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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Monday 19 September 2022, at 3 p.m., at the Peace Palace,

Vice-President Gevorgian, Acting President, presiding,

***in the case concerning* Certain Iranian Assets**
(Islamic Republic of Iran *v.* United States of America)

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le 19 septembre 2022, à 15 heures, au Palais de la Paix,

sous la présidence de M. Gevorgian, vice-président,
faisant fonction de président

***en l'affaire relative à* Certains actifs iraniens**
(République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

Present:	Vice-President	Gevorgian, Acting President
	Judges	Tomka
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
		Charlesworth
	Judges *ad hoc*	Barkett
		Momtaz
	Registrar	Gautier

Présents : M. Gevorgian, vice-président faisant fonction de président en l'affaire
MM. Tomka
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth, juges
Mme Barkett
M. Momtaz, juges *ad hoc*

M. Gautier, greffier

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The VICE-PRESIDENT, Acting President: Please be seated. You have the floor, Mr. Wordsworth.

Mr. WORDSWORTH:

PART V

IRAN'S CLAIMS FOR BREACH OF ARTICLES III (2) AND IV (1)

A. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you and a privilege to have been asked by Iran to develop its arguments on breach of Articles III (2) and IV (1) of the Treaty of Amity. These two provisions establish a number of important protections for Iranian companies, some of which will be very familiar to Members of the Court as they have come to form a bedrock in literally thousands of FCN (friendship, commerce and navigation) and investment treaties. Remarkably, the United States seeks to interpret these key protections almost out of existence, most obviously in its attempt to reduce both the well-known fair and equitable treatment standard and the separate treaty prohibition of unreasonable or discriminatory measures to a unitary protection concerned only with denials of justice. It makes this case without textual support and, moreover, in the face of the interpretations of more than 170 international arbitral tribunals that have interpreted and applied substantively similar or identical provisions in investment treaties.

B. Article III (2) of the Treaty of Amity

(i) Interpretation of Article III (2)

2. I will return to that shortly, but I start with Article III (2) — now on your screens — on freedom of access:

> "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction [so, that is an unqualified freedom of access], both in defense and pursuit of their rights [again, this is unqualified, and the relevant rights might be in domestic law or under the Treaty of Amity, including the right to recognition of juridical status under Article III (1)], to the end that prompt and impartial justice be done."

3. And these last words were specifically negotiated for this Treaty and are unique so far as concerns the 17 FCN treaties concluded prior to 1959[1]. Full meaning and effect must of course be given to them and, pursuant to the ordinary meaning of the terms used, Article III (2) establishes freedom of access that must be meaningful.

4. There would be no freedom of access to Iranian companies "to the end that prompt and impartial justice be done", if for example, subsequent to the access, the executive or legislature could change the law in a pending case, with retroactive effect, so that the key plank to a defence is removed. And that is exactly what happened in the *Peterson* case: as you have already heard, Section 502 of the 2012 Iran Threat Reduction Act amended US law with retroactive effect so as to remove key defences that were then being run by Bank Markazi[2].

5. The United States' position is that Article III (2) is concerned only with physical access to a court and the facility to present arguments[3]. But freedom of access, if it is not to be illusory, requires a court that is not — by intervening statute or executive order — inevitably deaf to the argument. And here it is useful to recall the Court's Judgment in the *Oil Platforms* case on another treaty-protected freedom, freedom of commerce under Article X, where the Court noted that any act which would impede the freedom is prohibited, and that the freedom could not be merely illusory. It held:

> "Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export."[4]

6. And the requirement for a freedom that is not merely illusory, i.e. that is meaningful, is all the more clear in Article III (2) given that the freedom of access is to a specific end — "that prompt and impartial justice be done". The relevant issue here is the destruction of a party's defence through intervening legislation, not the physical destruction of a party's goods, but the Court's underlying reasoning in *Oil Platforms* holds true.

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[1] R. Wilson, *United States Commercial Treaties and International Law* (1960), New Orleans, The Hauser Press, p. 239; RI, pp. 113-114, para. 5.10.

[2] See *Bank Markazi* v. *Peterson et al.*, United States Supreme Court, 20 April 2016, 578 U.S. 1 (2016), p. 10; and see also joint dissenting opinion of C. J. Roberts and J. Sotomayor, p. 7 (MI, Ann. 66).

[3] See CMUSA, pp. 103-104, para. 13.25, and RUSA, p. 112, para. 9.23.

[4] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 2003*, p. 201, para. 83.

7. Now, the United States has relied heavily on paragraph 70 of the Court's 2019 Judgment on preliminary objections to argue that Iran's freedom of access case must fail. The Court held in relevant part:

> "70. The Court is not convinced that a link of the nature alleged by Iran exists between the question of sovereign immunities and the right guaranteed by Article III, paragraph 2. [That is a completely different issue concerning immunities. The Court continued later in the same paragraph:]
>
> . . . . . .
>
> The provision at issue does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, [and that is the passage that the United States relies on. The Court continued:] 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."[5]

8. And the rest of the passage is concerned with a finding that there is nothing in the language of Article III (2), in its context or in the object and purpose of the Treaty, to suggest that the obligation to grant Iranian companies freedom of access entails an obligation to uphold customary international law immunities. So, three points:

(a) First, the Court's reasoning here is focused on whether Article III (2) establishes any rights with respect to the assertion and grant of sovereign immunities — an issue, of course, that is no longer before the Court.

(b) Second, within its enquiry, which included looking at context, the Court could see nothing to indicate an obligation to uphold immunities as an aspect of freedom of access. By contrast, as to the current enquiry, the context points to a materially different conclusion. The context is one in which the Parties have expressly agreed the right to recognition of juridical status — in the immediately preceding provision — Article III (1).

(c) Third, the United States is placing great weight on the Court's statement that Article III (2) does not seek to guarantee substantive or procedural rights, but it cannot ignore the Court's finding as to what the provision does protect, i.e. "the *possibility* for . . . a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have". The issues now before you fall neatly within that category.

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

(i) By removing the right to recognition of separate juridical status, the United States' measures have deprived Iranian companies of any possibility, as Iranian companies, to have access to the US courts. Before they even put a foot within the court door, they have, in effect, lost that juridical status and have been transformed into the State of Iran.

(ii) Further, by passing targeted legislation in the *Peterson* case several years after the enforcement proceedings against Bank Markazi were commenced, and thus depriving Bank Markazi of a central plank to its existing defence, as indeed had been sought through the lobbying of the plaintiffs' lawyers[6], the United States was depriving this Iranian company of the possibility of any meaningful access to the US courts. There is no possibility of a freedom of access that is not illusory where the law can be, and is, changed retroactively to support one party to a lawsuit, with the result that a respondent must lose on the central point (subject only to some limited factual enquiries).

9. And, despite what the United States has said in its written pleadings, it is not somehow by referring to context or object and purpose that the unrestricted wording of Article III (2) can be revised so as to qualify an unqualified entitlement to freedom of access[7].

