the events leading to the challenged court decision—in addition to the other elements necessary to establish that a taking has occurred.

11.27 Beyond these doctrinal issues, the Parties also disagree on the application of the police powers doctrine to the challenged measures and the assessment of whether the judicial decisions at issue are expropriatory. As the United States demonstrated in its Counter-Memorial and further substantiates below, Iran's positions on these issues are untenable. The challenged U.S. measures do not constitute breaches of the restrictions on takings in Article IV(2).

i. Iran's Interpretation of Article IV(2)'s Restrictions on the Taking of Property Remain Flawed

11.28 As noted, there remain two critical flaws in Iran's interpretation of Article IV(2)'s expropriation provision: *first*, Iran's view of the police powers doctrine is misconceived; and *second*, Iran ignores the restrictions that its own authorities place on claims for judicial expropriation.

(a) The Police Powers Doctrine

11.29 Beginning with the standard for invoking the police powers doctrine,[651] the Parties agree that the doctrine requires showing that the challenged measure is non-discriminatory[652] and has "a legitimate policy aim"[653] (or, as the United States put it in its Counter-Memorial, the measure must be a "*bona fide*, non-discriminatory regulation").[654] However, Iran attempts to establish the existence of an additional element: proportionality. Iran's sole support for this element is a line of arbitral awards tracing back to a single source (the award in *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*) ("*Tecmed*"),[655] which itself relied exclusively on decisions of the ECtHR. The *Tecmed* award, and the underlying ECtHR decisions, required "a reasonable relationship of proportionality between the charge or weight

[651] Iran vaguely suggests in its Reply that the police powers doctrine may not, in fact, be part of the expropriation inquiry under Article IV(2). Iran's Reply, ¶ 7.14. The United States has, however, supplied citations to State practice, arbitral awards, and scholarly commentary establishing that the police powers doctrine is a key part of international law on expropriation. U.S. Counter-Memorial, ¶ 14.79. Iran has not contradicted any of this authority or supplied any of its own. Instead, Iran relies on the purported silence of State Department witnesses regarding the doctrine in their congressional testimony about expropriation provisions in FCN treaties. But Iran ignores the context of this testimony. *First*, Harold Linder provided only the basic outline of the "protection against nationalization" in U.S. FCN treaties and did not go into any detail about the potential impact of this sort of treaty provision on a State's right to regulate. Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcomm. of the S. Comm. on Foreign Relations, 82d Cong. 8 (1952) (statement of Harold F. Linder, Deputy Assistant Sec'y for Economic Affairs) **(U.S. Annex 2)**. *Second*, the testimony of Thorsten Kalijarvi and his colleague Vernon Setser was in response to questions about language specific to the FCN treaty with Nicaragua, which limited the right to expropriate property to takings for "public purposes and reasons of social utility as defined by law." In particular, the questions concerned the meaning of the phrase "social utility." Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations, 84th Cong. 21 (1956) (statement of Thorsten V. Kalijarvi, Dep't of State) **(U.S. Annex 1)**. This testimony is no help to Iran.

[652] Iran's Reply, ¶ 7.14.

[653] Iran's Reply, ¶ 7.15(a) ("The first question is whether there exists a legitimate policy aim.").

[654] U.S. Counter-Memorial, ¶ 14.78.

[655] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 122 (May 29, 2003). *See also Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award ¶ 176(j) (July 17, 2006) (citing *Tecmed*); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility ¶ 87 (Jan. 15, 2008) (citing *Fireman's Fund*); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 311 (July 14, 2006) (citing *Tecmed*); *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award ¶¶ 404-409 (Oct. 5, 2012) (citing *Tecmed*, but considering proportionality in the context of a fair and equitable treatment—not expropriation—claim); *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Herman's S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award ¶ 305 n.404 (July 8, 2016) (citing *Tecmed*). Iran also references *Burlington Resources Inc. v. Republic of Ecuador*, but the tribunal in that case did not assess proportionality in applying the police powers doctrine. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability ¶ 529 (Dec. 14, 2012).

imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[656]

11.30 To the extent that these awards provide evidence of State practice at all, it is from a single source, namely ECtHR decisions. Other State practice, however, in particular by non-ECHR States, does not support a conclusion that either the ECtHR decisions or the *Tecmed* award rest on a settled principle of customary international law. On the contrary, while such practice shows consistent support for the non-discrimination and "legitimate policy aim" limbs of the police powers test, it does not provide support for the purported proportionality limb. For example, the sources that the United States cited in the Counter-Memorial from the Convention Establishing the Multilateral Investment Guarantee Agency and negotiations of the Multilateral Agreement on Investment are consistent with this approach and do not reference proportionality.[657] Likewise, the longstanding U.S. formulation of the test does not incorporate proportionality: "[u]nder international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory."[658] Accordingly, the 2004 and 2012 U.S. Model BITs, as well as the expropriation annexes to the investment chapters of modern U.S. free trade agreements, clarify that:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[659]

11.31 Thus, the ECtHR decisions underlying the *Tecmed* line of awards is not sufficient to establish the type of widespread, consistent State practice that would be necessary to conclude that proportionality has crystallized as a component of the test under customary international law for applying the police powers doctrine.[660]

---

[656] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 122 (May 29, 2003).

[657] Convention Establishing the Multilateral Investment Guarantee Agency, art. 11(a)(ii), Oct. 11, 1985, TIAS 12089, 1508 U.N.T.S. 99 **(U.S. Annex 206)**; Ministerial Statement on the Multilateral Agreement on Investment (April 28, 1998), *quoted* in UNCTAD Report, Expropriation: A Sequel at 81-82 (2012) **(U.S. Annex 202)**.

[658] *Lone Pine Resources Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Submission of the United States of America, ¶ 16 (Aug. 16, 2017) **(U.S. Annex 154)**.

[659] 2004 U.S. Model BIT, Annex B, Expropriation, ¶ 4(b) **(U.S. Annex 409)**; 2012 U.S. Model BIT, Annex B, Expropriation, ¶ 4(b) **(U.S. Annex 410)**. *See also* United States-Mexico-Canada Agreement, Annex 14-B, Expropriation, ¶ 3(b), U.S.-Can.-Mex., Nov. 30, 2018 **(U.S. Annex 411)**.

[660] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Draft Conclusion 8(1), U.N. Doc. A/73/10 (2018) **(U.S. Annex 381)**.

11.32 Critically, the proportionality inquiry envisioned in the ECtHR decisions is far more deferential to the State's regulatory prerogatives than the proportionality test that Iran is advocating in this case. In Iran's view, establishing proportionality requires the Party relying on the police powers doctrine to show that the measure at issue is "suitable and *necessary* to achieve the legitimate policy aim (including the unavailability of alternative measures)" and does not subject the other Party's nationals and companies to "undue burden."[661] However, the necessity element of this test is pure invention, supported by inapposite caselaw interpreting unrelated treaty provisions (*i.e.*, Article XX(d) of the GATT and Article XX(1)(d) of the Treaty of Amity).[662] As with the purported scope of "legal security" in connection with Article IV(2)'s first sentence—and, indeed, the concept of judicial expropriation discussed in the next section—there is a wide gulf between the law as Iran wants it to be and the law that its authorities actually support. Again, the ECtHR decisions underlying the *Tecmed* line of awards require only "a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[663]

11.33 Recent European Union investment treaties likewise set a very high bar for finding a measure disproportionate: "For greater certainty, except in the rare circumstance *when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[664] Canada has included similar language in some of its recent agreements.[665]

11.34 Accordingly, Iran has not established that proportionality is part of the test for applying the police powers doctrine and, in any event, even Iran's own authorities do not support the extreme version of proportionality that Iran has urged the Court to adopt here.

---

[661] Iran's Reply, ¶ 7.15(b) (emphasis added).

[662] Iran's Reply, ¶ 7.15(b) & nn.641-42.

[663] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 122 (May 29, 2003) (quoting European Court of Human Rights, *In the case of James and Others*, judgment of February 21, 1986, pp. 19-20).

[664] EU-Canada Comprehensive Economic and Trade Agreement, Annex 8-A, Expropriation, ¶ 3, Oct. 30, 2016 **(U.S. Annex 412)** (emphasis added). *See also* EU-Singapore Investment Protection Agreement, Chapter 4, Annex 1, Expropriation, ¶ 2, Oct. 19, 2018 **(U.S. Annex 413)**; Modernisation of the Trade Part of the EU-Mexico Global Agreement, Annex on Expropriation, ¶ 3 **(U.S. Annex 414)**.

[665] Canada-Colombia Free Trade Agreement, Article 811, ¶ 2(b), Can.-Col., Nov. 21, 2008 **(U.S. Annex 415)**.

(b) Judicial Expropriation

11.35 The United States argued in the Counter-Memorial that "decisions of domestic courts acting in the role of neutral and independent arbiters of legal rights should be considered separately from legislative and executive branch actions" and that they "do not give rise to a claim for expropriation."[666]

11.36 Iran attempts to minimize the distinction between judicial and executive/legislative acts in the expropriation context. The arbitral awards on which it relies, however, do not support Iran's position. To the contrary, in finding a judicial expropriation, each award identified an additional element of illegality, either in the act of the judiciary itself or in the chain of events leading to that act, beyond the elements necessary to establish an expropriation in other contexts.[667] Other arbitral awards beyond those referenced in Iran's Reply have also

[666] U.S. Counter-Memorial, ¶ 14.81.

[667] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award ¶¶ 134, 155, 159 (June 30, 2009) (noting that, in addition to a "substantial deprivation," "both parties consider that the actions of (or the actions attributable to) Bangladesh must be 'illegal' in order to give rise to a claim of expropriation" and ultimately concluding that the Bangladeshi court decision at issue was illegal in that it constituted an abuse of right and a violation of Bangladesh's obligations under the New York Convention.); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award ¶¶ 550-61, 645, 649 (Aug. 22, 2017) (concluding that the court decision at issue was "arbitrary" and inconsistent with international law); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award ¶¶ 707-708 (July 29, 2008) (concluding that "the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee, and Telcom Invest" and that the "decision of the Investment Committee was . . . unfair and inequitable in itself[.]"); *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award ¶¶ 72, 74, 107, 112, 117-18 (Sep. 9, 2009) (concluding that decisions by a series of Kyrgyz courts invalidating a "valid and legally binding" share purchase agreement, leading to claimants' deprivation of its rights in a hotel, were expropriatory).

recognized the need for an additional element of illegality to support a finding of judicial expropriation,[668] as have commentators.[669]

11.37 The need for something more than a court decision that has negatively affected a claimant's economic interests to establish a judicial expropriation is obvious: courts frequently affect such interests in the ordinary course of enforcing the law, including in the fields of contract, tort, and real property. If all such decisions could lead to claims for compensation against the State, the court system could not function.[670]

11.38 Iran's own authorities therefore do not support its attempt to erase the distinction between judicial and executive/legislative actions in the expropriation context and the Court should reject it.

ii. Iran's Claims Under the Expropriation Provision of Article IV(2) Fail

11.39 The United States now turns to applying the expropriation provision of Article IV(2), properly interpreted, to the measures at issue. The United States begins with the challenged legislative and executive measures, before addressing the judicial decisions. As the United States will show, neither the legislative or executive measures, nor the judicial decisions are expropriatory.

---

[668] *See, e.g.*, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award ¶ 713 (July 2, 2018) **(U.S. Annex 416)** ("In order to avoid a situation whereby any title annulment would constitute indirect expropriation or a measure tantamount to expropriation it is therefore necessary to ascertain whether an additional element of procedural illegality or denial of justice was present. Only then may a judicial decision be qualified as a measure constituting or amounting to expropriation."); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award ¶ 365 (Dec. 19, 2016) **(U.S. Annex 417)** ("A seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process."); *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award ¶ 314 (July 6, 2012) **(U.S. Annex 213)** ("[T]he courts' determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparts breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimants' expropriation claim is not established.").

[669] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES ¶ 8.85 (2d ed. 2017) **(U.S. Annex 418)** ("[N]ot all actions by State courts unfavourable to investor-claimants are expropriatory. In order to constitute expropriation, the actions of the State courts must be illegal.").

[670] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award ¶ 709 (July 2, 2018) **(U.S. Annex 416)** ("While it is possible that judicial action amounts to expropriation, it is the exception rather than the norm. In any kind of private law dispute over ownership of movable or immovable property, courts will make a decision which of the disputing parties claiming ownership rights prevails. This will result in a finding that one party will be entitled to ownership whereas the other (or others) will not. Such judicial determinations do not constitute expropriation. Similarly, where property transfers are held to be invalid, the resulting transfers of ownership do not amount to expropriation.").

(a) Legislative and Executive Measures

11.40 Before addressing the Parties' disagreements regarding the challenged legislative and executive measures, there are at least three points that are not in dispute. *First*, Iran does not contest that those legislative and executive measures that affected Iran's sovereign immunity or created rights of action against Iran have either been dismissed from the case on other grounds or are not expropriatory.[671] *Second*, Iran does not dispute that if the Court rejects its argument that Bank Markazi is a "company" within the meaning of the Treaty, those measures that are directed at Bank Markazi, whether in whole or in part, must be excluded from the Article IV(2) analysis (as they apply to Bank Markazi).[672] *Third*, it is uncontested that if the Court concludes that Executive Order 13599 is within the scope of Article XX(1)(c) or (d), Iran's expropriation claim with respect to this measure must fail.

11.41 Turning to the points of disagreement, Iran has little to say in response to the U.S. argument that legislative measures enabling plaintiffs to collect on their terrorism judgments against Iran do not, on their own, "take" Iranian property. Iran argues that "the *intended result* of the U.S. measures is that the property of Iranian companies be taken,"[673] but that is not the test. Regardless of the motive Iran attempts to assign to the measures, Iran cannot establish a breach of Article IV(2) without showing that they constituted "some form of actual or substantial taking."[674] The reality is that the legislative measures did not constitute a taking of any sort and Iran cannot establish otherwise. That ends the inquiry as to these measures.

11.42 With respect to Executive Order 13599, the U.S. Counter-Memorial included references to numerous U.S. court decisions concluding that similar blocking orders are not expropriatory because they are temporary and do not change ownership of blocked assets.[675] Iran has not addressed these decisions in its Reply, nor has it explained why the Court should second guess, let alone overrule, this well-established line of U.S. precedent.

11.43 In any event, Iran's claims as to all of the legislative and executive measures must fail because these measures are *bona fide*, non-discriminatory exercises of U.S. police powers. Iran contends that the United States has not established a "sound basis for invocation of police

[671] U.S. Counter-Memorial, ¶ 14.86.

[672] U.S. Counter-Memorial, ¶¶ 14.86, 14.88. *See also* Iran's Reply, ¶ 7.19.

[673] Iran's Reply, ¶ 7.21 (emphasis added).

[674] U.S. Counter-Memorial, ¶ 14.82 (quoting Iran's Reply, ¶ 5.65(b); internal quotation marks omitted).

[675] U.S. Counter-Memorial, ¶ 14.88, n.484.

powers,"[676] but nowhere does Iran explain why (i) establishing a framework for holders of terrorism judgments to collect on those judgments where the judgment debtor, Iran, refuses to pay; or (ii) blocking assets to address threats such as arms trafficking, support for terrorism, and the pursuit of ballistic missile capabilities are not legitimate policy aims. Moreover, the legislative and executive measures are neither discriminatory nor unreasonable for the reasons established in the U.S. discussion of Article IV(1).

11.44 Iran argues that the United States should be barred from invoking the police powers doctrine with respect to the challenged measures because they are disproportionate but, as explained above, Iran has not established that proportionality is part of the applicable test. Regardless, the U.S. measures are proportional, whether under the *Tecmed*/ECtHR "reasonable relationship" standard[677] or the "manifestly excessive" standard used in recent European Union investment treaties. The measures allow victims of terrorism with valid judgments against Iran—which Iran has refused to pay—to enforce those judgments against property held by Iran's agencies and instrumentalities. The United States has not permitted plaintiffs to satisfy their judgments against Iranian companies with no connection to the Iranian State, nor has it allowed them to collect more than they have been awarded against Iran. In light of (i) the unchallenged findings by U.S. courts regarding Iran's role in the terrorist acts that gave rise to the judgments, (ii) Iran's recalcitrance in the face of the judgments, (iii) the absence of Iranian State assets in the United States, and (iv) Iran's close connection with the companies at issue, the U.S. measures are plainly reasonable and not manifestly excessive.

(b) Judicial Decisions

11.45 As the United States argued in its Counter-Memorial, "decisions of domestic courts acting in the role of neutral and independent arbiters of legal rights . . . do not give rise to a claim for expropriation."[678] Iran contends in its Reply that the United States is wrong because "conduct of all State organs discharging judicial functions is automatically attributable to the State" and, accordingly, "if those organs act in a manner which is contrary to international law

[676] Iran's Reply, ¶ 7.23.

[677] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 122 (May 29, 2003).

[678] U.S. Counter-Memorial, ¶ 14.81.

(including the provisions of the Treaty), this will give rise to international responsibility on the part of the State."[679]

11.46 Iran's argument misses the point. Courts acting as "neutral and independent arbiters of legal rights" are not "act[ing] in a manner which is contrary to international law," even if their decisions have a negative impact on a claimant's economic interests. Indeed, even in the rare instances identified in Iran's Reply where a tribunal has sustained a claim of judicial expropriation, it has done so on the basis of some illegal act either by the court (*e.g.*, the "grossly unfair" court decision in *Saipem*)[680] or in the circumstances leading to the court's decision (*e.g.*, the collusive, improper, and inequitable conduct of the State that led to the Kazakh court decisions in *Rumeli Telekom*).[681]

11.47 Here, Iran has not alleged any misconduct by the U.S. courts independent of their application of legislative and executive measures that are allegedly in breach of various articles of the Treaty of Amity. However, for the reasons set out in the preceding section and other sections of this Rejoinder, the U.S. legislative and executive measures are not in breach of the Treaty. Accordingly, even if, as Iran contends, judicial acts can be expropriatory in certain circumstances, the actions of the U.S. courts in this case do not constitute expropriations of Iranian property.