(ii) Application of Article III (2)

10. I turn then to say a few more words on the application of Article III (2).

11. In brief terms, Bank Markazi, Bank Melli and a number of other Iranian companies have been deprived of the right to their separate juridical status in the enforcement actions listed and summarized at items 1-10 and 12 of tab 2 to the judges' folders. In proceedings against Iran, the goalposts have been shifted by the 2002 Terrorism Risk Insurance Act (TRIA) and related legislation[8] — such that enforcement can be made against the assets of Iranian companies in respect of default judgments against Iran — in cases to which the Iranian companies were not party, and which concern alleged acts in which the companies played no role, even allegedly.

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[6] J. Triedman, "Can U.S. Lawyers Make Iran Pay for 1983 Bombing?", *The American Lawyer*, 30 September 2013, p. 3 (RI, Ann. 116); judges' folder tab 3.

[7] PUSA, pp. 80-83 paras. 8.5 *et seq*.

[8] See MI, pp. 28-29, paras. 2.30-2.31, with respect to Section 1083 National Defense Authorization Act 2008, introducing a new Section 1610 *(g)* (1) into the 28 US Code.

(a) There could be no meaningful freedom of access where, any time the Iranian companies entered a US court in these enforcement cases, the outcome had already been predetermined because the court has been mandated by Congress to treat the companies as if they were Iran.

(b) No matter the nature or quality of the argument put forward, no matter the legal fact of separate juridical status and the recognition that would otherwise be accorded to such status as a matter of US domestic law, and that *must* be accorded as a matter of Article III (1) of the Treaty[9], as a result of the 2002 Act (TRIA) and related legislation, the Iranian companies are bound to lose on their key argument, resulting in the seizure of their property.

12. As to the *Peterson* case[10], there is the additional targeted and retroactive effect of Section 502 of the 2012 Act. The Court is now familiar with the powerful description of the way this provision works given by Chief Justice Roberts and Justice Sotomayor[11], but it is useful to see some of the majority's contrary reasoning. In response to the dissenting opinion, the majority stated:

> "THE CHIEF JUSTICE compares §8772 [and that is the provision of the USC enacted by Section 502] to a hypothetical 'law directing judgment for Smith if the court finds that Jones was duly served with notice of the proceedings.' *Post*, at 12–13. Of course, the hypothesized law would be invalid — as would a law directing judgment for Smith, for instance, if the court finds that the sun rises in the east . . . By contrast, §8772 provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets."[12]

13. That is just a way of saying that, subject to certain preliminary determination as to who owns the property, Bank Markazi loses — as a result of the intervening legislation. The force of the Chief Justice's analogy remains entirely pertinent. This Court is concerned with international law, not US constitutional law, and the fact that there may be a triable issue as to ownership of the property could make no difference in the current context. The reality is that there are only two possibilities under Section 502: either the property does not belong to Bank Markazi, in which case the section is not engaged, or the property does belong to it, in which case Bank Markazi's key defence is removed.

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[9] See *Peterson et al.* v. *Islamic Republic of Iran et al.*, US District Court, Southern District of New York, 28 February 2013 (2013 U.S. Dist. LEXIS 40470) (S.D.N.Y. 2013), p. 52, MI, Ann. 58; and US Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014), p. 7, MI, Ann. 62.

[10] Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 8.

[11] *Bank Markazi* v. *Peterson et al.*, US Supreme Court, 20 April 2016, 578 US 1 (2016), joint dissenting opinion of C. J. Roberts and J. Sotomayor, pp. 1-2 (MI, Ann. 66).

[12] *Bank Markazi* v. *Peterson et al.*, US Supreme Court, 20 April 2016, 578 US 1 (2016), pp. 18-19, footnote omitted, MI, Ann. 66.

Section 502 is thus a one-way street, removing any meaningful role for the US courts. Any freedom of access is indeed merely "illusory".

14. The United States has referred to a case of the European Court of Human Rights to show that retroactive legislation may, in exceptional cases, be consistent with Article 6 of the European Convention on Human Rights (ECHR), which of course concerns the right to a fair trial[13]. But the case in question, *National & Provincial Building Society* v. *United Kingdom*, concerned the removal of a loophole in generally applicable tax law that had inadvertently been introduced. That set of facts could not be further from the current case. The public interest in remedying an inadvertent defect in legislation of which a claimant taxpayer seeks to take opportunistic advantage bears no relation to a political decision to legislate to, in effect, dictate the result as to who wins and who loses in a dispute between private parties[14]. Moreover, as to its general approach, the European Court emphasized

> "the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection."[15]

Quite.

15. Turning briefly to the second element of Article III (2) on your screens, this is also engaged as Iranian companies are, as a matter of fact, being treated in terms of freedom of access in a way that is less favourable than for "nationals and companies of [such other High Contracting Party or] any third country"[16]. In particular, it is only Bank Markazi that has been singled out in the context of pending litigation through legislation carefully designed to remove the key defence[17]. There are no equivalent US measures with respect to the property of any other foreign company, as indeed the United States appears to accept[18].

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[13] RUSA, p. 113, para. 9.25.

[14] *National & Provincial Building Society, et al.* v. *United Kingdom* (117/1996/736/933-935), Judgment of 23 October 1997, paras. 110-112 (CMUSA, Ann. 188). The judgment is reported in *European Human Rights Reports (EHRR)*, Vol. 25, 1988, p. 127. See RUSA, p. 113, para. 9.25.

[15] RUSA, p. 113, para. 9.25.

[16] RI, p. 125, para. 5.40.

[17] See *Bank Markazi* v. *Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), joint dissenting opinion of C. J. Roberts and J. Sotomayor, p. 7 (MI, Ann. 66). See also Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 8.

[18] RUSA, p. 115, para. 9.30.

C. Article IV (1)

16. I move on to Article IV (1), which imposes three further — freestanding — obligations of protection:

> "Each High Contracting Party shall [and this is the first protection] at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; [then, and this is the second protection] shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and [then protection 3] shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

17. Curiously, the United States' case is that the first of these three protections establishes no more than a prohibition of denials of justice, whilst the second and third protections, it says, do not establish "independent obligations" but merely "inform" the content of the first[19].

18. There are two answers to this.

19. The first, which I will come back to in a little detail, is that the United States' interpretation is flatly inconsistent with the express wording of Article IV (1) and, indeed, the interpretation of the fair and equitable treatment standard in more than 170 arbitral awards; it is also inconsistent with what the US negotiators were saying around the time of the Treaty's conclusion.

20. The second point, which I will deal with right away, is that, even if it were somehow correct that Article IV (1) did no more than prohibit denials of justice, then there has anyway been a breach — because, as a result of the 2002 Act, the Iranian companies are bound to lose the argument based on their separate juridical personality, and because the United States has introduced specially tailored, retroactive legislation to remove Bank Markazi's key arguments in the course of ongoing proceedings. As to *Peterson*, and indeed the other cases, it is irrelevant that there was an absence of what the United States calls in its written pleadings "procedural improprieties"[20]. Even if that were correct, the whole point is that regardless of how good or bad the in-court procedure was, the intervening legislation meant that there could be no justice because there could be no reliance on separate juridical personality and because targeted legislation in *Peterson* meant that Bank Markazi could only lose on the key points.

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[19] CMUSA, p. 110, para. 14.12, and p. 118, para. 14.32; RUSA, p. 118, para. 10.7.

[20] RUSA, pp. 132-133, para. 10.40.

21. Consistent with the classic definition at Article 9 of the 1961 Harvard Draft Convention, there is a denial of justice where there has been an "obstruction of access to courts" or a "failure to provide those guarantees which are generally considered indispensable in the proper administration of justice"[21]. Both are engaged where, subsequent to the initiation of proceedings, the goalposts are shifted by targeted legislation. As Professor Paulsson has explained in his well-known treatise on denial of justice: "Once it is established that the relevant act or omission is imputable to the state, it simply cannot matter whether the doors to justice were blocked by executive fiat, legislative overreaching, or judicial obstreperousness."[22]

22. I turn to the broader issues of interpretation on Article IV (1), and note as an overarching point that, as the Court found in the *Oil Platforms* case, there is no territorial limitation[23].

23. Focusing then on the obligation to accord fair and equitable treatment (FET), pursuant to its ordinary meaning, this is an unqualified obligation of evident breadth. It is not in any way tied back to the customary international law minimum standard of treatment, although that is what the United States contends as a first step to its untenable position that this is no more than a prohibition of denials of justice[24]. Indeed, as Article IV (2) aptly demonstrates, where the parties did wish to incorporate a *renvoi* to customary international law into the Treaty, they did so expressly, there in Article IV (2), establishing what is "required by international law" as a form of basic minimum. And of course, there are no such words in Article IV (1) qualifying the FET standard.

24. As the Court will be well aware, there has been an almost unparalleled focus in international arbitral awards over the past decades in terms of identifying what is required by the FET standard in the context of investment treaties. And it is now well established that, in deciding whether there has been a breach, international tribunals will have recourse to a number of elements, in particular, to identify whether the conduct at issue:

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[21] Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, Cambridge, Mass., 1961 and *American Journal of International Law*, Vol. 55, 1961, pp. 548-584. Applied e.g. in *Liman Caspian Oil BV and Dutch Investment BV* v. *Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award of 22 June 2010, p. 68, para. 277; also quoted in J. Paulsson, *Denial of Justice in International Law*, Cambridge: Cambridge University Press (CUP), 2005, p. 96.

[22] J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005), p. 53.

[23] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 816, para. 35.

[24] See RUSA, pp. 117-118, para. 10.5, and pp. 123-124, para. 10.20.

"*(a)* is arbitrary, grossly unfair, unjust or idiosyncratic, with arbitrariness in turn involving an enquiry into proportionality; and/or

(b) is discriminatory; and/or

(c) involves a lack of due process leading to an outcome which offends judicial propriety; and/or

(d) defeats legitimate expectations based on commitments of the State in question."[25]

25. No doubt, this is familiar and at tab 13 of your judges' folder, we have listed out more than 170 international arbitral awards where an equivalent FET provision, that is, a provision that is not accompanied by wording tying the FET standard to the customary international law minimum standard, has been interpreted and applied by reference to some or all of these, or similarly worded, elements. These awards include many cases on which current or former judges of this Court have sat as arbitrator. And, in *no* case, even in the very few cases — less than a handful — where a tribunal has considered an express treaty obligation to accord FET to be a reference to the customary law minimum standard, *in no case* has a tribunal considered that FET is confined to a prohibition of denials of justice. And we invite you to work through that table in due course. We have excerpted the relevant parts of the awards.

26. So, how does the United States support its position to the contrary?

(a) First, it refers to treaty provisions where the FET standard in a treaty *is* expressly tied back to the international law minimum standard of treatment, in particular Article 1105 of the North American Free Trade Agreement (NAFTA), which you can now see on the screen[26]. FET, under Article 1105, is to be accorded, but only as a subset of the international law standard of treatment, not as an autonomous standard. At best, the existence of other *differently worded* provisions emphasizes the importance of a focus on the specific wording agreed to in the provision now before the Court, Article IV (1).

(b) Second, it is said that the Court, in its 2019 Judgment on preliminary objections, has already ruled that Article IV merely reflects the international law minimum standard[27]. Well of course, it has not. The Court merely stated "that the purpose of Article IV [looking at Article IV as a whole]

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[25] See further MI, pp. 87-90, paras. 5.22-5.27, and RI, pp. 126-147, paras. 6.21-6.44.

[26] See CMUSA, pp. 109-110, paras. 14.8-14.10; see also RI, pp. 131-133, paras. 6.14-6.16.

[27] CMUSA, p. 108, para. 14.7; RUSA, p. 118, para. 10.6, referring to *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 28, paras. 57-58.

is to guarantee certain rights and minimum protections" and could not "be interpreted as incorporating, by reference, the customary rules on sovereign immunities". That does not say — and was not intended to say — *anything* about the nature of the rights accorded by Article IV (1) other than with respect to immunity; and I invite you to read in due course the paragraphs at issue, paragraphs 57 and 58 of the 2019 Judgment.

(c) Third, the United States relies on what it calls "historical materials", referring chiefly to a 1967 OECD draft convention and its commentary[28] that is of no relevance in the treaty relations between Iran and the United States of America and which, moreover, has been referred to, but considered unpersuasive, in dozens of investment treaty cases. That is plain from the list of 170-odd cases at tab 13, where in multiple cases reference was made to that 1967 OECD draft and yet it was considered of no material assistance.

27. And it is notable that the Vandevelde treatise on the US FCN programme, which the United States of America refers to in other parts of its defence but *not* in this context, records that the FET provision "imposed an independent standard of treatment", and "an independent obligation on treaty parties that provided a basis for challenging the legality of host state treatment in situations where the other, more precise provisions of the treaty did not apply"[29]. Vandevelde also records:

> "Although the State Department often referred to fair and equitable treatment as prohibiting arbitrary or discriminatory treatment, as shown above, the standard had a broader application. Robert Wilson, a principal FCN treaty negotiator in the 1940s, *identified it as an independent standard that could be distinguished from* national treatment, MFN treatment, reasonable treatment, or *the international minimum standard*."[30]

28. Distinguished from the international minimum standard: so that is precisely the opposite of the United States' characterization in these proceedings.

29. Further, even where tribunals have been looking at the FET standard where it *is* tied back through express treaty language to the international law minimum standard, such as in Article 1105 NAFTA, they have generally identified the same or similar elements to those that I referred to earlier

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[28] RUSA, p. 119, paras. 10.8-10.9, referring to Organisation for Economic Co-operation and Development (OECD), 1967 Draft Convention on the Protection of Foreign Property, 1968, reprinted in *International Law Materials*, Vol. 7 (1), pp. 117 and 119, RUSA, Ann. 374).

[29] K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties*, 2017, pp. 402-403 and 412 (not included at CMUSA, Ann. 3).

[30] K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties*, 2017, p. 411 (not included at CMUSA, Ann. 3).

and they have not interpreted the international law minimum standard as limited exclusively to denials of justice[31].

30. In short, unfair and inequitable treatment contrary to Article IV (1) may take many different forms, of which just one is a denial of justice, and this is supported not just by ordinary meaning, context, object and purpose, and historical materials, but also by an unparalleled body of international cases.