Section C: Concluding Observations

11.48 As the preceding analysis has shown, Iran's interpretations of both limbs of Article IV(2) are unsupported by either the Treaty text or the authorities on which Iran relies. There is simply no basis to stretch the "most constant protection and security" provision in Article IV(2)'s first sentence beyond its traditional boundaries, which are limited to the protection against physical harm. Likewise, as to its expropriation claims, Iran's interpretation of the police powers doctrine is flawed and its application is cursory, and Iran fails to acknowledge limitations that its own authorities place on judicial expropriation. The Court should therefore reject Iran's claims under Article IV(2) in their entirety.

---

[679] Iran's Reply, ¶ 7.17.

[680] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award ¶¶ 134, 155, 159 (June 30, 2009).

[681] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award ¶¶ 707-708 (July 29, 2008).

CHAPTER 12: IRAN'S SUBSIDIARY CLAIMS – ARTICLES X(1), V(1), AND VII(1)

12.1 Iran's Reply devotes little attention to its claims under Articles X(1), V(1), and VII(1) and these claims are plainly peripheral to the main part of its case. As shown in this chapter, Iran has failed in its Reply to justify the expansive interpretations that it has attempted to apply to each of these articles and has also, in many instances, failed to provide a factual basis for its claims. Accordingly, Iran's claims under Articles X(1), V(1), and VII(1) must fail.

Section A: Iran Has Failed to Establish a Breach of Article X(1)

12.2 Article X(1) states: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."[682] In its Counter-Memorial, the United States demonstrated that, in context, Article X(1) applies only to maritime commerce or, at most, trade in goods, and that in any event, Iran has failed to establish as a factual matter that the U.S. measures it challenges actually impeded any "commerce" between the territories of the United States and Iran.

12.3 In its Reply, Iran asserts that the term "commerce," as used in Article X(1), has some expansive meaning that Iran does not define, but purportedly can include "debts" and "modern

[682] The full text of Article X reads as follows:

(1) Between the territories of the two High Contracting Parties, there shall be freedom of commerce and navigation.

(2) Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.

(3) Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

(4) Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: *(a)* duties and charges of all kinds, *(b)* the administration of the customs, and *(c)* bounties, drawbacks and other privileges of this nature.

(5) Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.

(6) The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

financial operations."[683] It also asserts a generic case that the existence of the U.S. measures has "rendered impossible commerce between the territories of the two Treaty Parties,"[684] and makes allegations with respect to specific measures, in particular the execution against assets in the *Peterson* litigation.[685]

12.4 In Sections A.i and A.ii below, the United States shows that Iran's interpretation of "commerce" is faulty and at odds with the plain text of Article X(1) and its context. Rather, the term can only refer to maritime commerce, and at its broadest is limited to trade in goods. In Section A.iii, the United States shows that, even assuming that "commerce" could have a meaning beyond maritime commerce or trade in goods, Iran's Article X(1) claim would still fail as Iran has not and cannot satisfy the territorial requirement. Iran has failed to identify any bilateral commerce between the territories of Iran and the United States affected by the specific U.S. measures about which it complains. Instead, as the United States has shown, Iran took pains to structure its investments so as not to be engaged in such "commerce" with the United States. In Section A.iv, the United States shows that Iran's theory of the case is also faulty because "legal impediments" to commerce, such as the rules governing enforcement of judgments in domestic courts, do not implicate Article X(1). Finally, in Section A.v, the United States offers some concluding observations.

12.5 As background for the remainder of the discussion in this Section, the United States notes that the Court has previously considered Article X(1) and the meaning of commerce, in the *Oil Platforms* litigation. In its Judgment on Preliminary Objections in that case, the Court interpreted Article X(1)'s "commerce" to include "commercial activities in general—not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce."[686] Although the Court considered that "commerce" was not limited to maritime commerce,[687] *Oil Platforms* shows that "commerce" nevertheless requires some underlying trade in goods.[688] Further, in its Judgment on the merits, the Court made clear that the party

---

[683] Iran's Reply, ¶¶ 8.13, 8.28.

[684] Iran's Reply, ¶ 8.34.

[685] Iran's Reply, ¶ 8.34.

[686] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 I.C.J. 803, 819, ¶ 49 (Dec. 12).

[687] *Oil Platforms*, 1996 I.C.J. at 817, ¶¶ 41-43. As noted in the Counter-Memorial, for the reasons already detailed in paragraphs 17.4-17.9 therein, and below in Section A.i, the United States is requesting that the Court reconsider this conclusion.

[688] In its reasoning, the Court stated that the "possibility must be entertained that [commerce] could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their

alleging a violation of Article X(1) bears the burden of demonstrating that a measure had the effect of impeding commerce "between the territories" of the Parties.[689] Accordingly, *Oil Platforms* establishes that there must be actual incidents of commerce that have been impeded, in order to show a violation of Article X(1).

i. The Parties Intended the Term "Commerce" in Article X(1) to Mean Maritime Commerce

12.6 Although, in its Reply, Iran argues that the "ordinary meaning" of Article X(1) requires some broad, unqualified interpretation of "freedom of commerce,"[690] this interpretation, reading Article X(1) in isolation from the remainder of Article X and its wider Treaty context, is flawed and incorrect.

12.7 Article X concerns principally the non-discriminatory access to ports for vessels *and their products*. For instance, Article X(3) provides that vessels of either Party shall be able to come on a non-discriminatory basis "with their cargoes" to all ports and waters of the other Party "open to foreign commerce and navigation." Article X(4) provides that vessels of either Party are to receive non-discriminatory treatment "with respect to the right to carry all products that may be carried by vessel to or from the territories" of the other Party.[691] Articles VIII, IX, and X are collectively the Treaty articles concerning trade in goods between the Parties, with Article X specifying the treatment of vessels and their products.

12.8 Given the position of Article X(1) at the head of an Article focusing on treatment of vessels and their cargoes, and the position of Article X in a grouping with other trade-related articles, the reference to "commerce" in Article X(1) cannot properly be read as encompassing anything beyond the maritime trade in goods.[692] Rather, interpreting the term "commerce" in Article X(1) in accordance with its ordinary meaning, in its "context and in light of [the

---

transport and their storage with a view to export." *Oil Platforms*, 1996 I.C.J. at 819-820, ¶ 50. The Court also considered whether "commerce" could include antecedent activities like procurement and production.

[689] *Oil Platforms (Islamic Republic of Iran v. United States of America),* 2003 I.C.J. 161, 214-215, 217-218, ¶¶ 119, 123 (Nov. 6).

[690] Iran's Reply, ¶¶ 8.14-8.17.

[691] Per Article X(4) such products are to receive treatment no less favorable than that accorded to "like products carried in vessels" of the other Party with respect to duties and customs. Articles X(2) and (6) serve to define "vessels" covered by Article X. Article X(5) does not deal with maritime trade in goods, but still concerns vessels and their safe harbor.

[692] Further, as noted in the U.S. Counter-Memorial (¶ 17.4), the term "commerce" as used in Article X(3) can only refer to maritime commerce; it could not have been the intention for the term "commerce" to have different meanings within the same Article.

Treaty's] object and purpose,"[693] indicates the Parties intended it to be limited to maritime commerce, and not to have a distinct meaning wholly unrelated to commerce by navigation.[694]

12.9 If Article X(1) had been anything other than an introduction to the maritime trade provisions, and had the term "commerce," as used therein, some distinct meaning unrelated to maritime trade, the *travaux préparatoires* would undoubtedly have reflected extensive discussions on that meaning and any qualifications to such a broad grant of freedom. They do not. Rather, the *travaux* uniformly shows that Article X was understood by the Parties to be a standard navigation provision, nothing more.[695] Iran attempts to dismiss the *travaux* as "self-serving"[696] because it cannot point to anything in the negotiating history to contradict the clear implication of that evidence: the Parties understood Article X as a navigation provision, and accordingly could only have intended "commerce," as used in that context, to mean maritime commerce.

12.10 As noted, the United States recognizes that in *Oil Platforms* the Court considered that "commerce" was not limited to maritime commerce. Unlike *Oil Platforms,* however, the instant case involves challenges to measures and underlying financial transactions that have no relation to navigation. The United States accordingly considers that the Court's *Oil Platforms* dicta should not be controlling in the circumstances of this case and requests that the Court revisit its interpretation in the context of the present case. Iran, in its Reply, notes that in *Oil Platforms* the Court considered the fact that the Treaty as a whole relates to commerce in general, not purely maritime commerce.[697] That is correct—the Treaty is an FCN treaty. However, the instant question is the meaning of the term "commerce" as used in Article X(1).

---

[693] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[694] If that had been the intention, such a general "freedom of commerce" provision would certainly have merited its own article containing the parameters of such freedom.

[695] Instructions from U.S. Dep't of State to U.S. Embassy Tehran, A-18, at 7 (July 23, 1954) **(U.S. Annex 227)** (indicating Article X was proposed by the United States to Iran as containing "the navigation provisions" of the standard FCN treaty, given the interests of Iran as a "maritime state"). Article X was labeled as "Navigation" in the table of contents included in the first draft. *Id.* at 17. In its Reply Iran argues that the final Treaty of Amity does not label Article X as "Navigation"; however, that the final Treaty does not contain headers, does not change the fact that a draft labeling Article X as "Navigation" is highly relevant to show it was understood to be a navigation provision. *See also* U.S. Counter-Memorial, ¶¶ 17.4-17.6. Other historical sources likewise reflect that Article X is a navigation provision only, concerned with the non-discriminatory treatment of vessels and their cargos. *See id*., ¶¶ 17.7-17.8 and sources cited in footnotes.

[696] Iran's Reply, ¶ 8.21 (stating the United States invokes a "self-serving" account of its "own understanding" during Treaty negotiations). Although the United States has not located any written correspondence directly between the Parties, if that is Iran's complaint, the correspondence reflects conversations and communications between Iran and the United States, along with drafts exchanged.

[697] Iran's Reply, ¶ 8.19 (quoting *Oil Platforms*, 1996 I.C.J. at 817, ¶¶ 41-43).

The context and placement of Article X(1), along with the negotiating history, indicate the Parties' intention that "commerce," as used therein, refer only to maritime commerce.

ii. In the Alternative, "Commerce" Can be No Broader Than Trade in Goods

12.11 If the Court considers that the term "commerce," as used in Article X(1), cannot be confined to maritime commerce, the term at the very least must be confined to trade in goods and certain ancillary activities integrally related thereto.[698] In its Reply, Iran states that if the Parties had meant to limit Article X(1) to trade in goods, they would have said so "expressly," using the same language as in Articles VIII and IX, and goes on to accuse the United States of asserting that Article X(1) is somehow "inconsistent" with Articles VIII and IX.[699] On the contrary, as set out in the U.S. Counter-Memorial, it is Iran's *expansive interpretation* of the term "commerce" as used in Article X(1) that is inconsistent with the restrictions on trade in goods allowed by Articles VIII and IX,[700] and which also does not align with the remainder of Article X, its terminology, or its location in the Treaty.

12.12 As noted, Article X, together with Articles VIII and IX, are collectively the Treaty articles concerning trade in goods between the Parties. Articles VIII and IX concern, respectively, non-discriminatory treatment in the import/export of a Parties' products, and customs regulations for importation/exportation of products. Article X, in turn, specifies the non-discriminatory treatment of the other Party's vessels and products carried therein. In this context, it could not have been the Parties' intent for the term "commerce," as used anywhere in Article X, to be broader than trade in goods—which are what constitute "products" and "cargoes." Services, and intangibles like financial instruments, are not vessel-borne cargoes. Further, it would not make sense to give the term, as used in Article X(1), a broader meaning than its meaning elsewhere in these trade-related articles. The only other times "commerce" is

[698] Although Iran asserts in the Reply that this is nothing more than a "recast[ing]" of the United States' argument with respect to the term being restricted to maritime commerce (Iran's Reply, ¶ 8.24), that is incorrect. As is apparent from the discussion, this is a distinct argument, presented in the alternative.

[699] Iran's Reply, ¶ 8.26.

[700] U.S. Counter-Memorial, ¶ 17.24.

used in Articles VIII, IX, or X—in Article VIII(4)[701] and X(3)[702]—it clearly only relates to trade in goods.

12.13 Although Iran intimates in its Reply that the Court in *Oil Platforms* interpreted "commerce" in Article X(1) broadly, to include financial operations,[703] this is incorrect. As discussed in the Counter-Memorial and above in Section A.i, there must be some underlying trade in goods for "commerce" to be affected,[704] and *Oil Platforms* does not support Iran's position that "commerce" can apply to a purely financial transaction having no connection, or a highly tenuous one, to trade in goods.[705]

12.14 Iran's reliance on the Court's decision in *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, for the proposition that "commerce" must be interpreted to have a modern meaning that can encompass sophisticated financial operations, is inappropriate.[706] Any presumption from *Navigational and Related Rights* that treaty parties intend generic terms to have an evolutive meaning in instances where a treaty is entered into for a very long period of time or is of continuing duration[707] should not apply to this case. The 1858 Treaty of Limits at issue in *Navigational and Related Rights*, which, following a war between Costa Rica and Nicaragua, set the territorial boundary between the countries, had an unlimited duration and was intended to create a legal regime "characterized by its perpetuity."[708] That in no way describes the Treaty of Amity. Regardless of the aspirational

---

[701] "Either [party] may impose prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature . . . provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other [party]."

[702] "Vessels of either [party] shall have liberty . . . to come with their cargoes to all ports, places and waters of such other [party] open to foreign commerce and navigation."

[703] Iran's Reply, ¶ 8.27 (quoting *Oil Platforms*, 1996 I.C.J. at 818, ¶ 45).

[704] *See* U.S. Counter-Memorial, ¶ 17.10 and associated footnotes.

[705] Iran again notes that in *Oil Platforms* the Court considered the Treaty of Amity to be a treaty related to "trade and commerce in general" and that other articles do not relate to trade in goods. Iran's Reply, ¶ 8.27 (quoting *Oil Platforms*, 1996 I.C.J. at 817, ¶ 41). As noted the United States does not dispute that the Treaty as a whole relates to the parties' commercial relationship. However, the instant question is the extent of "commerce" as used in Article X(1); the context of Article X(1) indicates a logical limit to the ambit of the word "commerce" as used therein.

[706] Iran's Reply, ¶ 8.28 (citing *Dispute Regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), 2009 I.C.J. 213, 244, ¶¶ 70-71 (July 13)).

[707] *Navigational and Related Rights*, 2009 I.C.J. at 243, ¶ 66.

[708] *Id.* at 242-243, ¶¶ 65-68. In addition to setting the territorial boundary, which established the San Juan River to be in Nicaragua, the 1858 Treaty of Limits gave Costa Rica "perpetual" rights of navigation on the San Juan River, for purposes of commerce. *Id.* at 236, 244, ¶¶ 44, 69. The Court noted that the object of the Treaty was to achieve a "permanent settlement" of the parties' territorial disputes, and that the territorial rules established in such treaties are "marked in their permanence." *Id.* at 243, ¶ 68.

language in Article I common to FCN treaties, Article XXIII provides for a ten-year initial term, and after that the Treaty was terminable by either Party on notice. This is not a case in which it would be appropriate to presume the Parties intended "commerce" to have a meaning it could not have had at execution.[709] Further, any such presumption would be rebutted by the ample evidence of the Parties' actual intention that Article X(1)'s "commerce" be restricted to trade in goods.[710]

iii. Iran's Article X(1) Claim Fails to Satisfy the Territorial Requirement

12.15 Iran has again failed to engage with Article X(1)'s territorial limitation. Article X(1) protects "freedom of commerce" only "between the territories of the High Contracting Parties," but Iran has failed to identify any commerce "between the territories" of the United States and Iran that was impeded by the measures at issue. Iran's only response is to deny that the Court in *Oil Platforms* pronounced a general finding that "only direct trade or direct commerce" is covered by Article X(1),[711] and to argue—incorrectly—that the United States has not engaged with its supposed responses.[712] But, as explained below, the Court's decision in *Oil Platforms* forecloses Iran's argument on this point.

12.16 The Court in *Oil Platforms* made clear that the party alleging a violation of Article X(1) bears the burden of demonstrating that a measure had the effect of impeding commerce "between the territories" of the parties.[713] Significantly, both parties in *Oil Platforms* claimed breaches of Article X(1), and the Court looked to the specific acts alleged by each party and determined, on the facts of each, that it did not implicate any commerce between the parties.

---

[709] The United States notes that, even were it appropriate to interpret "commerce" in an evolutive manner that could somehow include modern financial transactions, it is not at all clear what that meaning would be, or how the Court would decide its parameters in this case. To provide for "freedom" of financial transactions would require detailed rules and provisions with respect to banking, in the same way such rules are already included with respect to trade in goods in Articles VIII, IX, and X. Such are wholly absent from the Treaty, and should not be read into it.

[710] As the Court noted in *Navigational and Related Rights*, treaty terms should be interpreted in accordance with the parties' intention as reflected in the text and other relevant factors, which may mean using the meaning a term had when the treaty was drafted. *Navigational and Related Rights*, 2009 I.C.J. at 242, ¶ 63.

[711] Iran's Reply, ¶¶ 8.30-8.31.

[712] Iran asserts that paragraphs 6.15-6.18 of its Memorial addressed this issue. Iran's Reply, ¶ 8.30. But these paragraphs do not support Iran's case. On the contrary, paragraph 6.15 of the Memorial concedes both that Article X(1) includes is a territorial limitation and, quoting *Oil Platforms*, that a series of transactions with Iran at one end and the United States at the other is not commerce "between Iran and the United States." Iran does not, however, identify any commerce "between the territories" allegedly impeded by the measures challenged here.

[713] *Oil Platforms*, 2003 I.C.J. at 215, 217, ¶¶ 119, 123.

12.17 With regard to Iran's claims that two U.S. attacks on Iranian oil platforms, on October 19, 1987 and April 18, 1988, had impeded commerce between the parties in the products of the platforms, the Court found that no such commerce existed. The Court found that by the time of the April 18 attack, all commerce between the parties in Iranian oil products had ceased as a result of a U.S. embargo.[714] Although the October 19 attack preceded the embargo, the Court found that the platform that was the subject of that attack was *already* out of commission at the time of the attack, due to a previous Iraqi strike. There was no oil being produced at the time of the attack, and no prospect of production in the ten days before the embargo would have cut off all commerce between the parties in any event.[715] Thus there was no commerce in the products of either platform at the time of the attacks that the U.S. attacks could have "infringed."[716] With regard to the U.S. claims, the Court analyzed each of the ten Iranian attacks on shipping identified by the United States, and concluded that none of the ships attacked were "engaged in commerce or navigation between the territories" of the parties, so the Iranian attacks likewise did not breach Article X(1).[717] Last, the Court rejected the U.S. "generic" argument that "the cumulation of [Iran's attacks on shipping] made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce," ruling that such a claim "cannot be made out independently of the specific incidents."[718]

12.18 The Court's analysis in *Oil Platforms* compels the same conclusion here.

(a) Iran Cannot Establish a Violation of Article X(1) Based on Generic Allegations of Interference With Unspecified "Commerce"

12.19 Neither in its Memorial nor in its Reply does Iran explain how any of the specific measures it identifies affected commerce between the territories of the United States and Iran. Instead, Iran argues generically that "U.S. measures 'blocking' and/or seizing the assets of Iranian companies . . . have rendered impossible commerce between the territories of the two Treaty Parties."[719] This argument is analogous to the "generic" case that the Court rejected in

[714] *Oil Platforms,* 2003 I.C.J. at 205, ¶ 94. The United States imposed an embargo on October 29, 1987 on the import of most goods (including oil) and services of Iranian origin. After that date, the Court held, "all direct commerce" between the territories of the parties "was halted." *Oil Platforms*, 2003 I.C.J. at 250, ¶ 93.

[715] *Oil Platforms*, 2003 I.C.J. at 204-05, ¶¶ 92-93.

[716] *Oil Platforms*, 2003 I.C.J. at 207, ¶ 98.

[717] *Oil Platforms*, 2003 I.C.J. at 217, ¶¶ 121.

[718] *Oil Platforms,* 2003 I.C.J. at 217-218, ¶¶ 122-123.

[719] Iran's Reply, ¶ 8.34

Oil Platforms, and fails for the same reason: Iran cannot identify any specific incident of commerce affected by the U.S. measures.[720]

12.20 Iran attempts to circumvent this requirement by analogizing the rules governing terrorism-related litigation in U.S. courts to the 1984 laying of mines in Nicaraguan ports at issue in *Military and Paramilitary Activities in and against Nicaragua*, which Iran claims demonstrates "the breadth of acts that may interfere with commerce."[721] Iran suggests that the *Nicaragua* case stands for the proposition that by physically impeding access to ports, the mining inherently interfered with commerce between the parties, and that the U.S. measures resulting in the blocking or seizure of Iranian assets are analogous in that they *legally* impede commerce with the United States.[722]

12.21 Iran's position fails to account for the Court's merits decision in *Oil Platforms*. In rejecting the U.S. "generic" claim based upon Iran's attacks on shipping in the Persian Gulf absent "specific incidents" of interference with bilateral commerce, the Court in *Oil Platforms* necessarily rejected the argument that an activity's potential to interfere with commerce was sufficient to implicate Article X(1).[723] In view of *Oil Platforms*, the *Nicaragua* case can only be read as relying on the factual premise—not in dispute there—that there was commerce between the territories of United States and Nicaragua at the time of the mine-laying,[724] and the Court's express factual finding that such commerce was impeded by the mining of Nicaraguan ports.[725]

12.22 The *Nicaragua* analogy is thus inapposite to the present case, because the premise that commerce existed between the parties to be impeded by the U.S. measures in dispute is without support in the factual record. As *Oil Platforms* makes clear, a measure that supposedly "renders commerce impossible" does not violate Article X(1) if the commerce affected was only ever

---

[720] *Oil Platforms*, 2003 I.C.J. at 217, ¶¶ 122-123.

[721] Iran's Reply, ¶ 8.32.

[722] *Id.*

[723] *Oil Platforms*, 2003 I.C.J. at 217, ¶ 123 ("It is for the United States [as the party asserting an Article X(1) claim] to show that there was an *actual impediment* to commerce or navigation between the territories[.]") (emphasis in original).

[724] That this premise was factual in the *Military and Paramilitary Activities* case is clear from the Court's remark that a U.S. trade embargo was imposed on May 1, 1985, more than a year after the mining of the Nicaraguan ports, and that the Executive Order imposing that embargo took pains to prohibit the entry of Nicaraguan vessels into U.S. ports, *i.e.*, that such commerce via navigation was then ongoing. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* 1986 I.C.J. 14, 140-141, ¶ 280 (June 27).

[725] *See Military and Paramilitary Activities*, 1986 I.C.J. at 128-129, ¶ 253.

hypothetical.[726] Thus, as in *Oil Platforms*, Iran has the burden to identify a specific measure that interfered with actual, bilateral commerce between the Parties. This it has not done.

(b) The Only Specific Actions as to Which Iran Has Alleged a Violation of Article X(1) Do Not Relate to Commerce Between the Territories of the Parties

12.23 Iran has not provided any evidence of actual interference with bilateral commerce. On the contrary, Iran's effort to demonstrate that there was bilateral commerce between Bank Markazi and the United States with respect to the assets executed against in the *Peterson* litigation—the only case for which Iran even attempts to draw this connection—only demonstrates that there was no such commerce.[727]

12.24 Iran's complaint as it relates to Bank Markazi involves the execution against certain financial assets—the cash proceeds of matured bonds—held in a New York-based Citibank account owned by Clearstream Banking, S.A. ("Clearstream"), a Luxembourg intermediary that is neither owned nor controlled by Bank Markazi.[728] Bank Markazi had an account with Banca UBAE S.p.A., an Italian bank, and Banca UBAE had an account with Clearstream in Luxembourg. Prior to the bonds' maturing in 2012, Clearstream made credits to UBAE's account corresponding to interest payments it received on the bonds; and UBAE remitted those payments to Bank Markazi.[729] These activities do not constitute commerce "between the territories" of the United States and Iran.

12.25 As the Court explained in *Oil Platforms*, a "series of commercial transactions" with Iran at one end and the United States at the other "is not 'commerce' between Iran and the United States."[730] The facts at issue in *Peterson* precisely describe such a "series of transactions"—except that, as already noted, transactions carried out for a sovereign purpose, as these were, cannot plausibly be described as "commercial" in any sense.[731] Bank Markazi

---

[726] *Oil Platforms*, 2003 I.C.J. at 205, 217, ¶¶ 92-93, 123.

[727] By its own admission, the investments in question were not undertaken for any commercial purpose, but rather for "the classic central banking purpose of investing [its] currency reserves." Brief for Defendant-Appellant Bank Markazi at 35-36, *Peterson v. Islamic Republic of Iran* (No. 13-2952) (2d Cir. Nov. 19, 2013) (U.S. P.O. Annex 233). *See supra* Chapter 5.

[728] Petition for a Writ of Certiorari 7-8, *Bank Markazi v. Peterson*, No. 14-770 (Dec. 29, 2014) **(U.S. Annex 117)**; *see Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1321 & n.11 (2016) **(U.S. Annex 109)**.

[729] Petition for a Writ of Certiorari 7-8, *Bank Markazi v. Peterson*, No. 14-770 (Dec. 29, 2014) **(U.S. Annex 117)**; *Peterson v. Islamic Republic of Iran*, Case No. 15-0690, slip op., at 8-9 (2d Cir. Nov. 21, 2017) (Iran Reply Annex 58).

[730] *Oil Platforms*, 2003 I.C.J. at 207, ¶ 97.

[731] *See supra* Chapter 5.

engaged in transactions with UBAE in Italy; UBAE engaged in intermediate transactions with Clearstream in Luxembourg; and Clearstream engaged in transactions with Citibank and/or bond depositories in New York. At no point did Bank Markazi interact with Citibank or the bond depositories, take title to any bonds, or receive any payment from an entity based in the United States.

12.26 Iran offers three responses to this argument: first, Iran argues that this differs from the "series of commercial transactions" in *Oil Platforms* because Bank Markazi's intention was to invest in U.S. securities, and it "instruct[ed] an agent for the specific purpose of completing the transaction."[732] This argument fails for three reasons:

12.27 *First*, it is factually incorrect. Iran has identified, by International Securities Identification Number (ISIN), the 22 securities in which Bank Markazi claimed entitlements,[733] none of which were issued by U.S. issuers. Rather, Bank Markazi invested in the securities of European governments, international financial institutions (such as the World Bank), and certain European State-owned banks.[734] There is no connection between these issuers and the United States, except for their choice to issue dollar-denominated securities. Bank Markazi's "intention" with respect to these 22 investments was not to invest in the U.S. market—which it in fact studiously avoided—but rather to manage its exchange risk by investing (to some extent) in dollar-denominated securities.

12.28 *Second*, it is a distinction without a difference. Nothing in *Oil Platforms* turned on whether the U.S. buyers of petroleum products specifically intended to obtain products derived from Iranian oil through intermediaries. Rather, as the Court explained, it was the "nature of the successive commercial transactions" themselves that was determinative.[735]

12.29 *Third*, it ignores the reason why Bank Markazi utilized this convoluted structure involving two foreign cut-outs in the first place: because U.S. regulations not at issue in the present case prohibited it from engaging in commerce with an issuer or bank in the United

[732] Iran's Reply, ¶ 8.36.

[733] Iran's Reply, ¶ 3.25.

[734] Iran's Reply, ¶ 3.25; *see also* Bloomberg extracts regarding Bank Markazi Security Entitlements **(U.S. Annex 419)** (screenshots of Bloomberg terminal entries for each security identified by ISIN at paragraph 3.25 of Iran's Reply, with summary table).

[735] *Oil Platforms*, 2003 I.C.J. at 207, ¶ 97.

States.[736] At least from 2008, when the United States barred the processing of "U-turn" transactions—and certainly at the time the assets were ordered turned over to satisfy the outstanding judgment—Iranian companies were explicitly prohibited from transacting with U.S. banks directly *or* indirectly.[737] If Clearstream had been acting as Bank Markazi's "agent," as Iran now suggests, the transactions would not have been possible. Having structured its investments specifically to avoid engaging in prohibited "commerce" with the United States, Iran cannot credibly argue now that its intention was to engage in such commerce.

12.30 Iran next argues that "until 2008 the United States allowed commerce between the territories of the parties which made use of the U-turn arrangement,"[738] but this only undermines its case. The U.S. measures at issue that resulted in the turnover of the *Peterson* assets were taken in or after 2012,[739] by which time the United States, by Iran's own admission, no longer allowed such transactions between Bank Markazi and the United States.[740]

12.31 Iran's third response is that the United States treated the *Peterson* assets—bond proceeds then in the possession of Citibank in the United States—as property of Bank Markazi, "with the U.S. courts making a finding to this effect," and argues that Bank Markazi's ownership of those assets, regardless of the intermediaries used, was therefore commerce between Bank Markazi and the United States.[741] But even if Bank Markazi had a beneficial interest in those assets, the fact remains that the method it used to invest in them—through two foreign intermediaries—was chosen precisely because U.S. regulations prohibited Bank Markazi from transacting in securities issued and held in the United States.[742] And Bank Markazi relied on this convoluted structure in arguing to the U.S. courts that the assets were not Bank Markazi's, but rather "'of' a financial intermediary which held them in the United

---

[736] *See* Petition for a Writ of Certiorari 7-8, *Bank Markazi v. Peterson*, No. 14-770 (Dec. 29, 2014) **(U.S. Annex 117)**. Indeed, prior to 2008, Bank Markazi held an account directly with Clearstream. UBAE was inserted into the process because new U.S. regulations in 2008 – also not at issue in this case – would have preclude Clearstream from transacting with the U.S. financial system if Iran were involved in the transaction. *Id.* at n.1; Affidavit of Ali Asghar Massoumi, ¶¶ 22-23, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Aug. 31, 2017) (U.S. P.O. Annex A02).

[737] Iranian Transactions Regulations, 73 Fed. Reg. 66541 (Nov. 10, 2008) (**U.S. Annex 232)**. *See also* Affidavit of Ali Asghar Massoumi, ¶ 21, *Peterson v. Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Aug. 31, 2017) (U.S. P.O. Annex A02); U.S. Counter-Memorial, ¶¶ 1.16-17.17.

[738] Iran's Reply, ¶ 8.36.

[739] Iran's Memorial, ¶ 2.34 ("This immunity [of central bank property from execution] was recognised in relation to the Central Bank of Iran, until 2012.").

[740] Iran's Reply, ¶ 8.36.

[741] Iran's Reply, ¶ 8.36.

[742] *See supra* ¶ 12.29.

States on Bank Markazi's behalf."[743] Iran structured its investments specifically to avoid engaging in prohibited "commerce" with the United States, and the Court should reject Iran's invitation to disregard that structuring now in an effort to couch its claim in some form of "commerce."[744]

12.32 Although Iran mentions certain other assets allegedly "blocked" or "seized" in accordance with the U.S. measures, it has not sought to show that any such assets were related to, or impeded, commerce "between the territories" of the Parties. Rather, Iran argues generically that the U.S. measures have "rendered impossible" commerce "so far as concerns the Iranian companies" affected.[745] But without coming forward with evidence that there was commerce "between the parties" to be affected by U.S. measures—and except as to Bank Markazi Iran has not even attempted to present such evidence—Iran cannot meet its burden under Article X(1).[746]

iv. Article X(1) Cannot Plausibly Be Interpreted to Include "Legal Impediments" Such as the Rules Governing Terrorism-Related Litigation in U.S. Courts

12.33 As the U.S. has explained,[747] Iran's theory of the case would extend Article X(1) to apply, not merely to a physical obstacle, but to legal rules and procedures that govern terrorism-related litigation in U.S. courts,[748] on the theory that such rules impede commerce between the Parties by depriving Iranian State-owned banks and other companies of assets that may be used to engage in such commerce. Iran candidly acknowledges that this argument is novel.[749] No court has interpreted Article X(1) or any analogous provision of a FCN Treaty as applying to so-called "legal impediments" to commerce, much less "legal impediments" that consist of rules governing satisfaction of outstanding judgments in local courts. But Iran declines to grapple with the objection that its theory would render almost any rule or procedure that poses

[743] *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.3 (2016) **(U.S. Annex 109)**.

[744] *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1321 (2016) **(U.S. Annex 109)**.

[745] Iran's Reply, ¶ 8.34.

[746] *Oil Platforms*, 2003 I.C.J., at 214-215, 217, ¶¶ 119, 123.

[747] U.S. Counter-Memorial, ¶¶ 17.21-17.25.

[748] Iran's surviving claims challenge three categories of provisions: (1) those enabling the enforcement of court judgments entered against Iran against the property of Iranian agencies, instrumentalities, or state-owned companies, notwithstanding their "separate juridical personality"; (2) those allowing property of such entities to be attached before judgment; and (3) those "[r]emoving generally applicable defences," such as res judicata, limitations periods, and limitation of actions, and collateral estoppel. Iran's Memorial, ¶ 6.19(c), (d), (f); *see id.* ¶ 2.26.

[749] Iran's Reply, ¶ 8.32.

any "impediment" to commerce a Treaty violation. Rather than offer a limiting principle—likely because any plausible limiting principle would exclude its claim here—Iran dismissively labels the United States' critique a "diver[sion]."[750] But in fact this objection is fatal to Iran's overbroad construction of Article X(1), as two illustrations show.

12.34 *First*, as the United States has explained, if enforcement of a judgment against an Iranian company "impede[s] freedom of commerce," then it makes no difference whether enforcement flows from legislation specific to terrorism-related conduct or from any other principle of U.S. law.[751] The effect of enforcement on "freedom of commerce" is the same in either case. Thus, if Iran's interpretation were correct, Article X(1) would give Iranian companies complete immunity from execution of judgments, an absurd result and one that the Parties could not plausibly have intended from the bare declaration, "there shall be freedom of commerce[.]"

12.35 *Second*, Iran's interpretation of Article X(1) would render unlawful a number of regulations and restrictions that are expressly contemplated and permitted under other provisions of the Treaty. For example, customs regulations (Art. IX), restrictions on importation of goods (Art. VIII), and restrictions on currency exchange (Art. VII) constrain freedom of commerce, yet all are expressly permitted under certain circumstances—for example on the condition that they be imposed without discrimination—by the express terms of the Treaty. The same must also be true of measures that are not expressly permitted by the treaty but are consistent with its more specific provisions—such as the enforcement of validly entered judgments. Iran effectively concedes this point, but protests that a "good faith interpretation of Article X(1)" would not yield such a result.[752] But Iran again offers no principle by which the Court could conclude that Article X(1) prohibits a measure not inconsistent with any other provision of the Treaty. Iran's novel argument should be rejected.