31. I turn to the second element of Article IV (1): "Each High Contracting Party . . . shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests".

32. This second element is again framed in mandatory terms and is again unqualified and of notable breadth. It is truly perplexing that the United States seeks, again, to re-cast this as directed solely against denials of justice[32]. There is no textual support for that; there is nothing in the Treaty's objects and purposes that could suggest such a confined reading; and there is no support in any of the multiple awards which have examined this or the related prohibition of arbitrary or discriminatory measures in multiple FCN and investment treaties.

33. Indeed, in the US submissions before a Chamber of this Court in the *ELSI* case, where the United States was interpreting a prohibition of "arbitrary or discriminatory measures" in the United States-Italy FCN Treaty, it stated "that the prohibition of 'arbitrary or discriminatory' measures should be construed broadly, to protect investors against government action which violated the basic principles of non-discrimination and 'fair play' which underlie the Treaty"[33]. The United States further explained that: "Arbitrary actions include those which are not based on fair and adequate

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[31] See e.g. *Waste Management* v. *Mexico* (No. 2), ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 98; *Mobil Investments Canada Inc. and Murphy Oil Corporation* v. *Canada, Decision on Liability and Quantum*, 22 May 2012, para. 152; *TECO Guatemala Holdings, LLC* v. *Republic of Guatemala*, Award of 19 December 2013, para. 454; *Bilcon of Delaware et al* v. *Government of Canada*, Award on Jurisdiction and Liability, 17 March 2015, paras. 427 and 443; *Union Fenosa Gas* v. *Egypt*, Award of 31 August 2018, para. 9.51; *Joshua Dean Nelson* v. *Mexico*, Final Award, 5 June 2020, para. 322; *Eco Oro* v. *Colombia*, Decision on Jurisdiction, Liability and Principles of Quantum, 9 September 2021, para. 754.

[32] CMUSA, pp. 113-114, paras. 14.24-14.25; RUSA, p. 121, para. 10.13.

[33] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)*, Memorial of the United States of America (15 May1987), p. 76. Unlike its claim under the full protection and security standard, the US claim for breach of this provision was not formulated as a claim for a denial of justice and was articulated as invoking wider protections. See *ELSI*, Memorial of the United States of America (15 May 1987), p. 98.

reasons (including sufficient legal . . . justification), but rather arise from the unreasonable or capricious exercise of authority."[34]

34. Those past US submissions reflect the breadth of the wording and concepts in play, and leave one all the more perplexed by its current position[35].

35. Looking further at the concept of reasonableness, it is well established, and I think this is common ground, that in order for a challenged measure to be reasonable, there must be "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it"[36]. And in assessing whether conduct is indeed unreasonable or arbitrary, tribunals also refer to and apply the concept of proportionality. The many examples include *Electrabel* v. *Hungary* and *Blusun* v. *Italy*, where a tribunal presided over by the late Judge Crawford observed that an assessment of whether a given measure is proportionate may be of particular value because it "carries in-built limitations and is more determinate"[37].

36. As to the third protection for nationals and companies in Article IV (1), this provides: "Each High Contracting Party . . . shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

37. This is a more confined but nonetheless important protection. Again, the United States says that this is solely concerned with denials of justice[38]; again, that is not consistent with the breadth of the terms used or their context[39].

(i) Application of Article IV (1)

38. I move then to the application of Article IV (1), and it is convenient to look together at the breaches of the FET standard and of the prohibition of unreasonable and discriminatory conduct.

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[34] *ELSI*, Memorial of the United States of America (15 May 1987), p. 77; see further RI, p. 148, para. 6.48.

[35] *ELSI*, Memorial of the United States of America (15 May 1987), p. 76 and p. 98.

[36] See *AES Summit Generation Limited and AES-Tisza Erömü Kft* v. *The Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, para. 10.3.9, as quoted with approval in *SolEs Badajoz GmbH* v. *Kingdom of Spain*, ICSID Case No. ARB/15/38, Award of 31 July 2019, para. 326, and *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/1-9, Award, 25 November 2015, para. 179.

[37] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 318. See also *SolEs Badajoz GmbH* v. *Kingdom of Spain*, ICSID Case No. ARB/15/38, Award of 31 July 2019, paras. 327-328.

[38] CMUSA, pp. 115-116, paras. 14.27-14.29.

[39] RI, pp. 150-151, paras. 6.52-6.55.

39. So far as concerns the treatment of Bank Markazi, the United States' introduction of the 2002 Act and then the targeted retroactive legislation into the *Peterson* case[40] in 2012 constitutes a breach of Article IV (1), in at least three separate ways:

(a) First, this is a classic instance of conduct falling within the very frequently applied formulation of arbitrariness from the Judgment in the *ELSI* case — an act which shocks, or at least surprises, a sense of juridical propriety. Bank Markazi was deprived of its separate juridical personality, and I ask you to recall the views of the United States' own agencies that the 1999 bill which was a precursor to the 2002 Act was "fundamentally flawed", including because "it would direct courts to ignore the separate legal status of states and their agencies and instrumentalities"[41]. And then, of course, pursuant to Section 502 of the 2012 Act, Bank Markazi's key defence in the ongoing proceedings were simply nullified[42].

(b) Second, the conduct was unreasonable and disproportionate, including due to the absence of an appropriate correlation between the alleged public policy objective and the measures adopted to achieve it. Bank Markazi had no involvement, or even an alleged involvement, in any of the alleged acts concerned in the underlying judgments[43].

(c) And third, justice has been denied, as I have already outlined.

40. As to the United States' removal of the right of the other Iranian companies to assert their juridical status, thus making them subject to default judgments against Iran, the same basic points apply. Again, a fundamental line of defence was denied; again, Iranian companies were made subject to judgments made against Iran in proceedings to which Iranian companies were not party, and in which no allegations were made against them[44].

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[40] Table of Enforcement Proceedings against Iranian Assets Resulting in Seizure of Property, judges' folder, tab 2, Item No. 8.

[41] US House of Representatives, Report on the Justice for Victims of Terrorism Act, 13 July 2000, H. R. Rep. No. 106-733, at p. 12 (MI, Annex 12).

[42] RI, p. 156, para. 6.65 *(a)*.

[43] See further RI, pp. 166-169, paras. 6.89-6.95. See also table at judges' folder, tab 2.

[44] Table of Enforcement Proceedings against Iranian Assets Resulting in Seizure of Property, judges' folder, tab 2, Items 1-7, 9-10 and 12.

41. On your screen now, you see the words of the United States' own agencies in the year 2000 in their statement to Congress, in a passage that you have not yet been taken to. The departmental agencies wrote:

> "There are also significant problems with the provision of the proposed legislation that would change the way the FSIA defines a foreign state's agencies, and majority owned or controlled instrumentalities for terrorism-list countries where there is a terrorism-related judgment against it. This provision would overturn the Congress's own considered judgment when it passed the FSIA in 1976, as well as existing Supreme Court case law and basic principles of corporate and international law."

The United States has four responses that are useful to address up front.