12.36 Indeed, the Court's disposition of Iran's sovereign immunity claims in its Preliminary Objections Judgment compels the rejection of Iran's argument as to its remaining claims. If, as Iran argues, any legal impediment to commerce whatsoever constitutes a breach of Article X(1), then surely the denial of sovereign immunity to Iranian agencies and instrumentalities, resulting in the entry and execution of a judgment against them, would be such an impediment.

---

[750] Iran's Reply, ¶ 8.32.

[751] U.S. Counter-Memorial, ¶ 17.23.

[752] Iran's Reply, ¶ 8.26.

Yet the Court rejected this conclusion, noting that it was "not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled . . . is capable of impeding freedom of commerce, which by definition concerns activities of a different kind."[753] This logic applies equally to Iran's claims based upon U.S. rules and procedures permitting the enforcement against Iranian State-controlled entities of judgments against the Iranian State. Like Iran's sovereign immunity claim, they have "too tenuous a connection, with the commercial relations between the States Parties to the Treaty" to come within the language of Article X(1).[754]

v. Concluding Observations

12.37 The interests allegedly implicated by U.S. measures involve neither maritime commerce nor trade in goods, and so fall outside the scope of Article X(1) as understood by the Parties. Further, Article X(1) only imposes obligations on the Parties with respect to commerce and navigation between their territories; Iran's claims concern no transactions of any kind between the territories of the Parties. Iran has thus not established a breach of any obligation owed to it or its nationals or companies under Article X(1).

Section B: Iran Has Failed to Establish a Breach of Article V(1)

12.38 Iran's arguments in support of its claim for breach of Article V(1) were cursory in its Memorial, and its Reply does nothing to strengthen them. Rather than explain the basis for its claim in detail, Iran's Memorial puts forward the ungrounded assertion that "a specific and targeted regime has been imposed with respect to Iranian properties."[755] The U.S. Counter-Memorial, in addition to clarifying points about the scope of the Article and Iran's claim under the Article, identified two fatal shortcomings in Iran's claim, both symptomatic of the limited attention that Iran has paid to it: Iran's failures, *first*, to show any attempt by its companies to dispose of property, and, *second*, to identify a comparator as required for any most-favored-nation ("MFN") claim.[756] Iran's Reply wrongly accuses the United States of misreading the Treaty provision, incorrectly claiming, for example, that the first sentence of Article V(1)

[753] Preliminary Objections Judgment, ¶ 79.

[754] Preliminary Objections Judgment, ¶ 79.

[755] Iran's Memorial, ¶¶ 5.75-5.76.

[756] U.S. Counter-Memorial, ¶¶ 15.1-15.10.

imposes a separate and distinct obligation from the MFN standard stated in in its second sentence.[757] The assertions in Iran's Reply are, as addressed below, manifestly wrong.

i. The Scope of This Issue Is Limited

12.39 As a preliminary matter, Iran's claim is limited to clause (c) of Article V(1), on disposition of property, as the United States pointed out in its Counter-Memorial and Iran has not disputed.[758] Furthermore, the provision's key phrase, "shall be permitted," does not require States to facilitate transactions, or make them as easy as possible.[759] As Iran conceded in its Reply, measures that may regulate or encumber the disposition of property, without flatly prohibiting it, are not in violation of this Treaty provision.[760]

ii. Iran's Failure to Show Attempts to Dispose of Property Is Significant

12.40 To make a compensable claim, Iran must show an attempt by an Iranian owner to dispose of property that was prevented by one of the challenged measures, and it has failed to do so. Iran's general assertion that disposition is "impossible"[761] is insufficient to make a claim. For example, there are many court cases identified in Iran's Attachment 2 in which no property was subject to successful attachment and execution. These cases plainly did not affect the disposition of Iranian property at all, let alone in a manner that would breach Article V(1), and Iran has produced no evidence to the contrary, either in Attachment 2 to its Reply or elsewhere.[762]

iii. The Most-Favored-Nation Standard

(a) MFN Treatment Is the Key Standard of Article V(1)

12.41 Iran incorrectly asserts that Article V(1) encompasses "two related but distinct obligations," a "shall be permitted" obligation and an MFN obligation.[763] Treatment of the

[757] Iran's Reply, ¶ 7.27.

[758] U.S. Counter-Memorial, ¶ 15.3.

[759] The provision reads in full: "Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country."

[760] U.S. Counter-Memorial, ¶ 15.4; Iran's Reply, ¶ 7.26.

[761] Iran's Reply, ¶ 7.26.

[762] *See supra* Chapter 6, Section C.

[763] Iran's Reply, ¶ 7.27.

provision's first sentence as a separate, standalone obligation ignores the second sentence's language that "[t]he treatment accorded in these respects shall . . . ," which ties the two sentences of Article V(1) together. This phrase indicates that the second sentence is elucidating the first sentence, explaining it and giving it specific content—a measurable standard, as a minimum level that must be met. The two sentences are thus linked, with the second sentence providing a method for concrete measurement of the first, rather than creating an additional obligation. Iran's interpretation would ignore this essential context, in violation of the customary international law principles of treaty interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties.

12.42 Moreover, treatment of the first sentence as a "distinct obligation[]" from the second, as Iran urges, would entail interpreting the first sentence as a requirement to permit transactions without any limiting principle. If the first sentence were, in fact, so broad, the second sentence with its narrower MFN standard would be superfluous. Again, such an interpretation would only be plausible if the provision's two sentences were read in isolation, rather than in context, as required under customary international law.

12.43 The fundamental flaw of Iran's interpretation is also evident from common sense and practicality. Were the first, "shall be permitted," sentence to state an absolute requirement to permit any disposition of any property in any circumstances, it would negate States' well-recognized authority to establish universally applicable rules of contract law and to regulate commerce, as well as their authority to prohibit certain types of property transactions involving illicit conduct, such as those in stolen or smuggled goods. Interpreting the Treaty as negating such laws, and authorizing Iranian nationals to engage in transactions that would be illegal for U.S. and other foreign nationals, would be an absurd and socially harmful result. Thus, Iran's interpretation of the first sentence of Article V(1) as imposing an unbounded obligation cannot be sustained.

12.44 Instead, reading the two sentences in light of each other, the MFN provision in the second sentence supplies the clear standard for the first sentence's obligation. Iranian nationals and companies in the United States are entitled to MFN treatment in this regard. The "in no event" language means that at least MFN treatment is required, and that better treatment is

permissible. In sum, the key, measurable standard provided in Article V(1) is the MFN standard stated in its second sentence.[764]

(b) Iran Must Identify a Similarly Situated Comparator

12.45 As a crucial element of any MFN claim, a claimant must identify a similarly situated comparator that has received more favorable treatment. Instead of doing so for its Article V(1) claim, Iran has posed arguments as to why it need not do so. These arguments should not prevail.

12.46 MFN clauses are described (as are national treatment clauses) as "relative standards" of treatment, because their test relies on comparison to treatment of another person or entity: a comparator.[765] The ordinary meaning of the Treaty text, particularly the words "no less favorable than," underscores that the MFN standard is comparative, and thus requires a comparator to determine what treatment is due.

12.47 Furthermore, as logic dictates, a comparator must be comparable, rather than completely different. As a common-sense example, much different forms and degrees of regulation would be appropriate for a large automotive plant in a major city than for a small grocery store in a remote rural area, so an investor in one of those businesses is not entitled, under an MFN or national treatment clause, to the same sort of regulation accorded to the other business.

12.48 Iran claims that the lack of "in like circumstances" (or a similar phrase) in the Treaty of Amity's MFN provision justifies Iran's failure to identify a comparator.[766] To the contrary, much evidence supports the conclusion that a comparator must be similarly situated even where

---

[764] This reading is further supported by the history of the Treaty, as illuminated by other treaties in the FCN program. Of the roughly two dozen post-World War II U.S. FCN treaties, each has analogous provisions that address property transactions, but the structure of Article V(1), with its "shall be permitted" introduction, occurs in only one other treaty, between the United States and Ethiopia. All of the others state either MFN or national treatment standards for each clause addressing the lease, purchase, or disposition of property. As the United States contemporaneously explained, its Iran and Ethiopia treaties were intended as shorter versions of the "standard FCN" treaty that contained fewer obligations, but with no significant change in the nature of the obligations that they kept. Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations, 84th Cong. 3 (1956) (statement of Thorsten V. Kalijarvi, Dep't of State) **(U.S. Annex 1);** Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcomm. of the S. Comm. on Foreign Relations, 82d Cong. 2 (1952) (statement of Harold F. Linder, Deputy Assistant Sec'y for Economic Affairs) **(U.S. Annex 2)**. The correct way to read Article V(1) in light of its history, then, is as setting an MFN test for the described transactions.

[765] *See* U.S. Counter-Memorial, ¶ 15.8 & n.490.

[766] Iran's Reply, ¶ 7.28.

a treaty's MFN clause does not include "in like circumstances" language. The investment treaty practice of many States, although no longer that of the United States, is *not* to include "in like circumstances" in MFN provisions; a 2004 OECD paper pointed to the "European model BIT" (Bilateral Investment Treaty) as an example of treaties whose MFN clauses lack "in like circumstances" language, in contrast to "US and Canadian BITs."[767] Some State delegations, in the unsuccessful 1995-98 negotiations of a Multilateral Agreement on Investments, asserted that "in like circumstances" is unnecessary in the draft's MFN clause because it is implicit.[768] The conclusion that "in like circumstances" is implicit where not explicitly stated was also reached by the International Law Commission in its 1978 conclusions on MFN clauses (regarding trade in goods),[769] work done under the auspices of UNCTAD,[770] academic publicists,[771] and arbitral tribunals interpreting provisions in the 1992 Norway-Lithuania BIT[772] and the 1995 Turkey-Pakistan BIT.[773]

12.49 Accordingly, Iran needs to provide a comparator in like circumstances in order to make an MFN claim under Article V(1).

iv. Application of Article V(1) to the Challenged Measures

12.50 In addition to the fact that Iran's claims under Article V(1) related to the treatment of Bank Markazi must be dismissed because Bank Markazi is not a "company" within the meaning of the Treaty of Amity, and is therefore outside the Article's scope,[774] Iran's Article V(1) claims must also fail for other reasons related to the specific U.S. measures that Iran has

---

[767] Organisation for Economic Co-operation and Development [OECD], Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working papers on International Investment 2004/2, at 4 (2004) **(U.S. Annex 420)**.

[768] Organisation for Economic Co-operation and Development [OECD], Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Commentary to the Consolidated Text,* at 11, OECD Doc. DAFFE/MAI(98)8/REV1 (April 22, 1998) **(U.S. Annex 421)**.

[769] International Law Commission, Draft Articles on Most-Favoured-Nation Clauses, Arts. 9 & 10, Comment 18, U.N. Doc. A/33/10 (1978) **(U.S. Annex 422)**.

[770] U.N. Conf. on Trade and Development [UNCTAD], *UNCTAD Series on Issues in International Investment Agreements II: Most-Favoured-Nation Treatment*, at xiii, 26, 53-54, U.N. Doc. UNCTAD/DIAE/IA/2010/1 (2010) **(U.S. Annex 423)**.

[771] KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES 340-341 (2010) **(U.S. Annex 424)**.

[772] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award ¶¶ 362, 369, 430 (Sep. 11, 2007) **(U.S. Annex 425)**.

[773] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (Merits) ¶¶ 386, 389-390, 411 (Aug. 27, 2009) **(U.S. Annex 426)**.

[774] *See supra* Chapter 5.

challenged. The challenged U.S. measures, legislative, judicial, and executive, are addressed separately below.

12.51 The legislative measures at issue in this case are part of a framework that is intended to allow victims of terrorism to obtain, and collect on, judgments against State sponsors of terrorism. Those legislative measures were applied by the U.S. courts in judicial proceedings that Iran has likewise challenged, in particular proceedings by judgment holders attempting to enforce their judgements against the assets of agencies or instrumentalities of Iran. In the circumstances of this case, therefore, an appropriate comparator would be a company that is an agency or instrumentality of another State sponsor of terrorism. Iran has not, however, identified such a comparator, let alone shown that it was accorded better treatment than an Iranian company. Iran's Article V(1) claim as to the legislative measures must therefore fail.

12.52 Turning to Executive Order 13599, this measure was necessitated by, among other things, the United States' security interests in protecting against the deceptive practices of Bank Markazi and other Iranian financial institutions.[775] Iran's claims must fail because it has not identified any foreign financial institutions that have been accorded more favorable treatment than their Iranian counterparts despite engaging in similarly deceptive practices, such as concealing transactions with sanctioned parties and facilitating terrorist activities and ballistic missile capabilities.

12.53 In sum, Iran has failed to establish that any of the challenged measures are in breach of Article V(1).

Section C: Iran Has Failed to Establish a Breach of Article VII(1)

12.54 Iran's Reply does not support its claim that the United States violated Article VII(1) of the Treaty of Amity. Iran continues to assert a decontextualized, implausible reading of paragraph 1 of Article VII. In addition, Iran's allegation in its Reply that the practical effects of certain measures violate Article VII is untethered from any reading or legal analysis of the article and unsustainable as a practical matter. These shortcomings are fatal to Iran's claims, as addressed in greater depth below.

[775] *See, e.g.*, U.S. Counter-Memorial, ¶¶ 11.8-11.10, 11.16.

i. Iran's Reply Fails to Support Iran's Implausible, Decontextualized Reading of Article VII(1)

12.55 In the Counter-Memorial, the United States argued that Iran misinterpreted Article VII by ignoring the provision's context and negotiating history.[776] The United States argued that Article VII, when read in the context of the paragraph 1 exceptions and paragraphs 2 and 3, demonstrates that Article VII is limited in scope to exchange restrictions and that the measures objected to by Iran were not exchange restrictions.[777] The United States presented numerous examples from the negotiating history of the Treaty to demonstrate that both Parties understood Article VII to only concern exchange restrictions.[778] Iran's Reply neither engages meaningfully with the evidence presented by the United States nor provides a plausible context for Iran's implausible reading of Article VII. This section first highlights Iran's failure to address the ordinary meaning of Article VII in context before turning to the inadequacies of Iran's treatment of the negotiating history.

(a) Iran Does Not Address the Ordinary Meaning of Article VII in Context or the Negotiating History of Article VII

12.56 Iran's Reply fails to explain how Iran's interpretation of paragraph 1 of Article VII is consistent with the rest of the article or the Treaty. Although Iran's Reply relies on only a snippet of Article VII, paragraph 1 must be read in context,[779] with the full article. Article VII of the Treaty provides as follows:

> 1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.
>
> 2. If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party, of: (a) the compensation referred to in Article IV, paragraph 2, of the present Treaty, (b) earnings, whether in the form of salaries, interest,

[776] U.S. Counter-Memorial, ¶ 16.1.

[777] U.S. Counter-Memorial, ¶ 16.5.

[778] U.S. Counter-Memorial, ¶¶ 16.7-.14.

[779] As the Court observed in the *Oil Platforms* case, in interpreting a treaty, it must look to the rules of customary international law reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 I.C.J. 803, 812, ¶ 23 (Dec. 12).

> dividends, commissions, royalties, payments for technical services, or otherwise, land (c) amounts for amortization of loans, depreciation of direct investments and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.
>
> 3. Either High Contracting Party applying exchange restrictions shall in general administer them in a manner not to influence disadvantageously the competitive position of the commerce, transport or investment of capital of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country; and shall afford such other High Contracting Party adequate opportunity for consultation at any time regarding the application of the present Article.

12.57 In its Reply, Iran maintains its position that the ordinary meaning of paragraph 1 covers any restriction on transfers of funds and is not limited in scope by the subsequent two paragraphs, which only address exchange restrictions.[780] Iran does not explain or otherwise contextualize why the Parties would only address exchange restrictions in paragraphs 2 and 3 of Article VII given the full range of potential restrictions on transfers of funds under Iran's reading of paragraph 1. Nor does Iran explain why the clarifications found in paragraphs 2 and 3 would only be sensible for a subset of the restrictions that would be permitted by subparagraphs (a) and (b) of paragraph 1 under Iran's preferred reading. Rather than provide an interpretation that accounts for the context of the full Article VII, Iran suggests that its preferred reading of a snippet of Article VII should be accepted as the ordinary meaning merely because it, however implausible, is not absolutely precluded by logic.

12.58 Iran also fails to provide a plausible explanation in its Reply for the negotiating history of the Treaty, which on its face reinforces the U.S. reading and provides no support for Iran's overly broad interpretation of Article VII. Iran argues that there is nothing surprising or material about the absence of anything in the negotiating history that supports its interpretation of Article VII.[781] For example, Iran offers no explanation for why the header "exchange controls" was used to describe the relevant provisions during the negotiations. Iran merely states that this header was not included in the final draft of the treaty. However, this was the

[780] *See* Iran's Reply, ¶ 8.2.

[781] *See* Iran's Reply, ¶ 8.5.

case for all the discussion headers used during the negotiations and does not explain why the Article VII portion of the negotiations were described as addressing exchange controls.

(b) Iran Does Not Provide a Plausible Account for its Implausible Reading of Article VII

12.59 Taken together, Iran's efforts to refute discrete aspects of the U.S. interpretation of Article VII aggregate to an entirely implausible account. Iran's assertions imply that, despite the decision to establish an extraordinarily broad scope for the restrictions and exceptions in paragraph 1, the Parties saw no need to address the alleged extraordinary scope of paragraph 1 in the subsequent paragraphs. Iran merely notes that there is no logical necessity to do so. Iran does not explain why, despite spending a disproportionate amount of time (as compared to the length of the text) discussing Article VII during treaty negotiations,[782] the Parties saw no need to discuss the extraordinary scope it claims for Article VII(1). Nor does Iran provide an explanation, sensible or otherwise, for why the Parties did not consider the possibility of analogous provisions for non-exchange restrictions when discussing the subsequent paragraphs of Article VII, which extensively address the application of the Treaty to exchange restrictions.

12.60 In sum, Iran's reading of Article VII(1) is implausible in the context of the article's remaining provisions and contradicted by the article's negotiating history. For this reason, Iran's claim that the United States violated Article VII of the Treaty should be rejected.

ii. Iran's Implausible Reading of Article VII(1) Lacks a Limiting Principle and Is Therefore Flawed

12.61 In the Counter-Memorial, the United States pointed out that, even if Article VII(1) were interpreted as Iran urges, Iran's claim would still fail because the challenged legislative measures are not, in any sense, restrictions on the transfer of funds and Executive Order 13599 is excluded from the application of the Treaty of Amity pursuant to Article XX(1)(c) and (d). Although, as discussed in Chapter 7 above, Iran has responded on the application of Article XX(1) to Executive Order 13599, Iran has made little effort in its Reply to show how the legislative measures could be a breach of Article VII(1), however it is read. Iran's sole argument is the "practical point" that the measures purportedly have the effect of violating Article VII. This point is, however, without textual support in the Treaty and proves too much.

12.62 Several activities that no reasonable person would argue violate Article VII have the practical effect of restricting transfers of funds. As already pointed out in the U.S. Counter-

[782] *See, e.g.*, U.S. Counter-Memorial, ¶¶ 16.7-16.12.

Memorial, Iran's practical point would impugn the enforcement of *any* judgment under *any* circumstances against an Iranian company.[783] Iran suggests that this "hypothetical" case is "no assistance,"[784] but the U.S. argument does not present a hypothetical. The enforcement of judgments is a standard part of the U.S. judicial process and, under Iran's application of Article VII(1), Iranian companies would be entirely excluded from its operation in every circumstance, regardless of the type of court judgment involved. This cannot be correct. And there are many other examples of the absurdity of Iran's application of Article VII(1). Under Iran's interpretation, Article VII would prohibit all manner of banking regulations, including criminal anti-money-laundering laws, which have the practical effect of restricting transfers of funds to jurisdictions and persons that raise red flags when banks engage in standard customer due diligence. U.S. cooperation with anti-money laundering efforts by intergovernmental entities such as the FATF would also be problematic under Iran's practical effects standard,[785] as would any law targeting the financing of international crimes. Iran does not (and cannot) offer any justification for such a broad restriction.

12.63 Iran attempts to salvage its position on Article VII(1) in the last sentence of the relevant section of its Reply by asserting that general (*i.e.*, non-Iranian-specific) restrictions on transfers are not prohibited by Article VII.[786] But Iran cannot simply create a limiting principle from whole cloth in order to save itself from the absurd consequences of its reading of Article VII(1). As an initial matter, Section 201 of TRIA and Section 1610(g) of the FSIA apply to all State sponsors of terrorism, not solely to Iran, and so Iran's limiting principle would exclude them from Article VII(1).[787] More importantly, there is no basis in the text of Article VII(1) to distinguish between judgment enforcement provisions of "general application" and those that apply to Iranian companies. Either both are restrictions on the transfer of funds in breach of Article VII(1)—which cannot be the case, for the reasons discussed—or neither is.

---

[783] U.S. Counter-Memorial, ¶ 16.16.

[784] Iran's Reply, ¶ 8.11.

[785] FATF has identified Iran as a high-risk jurisdiction for money laundering. Financial Action Task Force, *High-Risk Jurisdictions subject to a Call for Action* (Feb. 21, 2020) **(U.S. Annex 270)**. FATF recommends that member countries "apply enhanced due diligence, and in the most serious cases, . . . counter-measures to protect the international financial system from the ongoing money laundering, terrorist financing, and proliferation financing . . . risks emanating from [high-risk jurisdictions]." *Id.*

[786] Iran's Reply, ¶ 8.11.

[787] *See supra* Chapter 8, Section A.

12.64 For all the foregoing reasons, Iran's claims concerning an alleged violation of Article VII of the Treaty should be rejected.

CHAPTER 13: ABUSE OF RIGHTS

Section A: Introduction and Overview

13.1 As explained in the U.S. Counter-Memorial,[788] there are two grounds for the application of the doctrine of abuse of rights in this case. The *first* is that Iran seeks to extend its rights under the Treaty, a consular and commercial agreement, to circumstances that the Parties plainly never intended them to address. The *second* is that Iran seeks to assert these rights for an improper purpose. It invokes the Treaty to circumvent its obligations to make reparation to U.S. victims of its State-sponsored terrorist acts.

13.2 Iran advances narrow submissions in response to the United States' defense of abuse of rights. It does not take issue with the existence of the doctrine or its status as a general principle of law.[789] Nor does it appear to dispute the U.S. analysis of the conditions for its application,[790] merely adding glosses of its own.[791] Instead, Iran focuses on the way in which the United States seeks to invoke and apply the doctrine of abuse of rights in this particular case.

13.3 Iran's principal contentions are two-fold. *First*, it argues that the United States' abuse of rights defense is identical to its preliminary objection on abuse of process grounds, which has been rejected by the Court.[792] *Second*, Iran claims that the United States cannot overcome the high evidential threshold for the doctrine's application. According to Iran, the U.S. defense of abuse of rights is "just as unsubstantiated" as its earlier preliminary objection.[793] Both arguments proceed on the express basis that the right in question is Iran's "procedural right" to refer specific categories of disputes to the Court under Article XXI(2) of the Treaty of Amity.[794]

13.4 These submissions are directed at the wrong target. The U.S. defense does not turn on the proper scope or application of Article XXI(2) of the Treaty. It exclusively concerns Iran's purported exercise of its *substantive* rights under the Treaty. A treaty party can only defend based on an "abuse of rights" if and to the extent that the Court concludes that its counter-party has rights under any or all of the provisions that are allegedly engaged in the circumstances of

---

[788] U.S. Counter-Memorial, ¶¶ 18.3, 18.10 and 18.12.

[789] *See* Iran's Reply, ¶¶ 11.42-11.49.

[790] *See* Iran's Reply, ¶ 11.51.

[791] *See*, in particular, Iran's Reply, ¶¶ 11.44-11.46, addressed *infra* in Section C.

[792] *See*, in particular, Iran's Reply, ¶¶ 11.33-11.34.

[793] Iran's Reply, ¶ 11.40.

[794] Iran's Reply, ¶ 11.39.

the case.[795] As noted above, both of the grounds justifying the U.S. invocation of the abuse of rights defense require the Court to assess whether Iran's assertion of its substantive Treaty rights engages the prohibition on exercising a right in a manner or for a purpose for which it was not intended. They are "properly a matter for the merits."[796]

13.5 Against this background, the United States deals with the limited points made by Iran in the sections that follow. Section B further addresses Iran's submission that the United States' defense is indistinguishable from its abuse of process objection. Section C responds to Iran's analysis of the circumstances in which the doctrine of abuse of rights is applicable. Section D rebuts Iran's argument that the Court should reject the application of the doctrine on the facts.

Section B: Abuse of Rights Is a Distinct Defense

13.6 Iran seeks to characterize the United States' abuse of rights defense as a mere "relabelling"[797] of its preliminary objection on abuse of process grounds. In Iran's submission, the United States now advances "the very same argument" that has already been rejected by this Court at the preliminary objections phase.[798] It seeks to draw parallels between the two grounds on which the United States' defense is advanced in the present phase of the case, and the arguments as originally advanced in the U.S. Preliminary Objections.[799] Iran also appears to take issue with the United States' refinement of those arguments in its oral pleadings, in the light of the Court's judgment in the *Immunities and Criminal Proceedings* case.[800]

13.7 Once again, the Court should assess the arguments as advanced by the United States, rather than as characterized by Iran. As was recognized in the Court's Preliminary Objections Judgment,[801] the United States took exception to Iran's invocation of the compromissory clause of the Treaty of Amity in the extraordinary circumstances of this case. The United States

---

[795] U.S. Counter-Memorial, ¶¶ 18.1 and 18.8.

[796] *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections Judgment, 2018 I.C.J. 292, ¶ 151 (June 6).

[797] Iran's Reply, ¶ 11.33.

[798] Iran's Reply, ¶ 11.34.

[799] Iran's Reply, ¶ 11.34.

[800] Iran's Reply, ¶ 11.35.

[801] Preliminary Objections Judgment, ¶ 100 ("The Court notes that the United States initially raise two objections to the admissibility of the Application, namely, first, that *Iran's reliance on the Treaty to found the Court's jurisdiction* in this case is an abuse of right . . . " (which was later clarified to be an objection of abuse of process)) (emphasis added) and ¶ 104 (". . . the United States submitted that the dispute did not fall within the scope of the Treaty of Amity and that *Iran could not therefore seek to found the jurisdiction of the Court on that instrument* . . .") (emphasis added).

clarified that this took the form of an abuse of process objection, as the Court accepted.[802] In the United States' submission, there was a "threshold issue of whether Iran can properly invoke the Treaty for purposes of founding the jurisdiction of the Court in respect of a dispute that has no proper roots in the Treaty."[803] This issue turned on the proper scope of application of the compromissory clause, as the United States expressly accepted in oral submissions:

> It is our contention that the dispute that Iran brings to the Court is a dispute that falls outside the intended scope of the compromissory clause of the Treaty. Iran's endeavour to invoke the compromissory clause to afford the Court jurisdiction to address the dispute is thus an abuse of process. Iran's case should accordingly be dismissed at this preliminary stage on grounds of inadmissibility.[804]

13.8 The United States accepts that Iran's assertion of jurisdiction under the Treaty's compromissory clause was dispositively determined in the Court's Preliminary Objections Judgment. But that is beside the point. The U.S. abuse of rights defense does not concern Iran's exercise of its right to refer a dispute to the Court under Article XXI(2) of the Treaty. Rather, it concerns Iran's assertion of its rights to substantive protection under each of Articles III(1), III(2), IV(1), IV(2), V(1), VII(1), and X(1) of the Treaty, none of which was engaged by the United States' abuse of process objection.[805] This is not least because the Court's assessment of their scope and operation in the circumstances of this case is plainly a matter for the merits.[806]

13.9 Iran nonetheless insists that "[t]he United States does *not* argue that the substantive provisions invoked by Iran . . . have been abused by Iran and that it should be held responsible for such abuse, or even that Iran should be deprived of the benefit of such treaty rights."[807] In

---

[802] Preliminary Objections Judgment, ¶ 104.

[803] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 8, 2018, 10am, p. 58, ¶ 90 (Sir Daniel Bethlehem QC).

[804] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 8, 2018, 10am, p. 59, ¶ 94 (Sir Daniel Bethlehem QC).

[805] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Hearing of October 8, 2018, 10am, p. 59, ¶ 92 (Sir Daniel Bethlehem QC) ("We do not here address individual provisions of the Treaty.").

[806] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections Judgment, 2018 I.C.J. 292, ¶ 151 (June 6) ("The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case.").

[807] Iran's Reply, ¶ 11.38 (emphasis in original).

so asserting, Iran both misapprehends the United States' position and the doctrine's true operation.

13.10 Contrary to Iran's submission, the United States does indeed argue that Iran's invocation of its substantive rights is abusive, as just explained and as the Counter-Memorial makes perfectly clear. The United States similarly claims that Iran should not be permitted to enjoy the benefit of those rights in the circumstances of this case. It is correct that the United States does not rely on the doctrine of abuse of rights in support of a claim against Iran. If Iran means to suggest that this fact renders the doctrine somehow irrelevant or unavailable, it is incorrect to do so.

13.11 While in some circumstances an abuse of rights may give rise to international responsibility, an abuse of rights may not have that effect in all cases. Instead, as in this case, it may operate as a fetter on the exercise of a right or privilege afforded under a treaty, whether as an independent limitation on that right or privilege, or as a matter of the good faith performance or interpretation of the treaty in question.[808] There is no limit on the use of the prohibition of abuse of rights in a defensive manner, nor has Iran identified any.[809] It accordingly does not follow from the fact that the United States has not sought to invoke Iran's international responsibility that the prohibition is not directly engaged in the circumstances of this case.

Section C: The Circumstances in Which the Doctrine May Be Applied

13.12 In its Reply, Iran does not take issue with any of the submissions advanced in the U.S. Counter-Memorial as to the status or scope of the doctrine.[810] Instead, it confines itself to making several short points in support of the broader—and uncontroversial—submission that

[808] *See, e.g.*, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 212 (Aug. 27) (rights "must be exercised reasonably and in good faith"). As to the principle of *pacta sunt servanda* more broadly, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7, 75, ¶ 142 (Sep. 25).

[809] *See, e.g.*, France's invocation of the principle of abuse of rights as a defense to Equatorial Guinea's claim in *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* France's Counter-Memorial, December 6, 2018, Chapter 4.

[810] Save for noting that the successful application of the doctrine in two cases in the investor-State context (*Philip Morris Asia Ltd. v. Commonwealth of Australia* and *Capital Financial Holdings Luxembourg SA v. Cameroon*) did "not demonstrate that this doctrine has evolved towards a broader application," which was a submission that the United States had not in fact made. *See* Iran's Reply, ¶ 11.48; U.S. Counter-Memorial, at 164 n.536.

the doctrine of abuse of rights has not been previously applied in an inter-State dispute.[811] The following points are notable.

13.13 *First*, Iran at no point contests the proposition that the doctrine of abuse of rights is a general principle of law.[812] Further, it expressly accepts that it is an application of the general principle of good faith.[813]

13.14 *Second*, as to its content, Iran recognizes that an abuse of rights encompasses a State's exercise of its right "for an end different from that for which the right was created."[814] It is this principle that has been recognized by the Permanent Court,[815] by Members of the Court,[816] and by eminent scholars.[817]

13.15 *Third*, Iran refers to "strict conditions" that have been set by the Court, referring to the judgment of the Permanent Court in *Certain German Interests in Polish Upper Silesia (Merits)*.[818] The United States accepts that there is a high threshold for an allegation of this kind, which is reflected in the requirements of "clear evidence" and "exceptional circumstances" that it directly acknowledged and applied in the Counter-Memorial.[819] It

---

[811] Iran's Reply, ¶ 11.43.

[812] Instead, it refers with apparent approval to the conclusion of an article in which it is argued that "abuse of rights is a long-standing general principle of law. . . ." Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 431 (2002) **(U.S. Annex 238)**. *See* Iran's Reply, at 247 n.888.

[813] Iran's Reply, ¶ 11.43.

[814] Iran's Reply, ¶ 11.42. For the avoidance of doubt, the United States does not accept, if it be suggested, that injury is a pre-condition to a State's reliance on the doctrine in all cases (as opposed to cases in respect of which reparation for breach of the prohibition is sought).

[815] *See Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (Judgment of June 7). See also *Certain German Interests in Polish Upper Silesia (Merits)*, 1926 P.C.I.J. (ser. A) No. 7, at 30, 37-38 (May 25).

[816] *See, e.g.*, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 2008 I.C.J. 177, 279, ¶ 6 (June 4) (Declaration of Judge Keith) ("Those principles [including the abuse of rights] require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors.").

[817] *See, e.g.*, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 131 (1987) **(U.S. Annex 87)** ("[T]he reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect . . . .").

[818] Iran's Reply, ¶ 11.46.

[819] U.S. Counter-Memorial, ¶¶ 18.5-18.14. *See Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections Judgment, 2018 I.C.J. 292, ¶ 150 (June 6) and Separate Opinion of Judge Donoghue, ¶ 18; Preliminary Objections Judgment, ¶ 113; *Jadhav Case (India v. Pakistan)*, 2019 I.C.J. 418, ¶ 49 (July 17); *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* 2020 I.C.J., Separate Opinion of Judge Sebutinde, ¶ 34 (Dec. 11); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v. United States of America)*, 2021 I.C.J., ¶ 93 (Feb. 3); *see also* Separate, Partly Concurring and Partly Dissenting, Opinion of Judge *ad hoc* Brower, 2021 I.C.J., ¶¶ 9-10, 13 (Feb. 3).

equally accepts that an abuse must be proved and not presumed. It does not accept, however, that the Permanent Court purported to lay down any general test in the passage on which Iran relies, where the Court merely analyzes the facts pertaining to that particular case.[820] Moreover, the objective nature of the Court's inquiry in that case also underlines that proof of bad faith or malice is not required.[821]

Section D: Application to This Case

13.16 Iran's primary submission under this heading is that the United States has failed to identify either "clear evidence in support of any underlying factual allegations" or any "exceptional circumstances justifying the application of the doctrine."[822]

13.17 This surprising submission is made in complete disregard of the clear and compelling evidence submitted with the U.S. Counter-Memorial of Iran's acts in breach of international law.[823] It also ignores the exceptional circumstances specifically identified in that connection, namely that it is Iran's own wrongful conduct which led to the measures adopted by the United States and which now Iran seeks to use to its own advantage before this Court.[824]

13.18 Iran instead makes a range of points that seek to grapple with the two U.S. arguments on abuse of rights. None of them is effective.

a. Iran begins with the U.S. argument that it asserts substantive rights under the Treaty of Amity in circumstances far beyond the Parties' contemplation. It repeats the point that the United States seeks to advance a jurisdictional objection at the merits phase. On this occasion, Iran contends that the United States' argument replicates the position that it took in the *Oil Platforms* case, rather than in the preliminary objections phase of the present case.[825] However, the answer is no different. As

---

[820] Iran's Reply, ¶ 11.46, referring to *Certain German Interests in Polish Upper Silesia (Merits)*, 1926 P.C.I.J. (ser. A) No. 7, at 37-38.

[821] *See further Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility ¶ 539 (Dec. 17, 2015) **(U.S. Annex 244)** ("It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test . . . ."); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 412 (2002) **(U.S. Annex 238)**.

[822] Iran's Reply, ¶ 11.51.