42. First, it says that Iran has not provided a clear statement of which cases are subject to Iran's Article IV (1) claim[45]. But the cases and Iranian companies affected are set out in Iran's written submissions[46], and the salient details are now in the table at tab 2 of the judges' folder, at items 1-10 and 12.

43. Second, the United States says, "the Iranian companies were fully able to engage in the same legal process available to all other litigants in the United States", and to this end it references the ability to examine witnesses, present evidence, hire counsel and so on[47]. But that is to misunderstand the nature of the standards under Article IV (1) and also to ignore Iran's complaint, which concerns not the minutiae of court procedure, but rather the inevitability of Iranian companies losing — because of the US legislation.

44. Third, the United States says in the context of Article IV (1) that it was entitled to pierce the corporate veil, and to this end it relies on the *Barcelona Traction* case[48]. But there is no suggestion in the Treaty that the Parties intended any such exception to Article III (1). Further, the Court's reasoning on lifting the corporate veil in *Barcelona Traction* is predicated on there being a "wealth of practice already accumulated on the subject in municipal law", and it refers to instances where the veil is lifted — "to prevent the misuse of the privileges of legal personality, as in certain cases of

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[45] RUSA, pp. 127-128, para. 10.30.

[46] RI, pp. 34-76, paras. 2.40-2.120, pp. 155-157, para. 6.65.

[47] RUSA, p. 127, para. 10.28.

[48] RUSA, pp. 129-131, paras. 10.36-10.37.

fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations"[49].

(a) Yet none of those instances of manipulation of corporate identity is applicable on the current facts. Indeed, as Professor Thouvenin noted earlier, the US agencies correctly identified in their submission to Congress in the year 2000, what the United States is in fact doing is "overturning Supreme Court precedent and basic principles of corporate law and international practice"[50].

(b) The United States does now assert that: "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"[51]. Yet no evidence is offered to back up this untenable assertion. The US measures were not aimed to address, and as a matter of fact do not address, instances of manipulation of corporate identity by Iran — because there have been no such instances. Indeed, if such instances had truly been in play, there would have been no reason for the US legislation to override the so-called *Bancec* criteria[52], a criteria established by its Supreme Court.

(c) Moreover, if the United States wishes to build its case on what it calls "valid, unpaid judgments against Iran", it must establish that validity. In the current context, that means establishing validity as a matter of international law: the United States cannot, of course, rely on its domestic law to justify a breach of its obligations of the 1955 Treaty. And if the United States is asking you to exercise your incidental jurisdiction to assess the validity of its judgments as a matter of international law, then that could not assist it — as the judgments against Iran were all made in breach of Iran's entitlement to immunity as a matter of customary international law.

45. Fourth, and finally, it could not somehow be enough to assert that the Iranian companies at issue are all agencies or instrumentalities of Iran[53]. The alleged support for terrorism, which is

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[49] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 39, para. 56.

[50] US House of Representatives, Report on the Justice for Victims of Terrorism Act, 13 July 2000, H. R. Rep. No. 106-733, at p. 12 (MI, Annex 12).

[51] RUSA, pp. 74-75, para. 8.9.

[52] *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, US Supreme Court, 17 June 1983, 462 U.S. 611 (1983) (MI, Annex 23).

[53] RUSA, pp. 138-139, para. 10.62.

based merely on the series of default judgments, concerns alleged acts of Iran. Those default judgments are being enforced against the property of Iranian companies in circumstances where the United States has abrogated its usual domestic law rules that delineate the limited circumstances where property of a State entity can exceptionally be regarded as property of the State[54], and where there are no allegations that the Iranian companies were involved in the alleged unlawful acts at issue. They are brought into the frame much later simply because they have property in the United States of America which the United States considers it convenient to take to satisfy its own aims.

46. Turning finally to the application of the third protection in Article IV (1), the United States is also in breach of the obligation to assure effective means of enforcement for the lawful contractual rights of Iranian companies, namely Bank Melli and TIC. It is not disputed that the funds of Bank Melli and TIC, which were enforced against in order to satisfy default judgments against Iran, represented lawful contractual debts owed by US companies. The United States does say that Bank Melli did not attempt to enforce its contractual rights, but this is to ignore the fact that Bank Melli did appear before the US court to contest the seizure of its properties, but of course, to no avail[55].

47. Mr. President, Members of the Court, I thank you for your attention and ask you to invite Mr. Aughey to continue Iran's opening submissions.

The VICE-PRESIDENT, Acting President: I thank Mr. Samuel Wordsworth and I give the floor to Mr. Aughey. You have the floor.

Mr. AUGHEY:

~~***Mr. President, Members of the Court, it is a privilege to appear before you and an honour to have been asked by Iran to develop its arguments on breach by the United States of Articles IV (2), V (1) and X (1) of the Treaty of Amity. I will address these provisions in turn.***~~

[54] MI, pp. 28-29, paras. 2.30-2.31, with respect to Section 1083 National Defense Authorization Act, 2008, introducing a new Section 1610 *(g)* (1) into the 28 US Code.

[55] RI, pp. 52-55, paras. 2.73-2.78.

PART VI

IRAN'S CLAIMS FOR BREACH OF ARTICLES IV (2), V (1) AND X (1)

A. Introduction

1. ***Mr. President, Members of the Court, it is a privilege to appear before you and an honour to have been asked by Iran to develop its arguments on breach by the United States of Articles IV (2), V (1) and X (1) of the Treaty of Amity. I will address these provisions in turn.***

2. The relevant facts are summarized in the table at tab 2 of the judges' folder.

3. Iran's claims under Article IV (2) and Article V (1) concern the property of Iranian companies that has been "blocked", and/or seized and disposed of, as summarized in items 1-10 and 12 of the table. There are four categories:

(a) First, the building in New York owned by Bank Melli which had been "blocked" pursuant to Executive Order in 2007. This was seized in 2009 pursuant to the 2002 TRIA, a sale was forced and the proceeds of around US$1.35 million were distributed in the *Weinstein* proceedings in 2012[56];

(b) Second, the three sets of funds representing lawful contractual debts owed by US companies to Iranian companies at issue in the *Heiser* proceedings, namely: *(a)* US$613,000 owed to the Telecommunication Infrastructure Company (TIC) by Sprint, which had not been "blocked" but was seized and distributed in August 2011[57]; *(b)* US$4.2 million owed to Bank Melli and Bank Saderat by Mastercard for services provided, which had been "blocked" by Executive Orders in 2007 and was seized and distributed in October 2013[58]; *(c)* US$17.6 million owed to Bank Melli by two US credit card companies in respect of credit card services provided in Iran, which had

[56] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 1; RI, pp. 48-51, paras. 2.63-2.69; *Weinstein, et al.* v. *Islamic Republic of Iran, et al.*, US District Court, Eastern District of New York, 20 Dec. 2012, No. 12 Civ. 3445, (E.D.N.Y. 2012), MI, Ann. 54.

[57] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 3; RI, pp. 72-73, paras. 2.109-2.112.