[823] U.S. Counter-Memorial, Chapter 5.B.

[824] U.S. Counter-Memorial, ¶ 18.13.

[825] Iran's Reply, ¶ 11.54.

already explained, the defense of abuse of rights asserted by the United States on the merits of this case is of an entirely different character.[826]

b. Iran argues that its claim cannot be alien to the commercial purposes of the Treaty given that the Court has linked the definition of "companies" under the Treaty to commercial and business activities.[827] However, the relevant consideration is not the manner in which the Treaty *could* be invoked, but the manner in which it is *actually* invoked. As already explained in detail above, the assets at the heart of Iran's claim were being used—as Bank Markazi has expressly admitted—"for the classic central bank purpose of investing [its] currency reserves."[828] There is no basis on which Iran can credibly assert that it is invoking the Treaty for commercial purposes.

c. Iran appears to assert that the nature and purpose of the U.S. measures is irrelevant to an assessment of Iran's exercise of its substantive rights.[829] This is both artificial and unprincipled. One cannot divorce Iran's exercise of its rights from the very measures at issue.

d. In connection with the United States' second argument that its substantive Treaty rights are invoked for an improper purpose, Iran argues that "the U.S. courts which have been seised by Iranian companies never suggested that their intent was to circumvent Iran's obligations vis-à-vis the United States."[830] This is beside the point. It is Iran's responsibility that is engaged, and it is Iran that seeks to circumvent its obligations before this Court.

e. Iran seeks to draw a distinction between the Iranian State and the assets owned by the companies at issue.[831] This is unconvincing. As already illustrated above, the assets at issue in the main U.S. case relevant to Iran's claim, *Peterson I*, were the currency reserves of Iran's Central Bank. Iran cannot credibly seek to create distance between State instrumentalities and the State itself for this purpose.

---

[826] *See supra* ¶¶ 13.6-13.7.

[827] Iran's Reply, ¶ 11.56.

[828] *See supra* Chapter 5, ¶ 5.11. *See also* U.S. Counter-Memorial, ¶ 9.13.

[829] Iran's Reply, ¶ 11.58.

[830] Iran's Reply, ¶ 11.61.

[831] Iran's Reply, ¶ 11.62.

f. Iran concludes by seeking to paint the United States' invocation of the doctrine of abuse of rights as a cynical attempt to circumvent its own breaches of the Treaty.[832] This submission is entirely at odds with the factual circumstances of this case. Iran has sponsored numerous terrorist attacks against U.S. nationals. Iran is now seeking to avoid the consequences of those actions by relying on Treaty rights that were plainly never intended for such use. It is difficult to conceive of a plainer abuse of rights.

13.19 For all of these reasons, the United States submits that Iran is precluded from exercising any right to substantive protection that the Court may find to be engaged in the circumstances of this case.

[832] Iran's Reply, ¶ 11.63.

PART IV: CONCLUSION AND REQUEST FOR RELIEF

In Part IV, the United States briefly summarizes its case (Chapter 14), before explaining that Iran's Reply has done nothing to address the flaws in its request for remedies (Chapter 15), and, finally, reiterating the U.S. request for relief (Chapter 16).

CHAPTER 14: SUMMARY OF U.S. CASE

14.1 At the heart of this case is Iran's decades-long sponsorship of terrorist attacks on U.S. nationals, including in particular the bombing of the U.S. Marine barracks in Beirut in 1983. When victims sought to hold Iran accountable for its role in these attacks through litigation in U.S. courts, Iran chose not to appear. When the victims eventually obtained judgments against Iran and began seeking to enforce them, Iran never sought to have them set aside. Finally, when Iran brought this case—which is predicated on the claim that the legal framework underlying victims' efforts to obtain compensation is internationally wrongful—Iran had almost nothing to say about its role in the attacks underlying the victims' judgments. Nor has Iran deviated from its strategic silence in its Reply—most notably, it has nothing to say about its role in the U.S. Marine barracks bombing.

14.2 This is not the conduct of a party that believes it has been wrongly accused. Rather, it is a strategy intended to avoid accountability. Iran simply does not want to answer for its actions yet audaciously hopes, by bringing this case, to recover funds that have been turned over to the victims of Iran-sponsored terrorism in U.S. courts without ever having to defend its conduct on the merits. The Court must not let Iran get away with it.

14.3 Nor is there any reason for the Court to do so, because Iran's claims fail for multiple reasons. *First*, Iran has only particularized claims with respect to **8** judgment enforcement actions, and the Court should disregard its reference to numerous other judicial proceedings in Attachments 1-4 to its Reply. *Second*, while Iran has attempted to add various measures postdating the termination of the Treaty of Amity to its claims, the Court should reject this effort because the Treaty's obligations ceased to be binding on the United States when termination became effective. Thus, post-termination measures cannot be the basis of claims for breach of the Treaty. *Third*, Iran's role in sponsoring the terrorist attacks that underlie the judgments plaintiffs have enforced in *Peterson*, *Weinstein*, and other actions fundamentally taints its claims under the doctrine of unclean hands. *Fourth*, Iran's claims under Articles III, IV, and V with respect to *Peterson I* and *II* fail because those actions involved the assets of Bank Markazi, which does not qualify as a "company" under the Treaty of Amity and is

therefore outside the scope of those articles. *Fifth*, the entities in five of the **8** enforcement actions at issue did not exhaust their local remedies. *Sixth*, Iran's claims regarding Executive Order 13599 are excluded from the treaty under Article XX(1). *Seventh*, and finally, Iran's claims are based on the misinterpretation and misapplication of Articles III, IV, V, VII, and X of the Treaty of Amity (and, in any event, even if the Court were to find that Iran's rights under these articles were infringed, allowing Iran to invoke such rights in these circumstances would be to permit an abuse of rights).

14.4 For all these reasons, the Court should reject Iran's attempt to invoke a commercial and consular treaty to impugn reasonable measures that the United States took to allow victims of Iran-sponsored terrorism to hold Iran accountable and to obtain compensation for their injuries.

CHAPTER 15: OBSERVATIONS ON REMEDIES

15.1 In its Counter-Memorial, the United States highlighted the vagueness of Iran's submissions on remedies.[833] Iran has done nothing to address the weaknesses in its pleaded case. The United States will briefly address each of the three remedies that Iran is now requesting from the Court: (i) cessation; (ii) reparation; and (iii) satisfaction.

15.2 Beginning with **cessation**, Iran acknowledges that the United States terminated the Treaty of Amity but refuses to recognize that the termination of the Treaty prevents it from seeking an order from the Court directing the United States to "undo" the challenged measures.[834] While Iran contends that the alleged "wrong must cease" and argues that this "obligation is unaffected by any termination of the Treaty,"[835] Iran is wrong. Iran's sole purported support for its position is Article 30 and the accompanying commentaries in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("State Responsibility Articles"). The first paragraph of the commentary to Article 30, however, entirely undermines Iran's argument. Specifically, it provides that "[t]he continuation in force of the underlying obligation is a necessary assumption of both [cessation and assurances and guarantees of non-repetition], since *if the obligation has ceased following its breach, the question of cessation does not arise* and no assurances and guarantees can be relevant."[836] This conclusion flows naturally from Article 13 of the State Responsibility Articles, which provides that "[a]n act of State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." The United States ceased to be bound by the Treaty of Amity after its termination and, accordingly, there is no basis for the Court now to order the United States to withdraw the challenged measures, however it rules on the merits of Iran's claims.

15.3 With respect to Iran's request for **reparation**, it remains entirely vague and unsubstantiated. Iran has made no attempt to fill the holes in its case that the United States

---

[833] U.S. Counter-Memorial, Chapter 19.

[834] By contrast, Iran does appear to recognize that it is no longer entitled to the assurance of non-repetition that it sought in its Memorial. Iran's Memorial, ¶ 7.15. Iran does not reiterate its request for such a remedy in its Reply.

[835] Iran's Reply, ¶ 12.13.

[836] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Ch. I, Art. 30, Commentary ¶ 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (emphasis added). *See also id.* ¶ 3 ("The tribunal in the '*Rainbow Warrior*' arbitration stressed 'two essential conditions intimately linked' for the requirement of cessation of wrongful conduct to arise, 'namely that the wrongful act has a continuing character and that *the violated rule is still in force at the time in which the order is issued*'." (emphasis added)).

identified in its Counter-Memorial, including the "fail[ure] to identify the full universe of entities that have allegedly been affected by the U.S. measures or the specific harm that they have suffered."[837] At most, Iran's Reply identifies **8** actions by plaintiffs to enforce their judgments against the assets of certain Iranian entities. While Iran has "reserved the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States,"[838] this evaluation, should it prove necessary, must pertain to the breaches, if any, that Iran has substantiated in its submissions on the merits and that the Court identifies in its Judgment on the merits (including with respect to the nature of the breach, the measure(s) at issue, and the Iranian entity(ies) implicated). Iran cannot use a further submission on the quantum of reparation to seek to prove additional breaches (including with respect to different Iranian entities) beyond any breaches that the Court identifies explicitly in this phase of the case. Iran has had its opportunity to submit evidence in support of its claims of breach and it is not entitled to another.

15.4 Turning to **satisfaction**, Iran contends that this remedy is necessary because "[t]here is . . . a great moral injury done to Iran that cannot be made good by restitution or compensation."[839] Iran's bare assertion of moral injury is, however, no substitute for evidence or argument substantiating such an injury.[840] Again, it is essential for the Court to keep in mind the context of the challenged measures. The judgments that plaintiffs have enforced in U.S. courts against the property of Iran's agencies and instrumentalities arose out of Iran-sponsored acts of terrorism. Iran did not contest its sponsorship of these terrorist acts in U.S. courts and, as discussed above, barely engages with the issue in this case. Accordingly, regardless of how the Court views the merits of Iran's claims, it is inconceivable that the legislative and executive measures the United States implemented to facilitate the efforts of victims of terrorism to obtain compensation from the agencies and instrumentalities of Iran, where Iran itself refused to provide such compensation, did a "great moral injury" to Iran.

[837] U.S. Counter-Memorial, ¶¶ 19.3-19.5.

[838] Iran's Reply, ¶ 12.16.

[839] Iran's Reply, ¶ 12.15.

[840] Iran provided no more support for this assertion in its Memorial, where it likewise addressed the justification for its request for satisfaction in a single sentence. Iran's Memorial, ¶ 7.25.

CHAPTER 16: REQUEST FOR RELIEF

16.1 On the basis of the facts and arguments set out above, the United States of America requests that the Court, in addition or in the alternative:

1. Dismiss all claims brought under the Treaty of Amity on the basis that Iran comes to the Court with unclean hands.

2. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to Bank Markazi.

3. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to companies that have failed to exhaust local remedies.

4. Dismiss on the basis of Article XX(1)(c) and (d) of the Treaty of Amity all claims that U.S. measures that block or freeze assets of the Iranian government or Iranian financial institutions (as defined in Executive Order 13599) violate any provision of the Treaty.

5. Dismiss all claims brought under Articles III, IV, V, VII, and X of the Treaty of Amity on the basis that the United States did not breach its obligations to Iran under any of those Articles.

6. To the extent the Court concludes that Iran, notwithstanding the foregoing submissions, has established one or more of its claims brought under the Treaty of Amity, reject such claims on the basis that Iran's invocation of its purported rights under the Treaty constitutes an abuse of right.

Respectfully submitted,

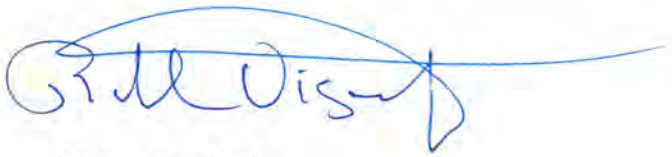
Richard C. Visek

Agent of the United States of America

May 17, 2021

CERTIFICATION

I, Richard C. Visek, Agent of the United States of America, hereby certify that the copies of this pleading and all documents annexed to it are true copies of the originals and that all translations submitted are accurate.



Richard C. Visek

Agent of the United States of America

May 17, 2021

LIST OF ANNEXES ACCOMPANYING THE REJOINDER

May 17, 2021

VOLUME I

ANNEX	DESCRIPTION
254.	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) [excerpt]
255.	Criminal Indictment, *United States of America v. Al-Mughassil,* Case No. 01-228-A (E.D. Va. June 1, 2001)
256.	Press Release, U.S. Dep't of Justice, Attorney General Statement (June 21, 2001)
257.	Dale Gavlak, "Lebanese Bristle Over Iran Commander's Comments Regarding Hezbollah Missile Capabilities." Voice of America (Jan. 4, 2021)
258.	Corr. [Court of First Instance] Antwerp, Ct. AC8, Feb. 4, 2021, 20A003763 (U.S. Dep't of State trans., 2021)
259.	Steven Erlanger, "Iranian Diplomat Is Convicted in Plot to Bomb Opposition Rally in France," N.Y. Times (Feb. 4, 2021)
260.	Daniel Boffey, "Belgian Court Sentences Iranian Diplomat to 20 Years Over Bomb Plot," The Guardian (Feb. 4, 2021)
261.	Samuel Petrequin, "Iranian Diplomat Covicted of Planning Attack on Opposition, (Feb. 4, 2021)
262.	Press Release, U.S. Department of Justice, Two Individuals Plead Guilty for Working on Behalf of Iran (Nov. 6, 2019)
263.	"Sweden Charges Man with Spying on Ahwazi Community for Iran," Reuters (Nov. 6, 2019)
264.	"Norwegian Found Guilty of Spying for Iran in Denmark," Reuters (June 26, 2020)
265.	Elian Peltier, "Iran Issues Death Sentence for Opposition Journalist," N.Y. Times (June 30, 2020)
266.	Press Release, Federal Foreign Office of Germany, "Federal Foreign Office on the Execution of the Blogger Ruhollah Zam," (Dec. 12, 2020)

ANNEX	DESCRIPTION
267.	Statement by the Ministry for Europe and Foreign Affairs Spokesperson, French Embassy in London, Iran – Execution of Ruhollah Zam (Dec. 12, 2020)
268.	Press Statement, European External Action Service, "Iran: Statement by the Spokesperson on the execution of Mr. Ruhollah Zam," (Dec. 12, 2020)
269.	Statement, U.N. Office of the High Commissioner for Human Rights, "Iran: UN Experts condemn execution of Ruhollah Zam," (Dec. 14, 2020)
270.	Financial Action Task Force, *High-Risk Jurisdictions Subject to a Call for Action – 21 February 2020* (Feb. 21, 2020)
271.	Financial Action Task Force, *High-Risk Jurisdictions Subject to a Call for Action – 23 October 2020* (Oct. 23, 2020)
272.	U.N. Security Council, Eighth Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015), U.N. Doc. S/2019/934 (Dec. 20, 2019)
273.	U.N. Security Council, Ninth Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015), U.N. Doc. S/2020/531 (June 11, 2020)
274.	*Aryeh v. Iran*, Case No. 266, Award No. 583-266-3 (Sep. 25, 1997), 33 IRAN-U.S. CL. TRIB. REP. 368
275.	*Sanum Investments v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award (Aug. 6, 2019) [excerpt]
276.	*Glencore International AG v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019) [excerpt]
277.	*GPF v. Republic of Poland*, SCC Arbitration V 2014/168, Final Award (Apr. 29, 2020) [excerpt]
278.	*Patel Engineering v. Mozambique*, PCA Case No. 2020-21, Respondent's Motion for Bifurcation (Nov. 20, 2020)

VOLUME II

ANNEX	DESCRIPTION
279.	*Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Second Proposal to Disqualify all Members of the Tribunal (Dec. 15, 2020) [excerpt]
280.	Civil Code of the Czech Republic (Feb 3, 2012) [excerpt]
281.	*Bertout v. Saffran* (2019) QCCS 4367 (Oct. 22) (Québec Superior Court)
282.	M. CHERIF BASSIOUNI, "A Functional Approach to General Principles of International Law" 11 MICH. J. INT'L L. 768, 788-789 (1990)
283.	Protocol, France-Venezuela, Feb. 27, 1903, Vol. X *R.I.A.A.* 3 (1903-1905)
284.	*Aroa Mines (Limited) Case – Supplementary Claim*, Vol. IX R.I.A.A. 402 (1903) [excerpt]
285.	Convention on Adjustment of Claims, U.S.-Ecuador, Nov. 25, 1862, 13 Stat. 631
286.	BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987) [excerpt]
287.	John Dugard, Special Rapporteur, International Law Commission, Sixth Report on Diplomatic Protection, U.N. Doc. A/CN.4/546 (Aug. 11, 2004)
288.	PATRICK DUMBERRY, "The Clean Hands Doctrine as a General Principle of International Law," 21 J. WORLD INV. & TRADE 489 (2020)
289.	JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (9th ed. 2019) [excerpt]
290.	*Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (May 24, 1999) [excerpt]
291.	*Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (Apr. 28, 2011) [excerpt]

ANNEX	DESCRIPTION
292.	*AIG Capital Partners v. Kazakhstan*, [2005] EWHC (Comm) 2239
293.	*NV Exploitatie-Maatschappij Bengkalis v. Bank Indonesia*, 65 I.L.R. 348 (Netherlands, Court of Appeal of Amsterdam 1963)
294.	*Blagojevic v. Bank of Japan*, 65 I.L.R. 63 (France, Court of Cassation 1976)
295.	International Law Commission, Draft Articles on Diplomatic Protection, with commentaries, U.N. Doc. A/61/10 (2006) [excerpt]
296.	*Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) [excerpt]
297.	Arbitration under Article 181 of the Treaty of Neuilly, Principal Question Judgment, etc., 28 AM. J. INT'L L. 773 (1934)
298.	*Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019)
299.	*Hausler v. J.P. Morgan Chase Bank N.A.*, 770 F.3d 207 (2d Cir. 2014)
300.	*Villoldo v. Castro Ruz,* 821 F.3d 196 (1st Cir. 2016)
301.	*Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014)
302.	CONCISE OXFORD ENGLISH DICTIONARY 1212 (11th ed. 2008) [excerpt]
303.	Mutual Defense Assistance Act of 1951, Pub. L. 213, 22 U.S.C. 1611 et seq. (1964)
304.	Harold J. Berman and John R. Garson, *United States Export Controls – Past, Present, and Future*, 67 COLUM. L. REV. 791 (1967)

VOLUME III

ANNEX	DESCRIPTION
305.	18 Fed. Reg. 2079 (Apr. 14, 1953)
306.	*Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272 (E.D.N.Y. 2009)

ANNEX	DESCRIPTION
307.	*Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004)
308.	*Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010)
309.	Docket, *Weinstein v. Islamic Republic of Iran,* 12-cv-03445 (E.D.N.Y. Jul.12, 2012) [excerpt]
310.	*Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152 (D.D.C. 2009)
311.	Order, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Apr. 24, 2020), ECF No. 210
312.	Affidavit of Service of Judgment upon Defendant, *Bennett v. Islamic Republic of Iran*, Case No. 03-cv-1486 (D.D.C. Jan. 24, 2011), ECF No. 51-1
313.	Complaint, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Dec. 2, 2011)
314.	Federal Register Notice, 72 Fed. Reg. 62,520 (Nov. 5, 2007)
315.	Summons, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Mar. 21, 2012), ECF No. 45
316.	Clerk's Notice of Entry of Default, *Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. Apr. 26, 2012), ECF No. 79
317.	*Bennett v. Islamic Republic of Iran*, Case No. 11-cv-5807 (N.D. Cal. June 2012), ECF Nos. 100, 101, 103, 106, 107
318.	Stipulation & Order Vacating Default, *Bennett v. Islamic Republic of Iran,* Case No. 11-cv-5807 (N.D. Cal. July 5, 2012), ECF No. 109
319.	Orders, *Bennett v. Islamic Republic of Iran*, 13-15442 (9th Cir.), ECF Nos. 16, 46, 87
320.	Motion to Quash Writs of Attachment by United States of America*, Bennett v. Islamic Republic of Iran*, Case No. 03-cv-1486 (D.D.C. July 18, 2008), ECF No. 34
321.	Corrected Brief for Appellee United States, *Bennett v. Islamic Republic of Iran*, Case No. 09-5147 (D.C. Cir. Dec. 1, 2009), Doc. 1218295

ANNEX	DESCRIPTION
322.	Brief for the United States as Amicus Curiae, *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016) (No. 13-15442), ECF No. 82
323.	*Levin v. Bank of New York*, Case No. 09-cv-5900, 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011)
324.	Order Granting Motion Authorizing Judgment Creditors to Pursue Attachment in Aid of Execution and Execution of December 22, 2006 Judgment, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Feb. 7, 2008), ECF No. 137
325.	Order Granting Motion Authorizing Judgment Creditors to Pursue Attachment in Aid of Execution of September 30, 2009 Judgment, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. May 10, 2010), ECF No. 158
326.	Order Re Notice & Service of Process, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Jan. 25, 2010), ECF No. 40
327.	Declaration of J. Kelley Nevling in Support of Bank of New York Mellon's Response to Plaintiffs' Motion for Partial Summary Judgment, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Sep. 15, 2010), ECF No. 264
328.	JP Morgan's Third-Party Complaint Against Wire Transfer Parties, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Dec. 31, 2009), ECF No. 61
329.	Bank of New York Mellon's Third-Party Complaint against Wire Transfer Parties, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Dec. 31, 2009), ECF No. 62
330.	Memorandum of Law of Citibank, N.A. and JPMorgan Chase Bank, N.A. in Response to Plaintiffs' Partial Motion for Summary Judgment, *Levin v. Bank of New York*, Case No. 09-cv-5900 (Sep. 15, 2010), ECF No. 265

VOLUME IV

ANNEX	DESCRIPTION
331.	*Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2013 WL 5312502 (S.D.N.Y. Sep. 23, 2013)

ANNEX	DESCRIPTION
332.	Amended Scheduling Order Authorizing Additional Pleadings and Governing and Scheduling Further Proceedings, *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, (Sep. 16, 2011), ECF No. 764-1
333.	Order Concerning Notice To and Service On Third-Parties, *Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, Case No. 11-cv-1601 (S.D.N.Y. Aug. 24, 2011), ECF No. 25
334.	*Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411 (S.D.N.Y. 2013)
335.	Third-Party Petition in Interpleader*, Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Apr. 11, 2011), ECF No. 11
336.	*Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602, 2013 WL 4780061 (S.D.N.Y. July 17, 2013)
337.	Order Concerning Notice to and Service on Third-Parties, *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Aug. 9, 2011), ECF No. 39
338.	*Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9 (D.D.C. 2011)
339.	Answer of Bank of Baroda, *Heiser v. Bank of Baroda, New York Branch*, Case No. 11-cv-1602 (S.D.N.Y. Apr. 8, 2011), ECF No. 10
340.	Answer of Sprint, *Heiser v. Islamic Republic of Iran*, Case No. 00-cv-2329 (D.D.C. June 21, 2010), ECF No. 165
341.	Answer of Citibank, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF No. 44
342.	Answer of Société Générale, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF No. 45
343.	Answer of JP Morgan, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF No. 54
344.	Answer of BNY Mellon, *Levin v. Bank of New York*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 23, 2009), ECF No. 56
345.	*Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014)
346.	*Levin v. Bank of New York*, 602 F. App'x 37 (May 11, 2015)

ANNEX	DESCRIPTION
347.	Order, *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900 (S.D.N.Y. Aug. 20, 2015), ECF No. 1065
348.	Letter from U.S. Department of Justice to Hon. Robert P. Patterson, *Levin v. Bank of New York Mellon*, Case No. 09-cv-5900 (S.D.N.Y. Oct. 28, 2014), ECF No. 1035
349.	*Levin v. Bank of New York Mellon*, Case No. 09-cv-5900, 2017 WL 4863094 (S.D.N.Y. Oct. 27, 2017)
350.	*Levin v. JPMorgan Chase Bank, N.A.*, 751 F. App'x 143 (2d Cir. 2018)
351.	Statement of Interest of the United States, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Aug. 3, 2012), ECF No. 230
352.	Response to the Statement of Interest of the United States, *Heiser v. Islamic Republic of Iran*, 00-cv-2329 (D.D.C. Aug. 17, 2012), ECF No. 231
353.	*Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429 (D.D.C. 2012)
354.	*Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013)
355.	*Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095 (D.C. Cir. 2019)
356.	*Greenlaw v. United States*, 554 U.S. 237 (2008)
357.	*Havlish v. bin Laden* (*In re Terrorist Attacks on September 11, 2001*), 2011 WL 13244047 (S.D.N.Y. 2011)
358.	Affidavit of Service, Exhibit C, *Havlish v. bin Laden*, Case No. 1:02-cv-00305-JR (D.D.C. Nov. 1, 2002), ECF No. 35-3

VOLUME V

ANNEX	DESCRIPTION
359.	Clerk's Certificates of Mailing of Summons & Complaint, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Mar. 18, 2005), ECF Nos. 21, 319-334, 340-354

ANNEX	DESCRIPTION
360.	Briefs for the United States as Amicus Curiae Supporting Petitioner, *Sudan v. Harrison*, 139 S. Ct. 1048 (2019) (No. 16-1094)
361.	Motion of the Solicitor General for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument, *Sudan v. Harrison*, 139 S. Ct. 1048 (No. 16-1094)
362.	Second Amended Complaint, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. Sept. 7, 2006), ECF No. 214 [excerpt]
363.	Report and Recommendation to the Hon. George B. Daniels, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. July 30, 2012), ECF No. 314
364.	*D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95 (2d Cir. 2006)
365.	*Amaya v. Logo Enterprises, LLC*, 251 F. Supp. 3d 196 (D.D.C. 2017)
366.	*Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323, 357 (D.D.C. 2020)
367.	*Owens v. Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017)
368.	List of Exhibits, *Havlish v. bin Laden*, Case No. 03-cv-09848-GBD-SN (S.D.N.Y. 2011), ECF No. 276
369.	Memorandum Decision and Order, *Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. Oct. 3, 2012), ECF No. 316.

VOLUME VI

ANNEX	DESCRIPTION
370.	*Havlish v. bin Laden,* Case No. 03-cv-09848-GBD (S.D.N.Y. Feb. 2012), ECF Nos. 302, 303, 306
371.	*Republic of Kazakhstan v. Stati*, 325 F.R.D. 507 (D.D.C. 2018)
372.	*First Fidelity Bank, N.A. v. Government of Antigua & Barbuda–Permanent Mission*, 877 F.2d 189 (2d Cir.1989)
373.	*Friends Christian High School v. Geneva Financial Consultants*, 321 F.R.D. 20 (D.D.C. 2017)

ANNEX	DESCRIPTION
374.	Organisation for Economic Co-operation and Development [OECD], 1967 Draft Convention on the Protection of Foreign Property, *reprinted in* 7 I.L.M. 117 (1968) [excerpt]
375.	Organisation for Economic Co-operation and Development [OECD], Committee on International Investment & Multinational Enterprises, Intergovernmental Agreements Relating to Investment in Developing Countries, Doc. No. 84/14 (May 27, 1984) [excerpt]
376.	Treaty of Friendship, Commerce and Navigation between the United States and Italian Republic, Feb. 2, 1948, T.I.A.S. 1965; 79 U.N.T.S. 171 (entered into force, 26 July 1949)
377.	*Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award (Apr. 29, 1999) [excerpt]
378.	BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987) [excerpt]
379.	*Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002) [excerpt]
380.	*Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award (Sep. 18, 2009) [excerpt]
381.	International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, U.N. Doc. A/73/10 (2018) [excerpt]
382.	THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (Andreas Zimmerman et al. eds., 2d ed. 2012) [excerpt]
383.	*National Grid PL.C v. Argentine Republic*, UNCITRAL/Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments, Award (Nov. 3, 2008) [excerpt]
384.	*Eli Lilly & Co. v. Government of Canada*, Case No. UNCT/14/2, Counter-Memorial of Canada (Jan. 27, 2015) [excerpt]
385.	*Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Respondent's Post-Hearing Brief (Mar. 13, 2017) [excerpt]

VOLUME VII

ANNEX	DESCRIPTION
386.	*Spence Int'l Investments, et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of El Salvador, (Apr. 17, 2015)
387.	*TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of Honduras, (Oct. 5, 2012) (U.S. Dep't of State trans., 2021) [excerpt]
388.	*Eli Lilly and Company v. Government of Canada*, Case No. UNCT/14/2, Submission of Mexico (Mar. 18, 2016)
389.	Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018 [excerpt]
390.	UNCTAD, Investment Policy Hub, Status of Comprehensive and Progressive Agreement for Trans-Pacific Partnership
391.	U.K. Department for International Trade, Formal Request to Commence U.K. Accession Negotiations to Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Feb. 1, 2021)
392.	*Methanex Corporation v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, (Aug. 3, 2005) [excerpt]
393.	1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41 (2020)
394.	*TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/05, Award (Dec. 19, 2008) [excerpt]
395.	GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2014) [excerpt]
396.	*GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020)
397.	*Vantaan Kaupunki v. Sansk Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, Case C-724/17, Judgment of the European Court of Justice (Mar. 14, 2019)
398.	*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Spain-Argentina BIT/ICSID Case No. ARB/07/26, Award (Dec. 8, 2016) [excerpt]

ANNEX	DESCRIPTION
399.	*Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) [excerpt]
400.	*PSEG Global Inc. and Konya Ilgin Electrik Uretim ve Ticaret Sirketi v. Republic of Turkey*, U.S.-Turkey BIT/ICSID Case No. ARB/02/5, Award (Jan. 19, 2007) [excerpt]
401.	*Ioan Micula, et al. v. Romania*, Sweden-Romania BIT/ICSID Case No. ARB/05/20, Award (Dec. 11, 2013) [excerpt]
402.	*Total, S.A. v. Argentine Republic*, France-Argentina BIT/ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010) [excerpt]

VOLUME VIII

ANNEX	DESCRIPTION
403.	Pitman B. Potter, *International Legislation on the Treatment of Foreigners*, 24 AM. J. INT'L L. 748 (1930)
404.	Edwin M. Borchard, *"Responsibility of States," at the Hague Codification Conference*, 24 AM. J. INT'L L. 517 (1930)
405.	JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (2013) [excerpt]
406.	Telegram from U.S. Department of State to U.S. Embassy, Addis Ababa (Aug. 28, 1951)
407.	Telegram from U.S. Department of State to U.S. Embassy, Tehran (Nov. 13, 1954)
408.	Agreement on the Reciprocal Promotion and Protection of Investments, art. 1(1), France-Argentina, July 3, 1991, 1728 U.N.T.S. 298; Agreement on the Reciprocal Promotion and Protection of Investments, art. I(2), Argentina-Spain, Oct. 3, 1991, 1699 U.N.T.S. 202; Agreement for the Promotion and Protection for Investments, art. 1(a), United Kingdom-Argentina, Dec. 11, 1990, 1765 U.N.T.S. 34); and Agreement on Encouragement and Reciprocal Protection of Investments, art. 1(a), Netherlands-Czech and Slovak Federal Republic, Apr. 29, 1991, 2242 U.N.T.S. 224
409.	U.S. Model Bilateral Investment Treaty (2004) [excerpt]
410.	U.S. Model Bilateral Investment Treaty (2012) [excerpt]

ANNEX	DESCRIPTION
411.	United States-Mexico-Canada Agreement, Annex 14-B, Expropriation, U.S.-Can.-Mex., Nov. 30, 2018
412.	EU-Canada Comprehensive Economic and Trade Agreement, Annex 8-A, Expropriation, Oct. 30, 2016, 2017 O.J. (L 11)
413.	EU-Singapore Investment Protection Agreement, Annex 1, Expropriation, Oct. 19, 2018, COM(2018) 194 final, 2019 O.J. (L 294)
414.	Modernisation of the Trade Part of the EU-Mexico Global Agreement, Annex on Expropriation, Apr. 21, 2018
415.	Canada-Colombia Free Trade Agreement, Annex 811, Can.-Col., Nov. 21, 2008, Can. T.S. 2011 No. 11
416.	*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (July 2, 2018) [excerpt]
417.	*Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016) [excerpt]
418.	CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES (2d ed. 2017) [excerpt]
419.	Extracts from Bloomberg regarding Bank Markazi Security Entitlements
420.	Organisation for Economic Co-operation and Development [OECD], Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working papers on International Investment 2004/2
421.	Organisation for Economic Co-operation and Development [OECD], Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Commentary to the Consolidated Text,* OECD Doc. DAFFE/MAI(98)8/REV1 (Apr. 22, 1998)
422.	International Law Commission, Draft Articles on Most-Favoured-Nation Clauses, U.N. Doc. A/33/10 (1978) [excerpt]
423.	U.N. Conf. on Trade and Development [UNCTAD], *UNCTAD Series on Issues in International Investment Agreements II: Most-Favoured-Nation Treatment*, U.N. Doc. UNCTAD/DIAE/IA/2010/1 (2010) [excerpt]

ANNEX	DESCRIPTION
424.	KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES (2010) [excerpt]
425.	*Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007) [excerpt]
426.	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan*, ICSID Case No. ARB/03/29, Award (Aug. 27, 2009) [excerpt]
427.	Press Statement on Threats to American Personnel and Facilities in Iraq, Secretary of State Michael R. Pompeo (Sep. 28, 2018); Remarks to the Media, Secretary of State Michael R. Pompeo (Oct. 3, 2018); Press Statement on U.S. Appearance before the International Court of Justice, Secretary of State Michael R. Pompeo (Oct. 8, 2018); Edward Wong, "Blaming Iran, U.S. Evacuates Consulate in Southern Iraq," N.Y. Times, Sep. 28, 2018
428.	Excerpts from U.S. Federal Rules of Civil Procedure and Federal Rules of Evidence

APPENDIX 1:
ENFORCEMENT CASES IN ATTACHMENT 2 TO IRAN'S REPLY

The **8** enforcement cases with respect to which Iran has made particularized claims are in bold.