[58] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 2, item No. 10; RI, pp. 55-57, paras. 2.79-2.83, *Levin, et al.* v. *Bank of New York, et al.*, US District Court, Southern District of New York, Judgment and Order Directing Turnover of Funds and Discharge, 31 Oct. 2013, No. 09 Civ. 5900 (S.D.N.Y. 2013), MI, Ann. 60.

been "blocked" pursuant to Executive Orders in 2007 and 2012 and which was seized in 2013 and distributed in April 2020[59];

(c) The third category comprises around US$1.8 billion owned by Bank Markazi at issue in the *Peterson* case, which had been "blocked", as you have heard in 2012 by Executive Order 13599 and then seized pursuant to the 2002 TRIA and the targeted retroactive legislation introduced by the 2012 ITRSHRA, culminating in the distribution of those assets to the plaintiffs in June 2016[60];

(d) the fourth category is around US$6.3 million owned by various other Iranian companies held in US bank accounts. And those funds were also "blocked", seized and then distributed in the *Heiser* proceedings in various judgments between 2012 and 2016[61].

4. In each instance, the property of Iranian companies was taken without compensation and handed over to plaintiffs holding default liability judgments against Iran. This amounts to an unlawful expropriation, as well as a failure to accord most constant protection and security, in breach of Article IV (2) and a breach of the obligation under Article V (1) to permit Iranian companies to dispose of their property in the territory of the United States.

5. Iran's claim for breach of Article X (1) encompasses the same measures as well as those summarized at items 11 and 13 of the table. I refer to the "blocking" in 2012 and the seizure and distribution in April 2016 of around US$9.5 million representing the lawful contractual debt owed to Iran's Ministry of Defence by a US company, Cubic, under a commercial contract[62]. And also to the seizure and distribution in the *Heiser* proceedings of "blocked" funds owned by the Iranian Navy, which had been deposited in a US bank account as collateral for a letter of credit[63].

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[59] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 7; RI, pp. 51-55, paras. 2.70-2.78. *Bennett, et al.* v. *The Islamic Republic of Iran, et al*., US District Court for the Northern District of California, Order Granting Motion to Lift Stay and for Withdrawal, 24 Apr. 2020, No. 3:11-cv-05807CRB (S.D. Cal. 2020), RI, Ann. 85.

[60] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 8.

[61] See Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, items Nos. 4, 5, 6, 9 and 12; RI, pp. 74-75, paras. 2.113-2.118.

[62] Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 11; RI, pp. 15-16, para. 2.3, fn. 48; *Ministry of Defense of Iran* v. *Cubic, et al.*, US District Court, Southern District of California, 29 Apr. 2016, No. 98-cv-1165 (S.D. Cal. 2016), MI, Ann. 67.

[63] Table of enforcement proceedings against Iranian assets resulting in seizure of property, judges' folder, tab 2, item No. 13.

B. Article IV (2)

6. Turning in more detail to the provisions of the Treaty, I start with Article IV (2), which contains two separate limbs and establishes two separate protections for the property of Iranian nationals and companies.

7. Focusing on the expropriation provision, which is on your screens, this states: "Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation." And that is in the second sentence.

8. There are three points on interpretation to emphasize.

9. First, there is no restriction on the type of property to which this provision applies. Both limbs of Article IV (2) apply to intangible "interests in property". This is express in the first sentence and, the words "such property" at the start of the second sentence refer back to this definition of property. By contrast, where the drafters intended to refer to a specific type of property they did so expressly, as in Articles IV (3) and V (1), which refer to "premises" and "real property" respectively.

10. The second point on interpretation is that, on its face, this provision applies to expropriation by any part of the State — the executive, the legislature or the judiciary. The United States contends that there can be no judicial expropriation without an illegal act on the part of the court or in the chain of events leading up to the judgment[64].

11. This is irrelevant because the US executive, legislative and judicial measures together comprise a series of acts, the combined effect of which amounts — and was intended to amount — to a taking. The United States contends that the decisions of its courts should be "considered separately from legislative and executive branch actions"[65]. But as Mr. Wordsworth explained, the US courts were merely the conduit for the implementation of legislative and executive measures. The US courts were not, as the United States now claims, "acting in the role of neutral and independent arbiters of legal rights"[66]; rather, they had no choice but to apply the plain terms of the legislative and executive measures. And, as you have heard from Mr. Wordsworth, the US measures have denied justice to the relevant Iranian companies, including Bank Markazi.

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[64] RUSA, p. 156, paras. 11.35-11.36.

[65] *Ibid.*, para. 11.35.

[66] *Ibid.*, p. 145, para. 11.3.

12. In any event, there is no textual or other basis for limiting Article IV (2) as the United States would wish. The key question when applying the expropriation provision is whether there has been a prohibited taking, that is, a substantial deprivation of property that is not both for a public purpose and accompanied by compensation. Article IV (2) expressly permits lawful expropriation, but this is irrelevant since the property of Iranian companies, including Bank Markazi, has been taken without any compensation.

13. The third point on interpretation is that the US justification for all the takings in this case rests on the "police powers" doctrine under customary international law. The United States now asserts that the applicability of this customary rule is a matter of basic and fundamental importance[67]. Why then, one wonders, was the police powers exception neither referred to in Article IV (2)[68], nor mentioned by the US State Department official when explaining the scope of the 1955 Treaty to the Senate Committee on Foreign Relations and seeking its approval[69], nor referred to in the US State Department's detailed study on US FCN treaties?[70]

14. In any event, the United States also seeks to water down the "police powers" doctrine by denying any role for considerations of whether the given taking is proportionate[71]. But the test of whether something is a protected exercise of regulatory powers necessarily includes an element of proportionality. Thus, as the tribunal in *Philip Morris* v. *Uruguay* (which included the late Judge Crawford) explained:

> "As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the

[67] CMUSA, pp. 135-138, paras. 14.78-14.81.

[68] See US Model BIT 2004, Ann. B (available at https://ustr.gov/sites/default/files/U.S. model BIT.pdf, last accessed on 18 Sept. 2022), p. 38.

[69] Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcommittee of the Senate Committee On Foreign Relations, 82nd Cong. 4 (1952), Statement of Harold F. Linder, Deputy Assistant Secretary for Economic Affairs, p. 398, CMUSA, Ann. 2; Commercial Treaties with Iran, Nicaragua and the Netherlands: Hearing Before the Senate Committee on Foreign Relations, 84th Cong. (1956), Statement of Thorsten V. Kalijarvi, Department of State, p. 21, CMUSA, Ann. 1.

[70] C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", US Department of State (1962), excerpts, pp. 115-119, MI, Ann. 20, pp. 287-291.

[71] RUSA, pp. 151-152, para. 11.25, pp. 153-155, paras. 11.29-11.34.

> action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate."[72]

15. Moreover, proportionality is ***also*** inherent in the US formulation of the "police powers" doctrine, that is, ***is there a*** bona fide regulatory measure designed and applied to protect a public welfare interest?[73] A bona fide regulatory measure is, by its nature, one free from arbitrariness or unreasonableness. The same concepts of arbitrariness and unreasonableness apply whether one is talking about the fair and equitable treatment (FET) provision or the police powers doctrine. And, as Mr. Wordsworth explained, many tribunals have recognized that unreasonableness necessarily entails some consideration of proportionality. How else can an international court or tribunal assess whether a measure is genuinely designed and applied to protect a legitimate public welfare aim, if it is precluded from considering whether the measure is necessary and suitable to protect that interest? And how could a measure that any observer would consider to be grossly excessive as a response be regarded as "reasonable"?