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
1.	Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems 3:98-cv-01165 (S.D. Cal.)	Ministry of Defense	Supreme Court granted Ministry of Defense's request to extend time to file petition for certiorari in May 2016. No petition ever filed.	Court ordered turnover of $9,462,750.81 derived from an arbitration award in favor of the Iranian Ministry of Defense.
2.	**Heiser v. Islamic Republic of Iran** **1:00-cv-02329 (D.D.C.)**	**None**	**No appeal filed by Iranian entities.**	**Court ordered turnover of $613,587.38 that Sprint Communications Company LP owed to Telecomm-unications Infrastructure Company of Iran, $59,031.92 in assets of Iranian entities (Iran Marine and Industrial, Sediran Drilling Company, Iran Air, and Bank Melli PLC U.K.), and $249,365.44 in assets of Iranian Navy.**
3.	Stern v. Islamic Republic of Iran 1:00-cv-02602 (D.D.C.)	None	Court granted garnishee ICANN's motion to quash writ of attachment, affirmed by court of appeals.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
4.	Weinstein v. Islamic Republic of Iran 1:00-cv-02601 (D.D.C.)	None	Court granted garnishee ICANN's motion to quash writ of attachment, affirmed by court of appeals.	None
5.	Peterson v. Islamic Republic of Iran et al. 1:01-cv-02094 (D.D.C.)	None	Numerous garnishees filed motions to quash writs of attachment.	None
6.	Bakhtiar v. Islamic Republic of Iran 1:02-cv-00092 (D.D.C.)	None	Writs of garnishment issued to multiple banks.	None
7.	Hegna v. Islamic Republic of Iran 5:02-mc-00042 (N.D. Tex.)	None	Court of Appeals affirmed district court decision granting U.S. motion to void writ of attachment and execution as to property in Lubbock, TX owned by Iran.	None
8.	Bennett v. Islamic Republic of Iran 4:12-mc-00633 (S.D. Tex.)	None	Registration of judgment only; no further action.	None
9.	Davis v. Islamic Republic of Iran 1:07-cv-01302 (D.D.C.)	None	Court issued order authorizing enforcement of judgment.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
10.	Stern v. Islamic Republic of Iran 8:03-mc-00371 (D. Md.)	None	Registration of judgment only; no further action.	None
11.	Havlish v. Bin Laden 1:03-cv-09848 (S.D.N.Y.)	None	Court issued writs of execution; no further action.	None
12.	Rubin v. Islamic Republic of Iran 1:03-cv-09370 (N.D. Ill.)	Government of Iran	Supreme Court issued decision on Feb. 21, 2018, affirming ruling of court of appeals that 28 U.S.C. 1610(g) does not provide a freestanding basis for parties to attach and execute against the property of a foreign state.	None
13.	Ellis v. Islamic Republic of Iran 1:05-cv-00220 (D.D.C.) *Iran identifies plaintiff as Goldberg-Botvin*	None	Court issued order authorizing enforcement of judgment.	None
14.	Rubin v. Islamic Republic of Iran 2:05-mc-70974 (E.D. Mich.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
15.	**Levin v. Bank of New York** **1:09-cv-05900 (S.D.N.Y.)**	**None**	**No appeal filed by Iranian entities.**	**Court ordered turnover of assets, but amounts and Iranian entities are redacted in court documents.**
16.	Levin v. Islamic Republic of Iran 1:11-mc-00283 (S.D.N.Y.)	None	Writs of execution served on garnishee banks; no further action.	None
17.	Murphy v. Islamic Republic of Iran 1:11-mc-00423 (S.D.N.Y.)	None	Registration of judgment, writs of execution served on garnishee banks; no further action.	None
18.	Leibovitich v. Syrian Arab Republic 1:08-cv-01939 (N.D. Ill.)	None	Court granted garnishee banks' motions to quash plaintiffs' motions for discovery; court granted plaintiffs' motion to dismiss subpoenas issued to Boeing Corp. for discovery.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
19.	Ben Haim v. Islamic Republic of Iran 1:08-cv-00520 (D.D.C.)	None	Court granted garnishee ICANN's motion to quash writ of attachment, affirmed by court of appeals.	None
20.	Bodoff v. Islamic Republic Of Iran 1:08-cv-00547 (D.D.C.)	None	Court affirmed prior awards for compensatory and punitive damages; not an enforcement action.	None
21.	Peterson v. Islamic Republic of Iran 4:08-mc-00016 (N.D. Okla.)	None	Registration of judgment; no further action.	None
22.	Ben-Rafael v. Islamic Republic of Iran 1:08-cv-00716 (D.D.C.)	None	Court granted plaintiffs' motion authorizing enforcement of judgment; no further action.	None
23.	Peterson v. Islamic Republic of Iran 2:08-mc-00098 (E.D. Cal.)	None	Registration of judgment; no further action.	None
24.	Wamai v. Republic of Sudan 1:08-cv-01349 (D.D.C.)	None	Plaintiffs pursuing enforcement against Sudan only.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
25.	Heiser v. Islamic Republic of Iran 2:08-mc-00109 (E.D. Cal.)	None	Registration of judgment; no further action.	None
26.	Heiser et al v. Islamic Republic of Iran 1:08-mc-00212, reclassified as 1:11-cv-00137 (D. Md.), No. 40 below	None	Garnishee banks dismissed from case; proceeding against remaining garnishee stayed.	None
27.	Heiser v. Islamic Republic of Iran 3:08-mc-00491 (S.D. Cal.)	None	Registration of judgment and writs of attachment issued; no further action.	None
28.	Heiser v. Islamic Republic of Iran 3:08-mc-00323 (D. Conn.)	None	Registration of judgment only; no further action.	None
29.	Peterson v. Islamic Republic of Iran 0:08-mc-00062 (D. Minn.)	None	Registration of judgment only; no further action.	None
30.	Peterson v. Islamic Republic of Iran 3:08-mc-09256 (D. Or.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
31.	Acosta v. Islamic Republic of Iran 2:09-mc-00101 (E.D. Cal.)	None	Registration of judgment; no activity since 2011.	None
32.	Greenbaum v. Islamic Republic of Iran 2:09-mc-00104 (E.D. Cal.)	None	Registration of judgment; no further action.	None
33.	Heiser v. Islamic Republic of Iran 4:09-mc-00559 (S.D. Tex.)	None	Notice of *lis pendens* filed only; no further action.	None
34.	Heiser v. Islamic Republic of Iran 8:09-mc-00373 (D. Md.)	None	Notice of *lis pendens* filed only; no further action.	None
35.	Heiser v. Islamic Republic of Iran 3:09-mc-00941 (S.D. Cal.)	None	Notice of *lis pendens* filed only; no further action.	None
36.	Heiser v. Islamic Republic of Iran 2:09-mc-00105 (E.D. Cal.)	None	Notice of *lis pendens* filed only; no further action.	None
37.	Khaliq v. Republic of Sudan 1:11-mc-00036 (S.D.N.Y.)	None	Notice of *lis pendens* and certificates of service of garnishee banks filed; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
38.	**Peterson v. Islamic Republic of Iran** **1:10-cv-04518 (S.D.N.Y.)**	**Bank Markazi**	**Bank Markazi petitioned for writ of certiorari. Supreme Court affirmed lower court decision on Apr. 20, 2016.**	**Court authorized distribution of $1,895,600,513 to plaintiffs on June 6, 2016.**
39.	Heiser v. Islamic Republic of Iran 1:10-mc-00005 (S.D.N.Y.)	None	Registration of judgment and writs of execution served on garnishee banks; currently seeking same assets at issue in No. 79 below, Peterson v. Iran, 1:13-cv-09195 (S.D.N.Y.).	Unknown whether any assets have been turned over because court documents are sealed.
40.	Heiser v. Islamic Republic of Iran 1:11-cv-00137 (D. Md.) (see also No. 26 above)	None	Garnishee banks dismissed from case; proceeding against remaining garnishee stayed.	None
41.	Heiser v. Islamic Republic of Iran 1:11-cv-00998 (S.D.N.Y.)	None	Plaintiffs voluntarily dismissed case on July 3, 2018.	None
42.	Owens v. Republic of Sudan 1:11-mc-00037 (S.D.N.Y.)	None	Notice of *lis pendens* and certificates of service on garnishee banks filed; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
43.	Bennett v. Islamic Republic of Iran 1:11-mc-00035 (S.D.N.Y.)	None	Registration of judgment and writs of execution issued; no further action.	None
44.	**Heiser v. Bank Of Baroda, New York Branch** **1:11-cv-01602 (S.D.N.Y.)**	**None**	**No appeal filed by Iranian entities.**	**Court ordered turnover of $119,827.68 in assets of Iranian entities (Bank Saderat, Export Development Bank of Iran, Behran Oil Company, and Bank Melli).**
45.	**Heiser v. The Bank Of Tokyo-Mitsubishi UFJ, Ltd.** **1:11-cv-01601 (S.D.N.Y.)**	**None**	**No appeal filed by Iranian entities.**	**Court ordered turnover of $359,689.75 in assets of Iranian entities (Bank Sepah International PLC, Azores Shipping Company LL FZE, Iranohind Shipping Company, IRISL Benelux NV, Export Development Bank of Iran, and Bank Melli).**
46.	Heiser v. Mashreqbank PSC 1:11-cv-01609 (S.D.N.Y.)	None	No appeal filed by Iranian entities.	Court ordered turnover of $123,202.32, but Iranian entities are redacted in court documents.

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
47.	Valore v. Islamic Republic of Iran 1:11-mc-00217 (S.D.N.Y.)	None	Registration of judgment, writs served; no further action.	None
48.	Heiser v. Islamic Republic of Iran 1:11-mc-00295 (S.D.N.Y.)	None	Court granted plaintiffs' application for issuance of writs of execution; no further action.	None
49.	Heiser v. Islamic Republic of Iran 3:11-mc-00116 (W.D.N.C.)	None	Registration of judgment and writ of execution issued; no further action.	None
50.	Greenbaum v. Islamic Republic of Iran 3:11-mc-80283 (N.D. Cal.)	None	Case related to Bennett v. Iran, No. 54 below.	None
51.	Rimkus v. Islamic Republic of Iran 1:11-mc-00413 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
52.	Rimkus v. Islamic Republic of Iran 1:11-mc-00412 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
53.	Heiser v. Franklin Templeton Fiduciary Trust 1:11-cv-08446 (S.D.N.Y.)	None	Proceeding stayed pending judgment in the following case, which involves the same assets.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
54.	**Bennett v. Islamic Republic of Iran** **3:11-cv-05807 (N.D. Cal.)**	**Bank Melli** **(after third-party garnishees deposited $17.6 million in blocked assets with court)**	**Supreme Court denied Bank Melli's petition for certiorari on March 30, 2020.**	**Court ordered turnover of $17,324,832.16 in assets of Bank Melli held by Visa, Inc. and Franklin Resources, Inc. to Bennett, Heiser (#53 above), Greenbaum (#50 above), and Acosta plaintiffs.**
55.	Bennett v. Islamic Republic of Iran 0:12-mc-00004 (D. Minn.)	None	Registration of judgment only; no further action.	None
56.	Rafii v. Islamic Republic of Iran 3:12-mc-00093 (S.D. Cal.)	None	Registration of judgment only; no further action.	None
57.	Marthaler v. Islamic Republic of Iran 3:12-mc-00003 (W.D. Wis.) *Iran identifies plaintiff as Heiser*	None	Registration of judgment; court issued order authorizing attachment and execution; no further action.	None
58.	Bodoff v. Islamic Republic of Iran 1:12-mc-00154 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
59.	Rubin v. Islamic Republic of Iran 1:12-mc-00153 (S.D.N.Y.)	None	Registration of judgment and writs of execution served; no further action.	None
60.	Stern v. Iranian Ministry of Information and Security 1:12-mc-00151 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
61.	Ben Haim v. Islamic Republic of Iran 1:12-mc-00152 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
62.	Stethem v. Islamic Republic of Iran 1:12-mc-00203 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
63.	**Weinstein v. Islamic Republic of Iran** **2:12-cv-03445 (E.D.N.Y.)** ***See also* Weinstein v. Islamic Republic of Iran,** **2:02-mc-00237 (E.D.N.Y.); case converted to 2:12-cv-03445 after denial of certiorari petition.**	**Bank Melli; Bank Saderat**	**Supreme Court denied Bank Melli's petition for writ of certiorari on June 25, 2012.**	**Court ordered distribution of $1,021,736.39 to Weinstein plaintiffs and $333,776.67 to Heiser plaintiffs from proceeds of sale of Bank Melli's real property.**

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
64.	Owens v. Republic of Sudan 1:12-mc-00243 (S.D.N.Y.)	None	Notice of *lis pendens* filed only; no further action.	None
65.	Heiser v. Islamic Republic of Iran 2:12-mc-00391 (C.D. Cal.)	None	Registration of judgment only; no further action.	None
66.	Heiser v. Islamic Republic of Iran 2:12-mc-00392 (C.D. Cal.)	None	Registration of judgment only; no further action.	None
67.	Bland v. Islamic Republic of Iran 1:12-mc-00373 (S.D.N.Y.)	None	Registration of judgment and writ of execution issued (but not served); no further action.	None
68.	Bakhtiar v. Islamic Republic of Iran 1:12-mc-00403 (S.D.N.Y.)	None	Registration of judgment and writs of execution served; no further action.	None
69.	Holland v. Islamic Republic of Iran 1:13-mc-00149 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
70.	Davis v. Islamic Republic of Iran 1:13-mc-00046 (S.D.N.Y.)	None	Garnishee bank filed notice of appearance; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
71.	Brown v. Islamic Republic of Iran 1:13-mc-00113 (S.D.N.Y.)	None	Registration of judgment and writ of execution served on garnishee bank; no further action.	None
72.	Havlish v. Royal Dutch Shell P.C. 1:13-cv-07074 (S.D.N.Y.)	None	Plaintiffs appealed district court's grant of Shell's motion to dismiss for lack of personal jurisdiction; pursuant to parties' stipulation, court of appeals remanded to lower court for dismissal of plaintiffs' petition.	None
73.	Brewer v. Islamic Republic of Iran 1:13-mc-00148 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
74.	Blais v. Islamic Republic of Iran 1:13-mc-00145 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
75.	Valencia v. Islamic Republic of Iran 1:13-mc-00150 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
76.	Botvin v. Islamic Republic of Iran 1:13-mc-00322 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
77.	Botvin v. Islamic Republic of Iran 1:13-mc-00323 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
78.	Wultz v. Islamic Republic of Iran 1:13-mc-00055 (S.D.N.Y.)	None	Registration of judgment and writ of execution served; no further action.	None
79.	**Peterson v. Islamic Republic of Iran** **1:13-cv-09195 (S.D.N.Y.)**	**Bank Markazi**	**Supreme Court remanded case to court of appeals, which remanded to district court in June 2020. Case pending.**	**None**
80.	Goldberg-Botvin et al v. Islamic Republic of Iran 1:14-cv-03002 (N.D. Ill.)	None	Registration of judgment; citations to discover assets served on third-party financial institutions; no further action.	None
81.	Botvin v. Islamic Republic of Iran 1:14-cv-03010 (N.D. Ill.)	None	Registration of judgment; citations to discover assets served on third-party financial institutions; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
82.	Levin v. Islamic Republic of Iran 1:14-mc-00041 (S.D.N.Y.)	None	Plaintiffs' request for issuance of writs of execution granted; writs served; no further action.	None
83.	Relvas v. Islamic Republic of Iran 1:14-mc-00359 (S.D.N.Y.)	None	Notice of *lis pendens* filed only; no further action.	None
84.	Levin v. Islamic Republic of Iran 1:14-mc-01389 (E.D.N.Y.)	None	Case filed and terminated on the same day.	None
85.	Oveissi v. Islamic Republic of Iran 3:15-mc-00005 (D. Alaska)	None	Registration of judgment only; no further action.	None
86.	Oveissi v. Islamic Republic of Iran 2:15-mc-0050 (C.D. Cal.)	None	Registration of judgment only; no further action.	None
87.	Bakhtiar v. Islamic Republic of Iran 3:15-mc-00099 (W.D.N.C.)	None	Registration of judgment only; no further action.	None
88.	Havlish v. bin-Laden 1:15-cv-04055 (N.D. Ill.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
89.	Bodoff v. Islamic Republic of Iran 1:15-mc-00234 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
90.	Ben Haim v. Islamic Republic of Iran 1:16-mc-00094 (S.D.N.Y.)	None	Registration of judgment and writ of execution issued; no further action.	None
91.	Leibovitch v. Syrian Arab Republic 1:16-mc-00097 (S.D.N.Y.)	None	Registration of judgment, issuance and service of writs of execution; no further action.	None
92.	Havlish v. Clearstream Banking, S.A. 1:16-cv-08075 (S.D.N.Y.)	None	Seeking same assets at issue in No. 79 above, Peterson v. Iran, 1:13-cv-09195 (S.D.N.Y.).	None
93.	Wultz v. Islamic Republic of Iran 3:17-mc-00009 (D.V.I.)	None	Registration of judgment only; no further action.	None
94.	Bayani v. Islamic Republic of Iran 3:17-mc-00154 (D.P.R.)	None	Registration of judgment only; no further action.	None
95.	Wultz v. Islamic Republic of Iran 3:17-mc-00153 (D.P.R.)	None	Registration of judgment only; no further action.	None
96.	Heiser v. Islamic Republic of Iran 2:17-mc-00114 (W.D. Wash.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
97.	Gill v. Islamic Republic of Iran 1:17-mc-00500 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
98.	Braun v. Islamic Republic of Iran 1:18-cv-01681 (N.D. Ill.)	None	Registration of judgment; citation to discover assets served on Boeing Corp.; no further action.	None
99.	Rubin v. Islamic Republic of Iran 1:18-cv-01689 (N.D. Ill.)	None	Registration of judgment; citation to discover assets served on Boeing Corp.; no further action.	None
100.	Weinstein v. Islamic Republic of Iran 1:18-cv-01691 (N.D. Ill.)	None	Registration of judgment; citation to discover assets served on Boeing Corp.; no further action.	None
101.	Bodoff v. Islamic Republic of Iran 1:18-cv-01686 (N.D. Ill.)	None	Registration of judgment; citation to discover assets served on Boeing Corp.; no further action.	None
102.	Khaliq v. Republic of Sudan 1:19-mc-00289 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None

Iran's Att. 2 Case No.	Case Caption and Docket Number (Court)	Appearances by Iranian Entities	Status (as of February 15, 2021)	Assets Turned Over to Plaintiffs Following Court Order
103.	Mwila v. Islamic Republic of Iran 1:19-mc-00290 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
104.	Owens v. Republic of Sudan 1:19-mc-00288 (S.D.N.Y.)	None	Registration of judgment only; no further action.	None
105.	Leibovitch v. Islamic Republic of Iran 1:19-mc-01590 (E.D.N.Y.) 1:19-mc-01586 (E.D.N.Y.)	None	Registration of judgment only in both cases; no further action.	None
106.	Braun v. Islamic Republic of Iran 1:19-mc-01618 (E.D.N.Y.)	None	Registration of judgment only; no further action.	None