16. I move to the prohibited expropriations of property in this case[74].

17. The existence of the takings in each case falling under the four categories that I outlined at the outset cannot be denied. The design and effect of the relevant US measures, as implemented by the US courts was, for the property of Iranian companies to be taken and given to plaintiffs in cases against Iran.

18. As Mr. Wordsworth has explained, each of these takings is unreasonable, including because it is disproportionate. The Iranian companies have been subject to an undue and excessive burden. The measures are said to be justified by the policy goal of securing compensation for default judgment creditors against Iran. Two points in response. *First*, the aim of securing compensation for judgment creditors cannot justify the taking of any and all measures that might have that intended result. The situation is in no way comparable to the compulsory purchase of specific land in order to

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[72] *Philip Morris* v. *Uruguay*, ICSID Case No. ARB/10/7 (Bernardini, Born, Crawford), Award of 8 July 2016, para. 305. See also *Olympic Entertainment Group AS* v. *Republic of Ukraine*, PCA Case No. 2019-18, Award of 15 April 2021, paras. 89-90; *Marfin Investment Group Holdings SA and others* v. *Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, paras. 981-983; *Técnicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paras. 121-122; *Azurix Corp.* v. *Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 311-312*; Burlington Resources Inc.* v. *Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 Dec. 2012, para. 504.

[73] RUSA, pp. 153-154, paras. 11.29-11.30 citing *Lone Pine Resources Inc.* v. *Government of Canada*, NAFTA/ICSID Case No. UNCT/15/2, Submission of the United States of America, para. 16, 16 Aug. 2017, RUSA, Ann. 154.

[74] RI, pp. 179-182, paras. 7.18-7.24.

build a specific railway. But even in that context, for example, a State could not justify inflicting against the landowner oppressive measures merely on the basis that this might result in forcing him or her to sell the land. *Second*, it was unreasonable — and as Mr. Wordsworth noted earlier — in 2000, the United States' own agencies had recognized that it would be unreasonable for the United States to disregard the separate juridical status of the Iranian companies and to take their property to satisfy judgment debts against Iran, to which those companies were not party and in respect of alleged acts in which they were not even alleged to have been involved.

19. The United States has also breached Article IV (2) through the indirect taking of property of Iranian companies, and that is through the earlier "blocking" of their assets pursuant to Executive Order 13599. The effect of such "blocking" measures having been in force since 2012 is that the owners have been "radically deprived of the economic use and enjoyment of their property as if the rights had ceased to exist"[75].

20. Turning to the other, separate, protection contained in the first sentence of Article IV (2), and this is again on the screen:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law."[76]

21. Iran's interpretation of this provision has been set out in detail in its written pleadings[77]. The same conduct which Mr. Wordsworth has explained gives rise to breaches of the FET provision in Article IV (1) also breaches the protection and security provision in Article IV (2).

C. Article V (1)

22. Moving then to Article V (1), which is shown on the screen:

> "Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: . . . *(c)* to dispose of property of all kinds by sale, testament, or otherwise."

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[75] RI, pp. 180-181, para. 7.22.

[76] See further C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", US Department of State (1962), excerpts, pp. 112-113, MI, Ann. 20, pp. 284-285.

[77] RI, pp. 172-180, paras. 7.4-7.22.

23. This is a discrete head of breach, and the language is straightforward. The United States is obliged to permit all Iranian nationals and companies to dispose of their property in the territory of the United States. The protection is not limited to nationals and companies who are engaged in commercial activities or to property related to such activities.

24. The United States contends that the obligation will only be engaged where the relevant national or company has actually attempted to dispose of its property and has been prevented from doing so[78]. Yet, Article V (1) establishes a right to dispose of property which may be exercised at any time. The United States' apparent position that its confiscation of the property of Iranian companies somehow prevents this provision from becoming engaged renders the right illusory[79].

25. The United States also contends that the provision goes no further than a protection on most-favoured-nation (MFN) treatment basis because it says the second sentence of Article V (1) qualifies the first[80]. That is plainly wrong. As follows from the ordinary meaning of the words, the MFN provision is separate and additional[81]. The treatment accorded in these respects shall, repeating the mandatory word in the first sentence, in no event be less favourable than that accorded to nationals and companies of any third country.

26. Turning to the application of Article V (1), it is undisputed that various Iranian companies had property in the United States, as outlined at the outset. The right of these Iranian companies to dispose of their property located in the United States has been rendered illusory because all such property at issue in this case has been "blocked" and/or seized, and then disposed of.

D. Article X (1)

27. I move to the final provision, Article X (1). Pursuant to this provision: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

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[78] RUSA, pp. 176-177, para. 12.41.

[79] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 201, para. 83.

[80] RUSA, pp. 175-176, para. 12.38.

[81] C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", US Department of State (1962), excerpts, p. 183 (MI, Ann. 20, p. 309).

28. The provision does not protect commerce as such but "freedom" of commerce between the territories of the two States[82]. Of course, the Court has looked at this provision several times before, most importantly in its detailed analysis in the *Oil Platforms* case, concluding that, as follows from the ordinary meaning of the words, "commerce" is a broad concept (not restricted to maritime commerce or to trade in goods). As the Court found in paragraph 78 of its Judgment on preliminary objections in the present case, there is no reason to depart from this settled view[83].

29. Yet, the United States is asking the Court to reverse its interpretation of Article X (1) in *Oil Platforms* and to replace the words "freedom of commerce" with the words "freedom of direct maritime commerce by trade in goods"[84]. This is a bold attempt to rewrite the Treaty and, moreover, the Court's jurisprudence. It is, with great respect, hopeless.

30. First, the United States' argument that "commerce" means maritime commerce only was specifically rejected by the Court in *Oil Platforms*, ruling that

> "[t]he Treaty of 1955 is thus a Treaty relating to trade and commerce in general, and not one restricted purely to maritime commerce . . . [T]he view that the word 'commerce' in Article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court."[85]

31. This ruling was endorsed by the Court in its 2019 Judgment on preliminary objections[86]. The United States may wish to gloss over this awkward history and to repeat its earlier position, but the US pleadings breathe no new life into the argument.

32. Second, the United States' argument that "maritime commerce" must in turn be limited to trade in goods because this is the only form of commerce involving maritime vessels[87] both adds nothing and disregards the Court's further ruling in *Oil Platforms* that "the expression 'international

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[82] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.

[83] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 34, para. 78.

[84] RUSA, pp. 162-163, paras. 12.4-12.5, pp. 164-165, para. 12.10.

[85] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 817, paras. 41-43. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 199, para. 80.

[86] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 27, para. 78.

[87] RUSA, p. 165, paras. 12.11-12.12.

commerce' designates, in its true sense, 'all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations'"[88].

33. Plainly the Court was not suggesting that "commerce" is limited to trade in goods[89]. As of 1955, the Treaty parties would have been acutely aware when deciding not to define "commerce" that this was a broad and evolving term, referring to a class of activity that could change over the lifetime of the Treaty[90].

34. The United States contends that the Treaty parties must be free to erect such legal impediments as they wish because they cannot have intended to prohibit the execution of judgments of domestic courts or restrictions and regulations on customs, imports and currency exchange which are referred to in Articles VII and IX of the Treaty[91]. This is a non sequitur. Iran's good faith interpretation of Article X (1) in the context of the other Treaty provisions does not prohibit such measures. By contrast, the interference with freedom of commerce effected by the specific US measures is not rendered permissible by any other provision of the Treaty.

35. In *Nicaragua*, the Court recognized the breadth of acts that may interfere with freedom of commerce, finding that

> "it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports . . . [T]he laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce."[92]

36. Here, the US measures "blocking" the relevant assets of the relevant Iranian companies in 2012 pursuant to Executive Order 13599, disregarding their separate juridical status, and seizing and disposing of their assets, have made it impossible for Iranian companies to engage in commerce between Iran and the United States. The mining of a port where trade takes place can be seen as the physical equivalent to the automatic "blocking" and/or seizure of all assets of Iran and Iranian

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[88] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 818, para. 45.

[89] RUSA, p. 166, para. 12.13.

[90] See *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 243, para. 66; RUSA, pp. 166-167, para. 12.14.

[91] *Ibid.*, p. 174, paras. 12.34-12.35.

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

financial institutions, including where Bank Markazi, as Iran's Central Bank, provides a necessary gateway to commerce.

37. The United States' only response is to assert that commerce between Iran and the United States at the time of Iran's claim was hypothetical[93]. But Article X (1) protects "freedom of commerce", not commerce per se. In any event, it is indisputable that, at the time of Iran's Application in June 2016, commerce existed and was permitted by the United States[94]. According to the US Census Bureau, there were exports to Iran of around US$159 million and imports from Iran of US$79.2 million in that year alone[95].

38. I have already referred to the category of cases involving the seizure of funds representing contractual debts lawfully owed by US companies to Iranian companies in respect of credit card and telecommunication services performed in Iran. This is money that United States companies promised to pay Iranian companies for performing, at their own expense, services in Iran. The United States does not dispute that these services were provided, that the provision of those services was lawful under US law at the time, and that the money was lawfully owed. Its assertion that Iran has failed to provide evidence that these transactions involved "commerce" is therefore puzzling[96]. I have also referred to the debt owed to Iran's Ministry of Defence by the US company Cubic under a commercial contract[97]. This is a situation in which an international arbitration tribunal issued an award in the Ministry of Defence's favour. In each instance, the seizure and turnover by the United States of the funds representing these contractual debts has interfered with the freedom of commerce between Iran and the United States.

39. The funds of the various other Iranian companies and the Iranian Navy held in bank accounts in the United States, which were at issue in the *Heiser* proceedings, were also generated by

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[93] RUSA, pp. 169-170, para. 12.22.

[94] Written Statement of the Islamic Republic of Iran on the Preliminary Objections of the United States of America (WSI), 1 Sept. 2017, pp. 18-21, paras. 2.19-2.26.

[95] US Census Bureau, *Trade in Goods with Iran*, available as of 22 Jan. 2017, p. 550, MI, Ann. 97.

[96] RUSA, p. 173, para. 12.32.

[97] RI, pp. 15-16, para. 2.3, fn. 48; see *Ministry of Defense of Iran* v. *Cubic et al.*, US District Court, Southern District of California, 29 Apr. 2016, No. 98-cv-1165 (S.D. Cal. 2016), MI, Ann. 67.

and/or used for commercial purposes[98]. The seizure and turnover of those assets to the *Heiser* judgment creditors in 2013 and 2016 was similarly an interference with freedom of commerce.

40. As to Bank Markazi, Professor Thouvenin has explained that its investment and trading in the securities interests at issue in the *Peterson* case was a commercial activity for the purposes of the Treaty. The transactions involved commerce between the territories of Iran and the United States. It is immaterial that Bank Markazi purchased and held the securities through a non-US intermediary, Clearstream, which maintained an account in New York with the US bank, Citibank. This was plainly a form of commerce, and the US courts held that Clearstream was acting as Bank Markazi's agent[99]. There is no question that Bank Markazi was the sole beneficial owner of the proceeds in the New York bank account[100].

41. On the very different facts in *Oil Platforms*, the Court held that a series of distinct but unidentified transactions involving the sale of Iranian oil and the ultimate purchase by a customer in the United States was not commerce between Iran and the United States. What was determinative in that case was the "nature of the successive commercial transactions" because the Court found that "[a]fter the completion of the first contract Iran had no ongoing financial interest in, or legal responsibility for, the goods transferred"[101]. Once goods are sold on to the open market, so that they can be bought or sold by practically anyone, there is no commerce between the territories of the High Contracting Parties. The United States is plainly wrong to seek to portray this specific finding as a general pronouncement that commerce between the two territories involving intermediaries can never be covered by Article X (1)[102].

42. And the position on the facts in *Peterson* is diametrically opposed to the facts in *Oil Platforms*. The finding of the US courts in the *Peterson* case was predicated on their finding that

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[98] RI, pp. 74-75, paras. 2.114-2.115.

[99] CMUSA, Ann. 108, p. 17. See also RI, p. 61, para. 2.93.

[100] RUSA, pp. 172-173, para. 12.31.

[101] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 207, para. 97.

[102] RUSA, p. 171, para. 12.26, p. 171, para. 12.28.

Bank Markazi did have an "ongoing financial interest" in the relevant assets[103]. This was an interference with freedom of commerce between the territories of Iran and the United States.

43. A final point. While the interference with freedom of commerce is evidenced by the 2012 "blocking" measures and the enforcement cases against the Iranian companies to which I have referred, the severity of that interference has to be understood in the context of the US$120 billion in damages rendered by US courts in cases against Iran. From 2008, there was no question that *any* assets located in the United States of *any* Iranian company in which the State of Iran held any form of interest, however indirect, would be subject to seizure, even if that property was not "blocked" by Executive Order. Thus, the United States made commerce between the territories impossible for any such Iranian company[104].

44. Mr. President, Members of the Court, I thank you for your attention and ask that you call Professor Pellet to continue Iran's opening submissions.

The VICE-PRESIDENT, Acting President: I thank Mr. Aughey. Je donne la parole à présent au professeur Alain Pellet. Vous avez la parole.

M. PELLET :

PARTIE VII

L'ARTICLE XX, PARAGRAPHE 1, DU TRAITÉ D'AMITIÉ NE FAIT PAS OBSTACLE AUX DEMANDES DE L'IRAN CONCERNANT LE DÉCRET (E. O.) 13599

1. Merci beaucoup Monsieur le président. Monsieur le président, Mesdames et Messieurs les juges, à l'appui de leur première exception préliminaire, les Etats-Unis s'étaient prévalus, avec une apparente conviction, des alinéas *c)* et *d)* du premier paragraphe de l'article XX du traité d'amitié, de commerce et de droits consulaires du 15 août 1955[105]. Cette exception portait exclusivement sur les «demandes de l'Iran découlant des mesures adoptées par les Etats-Unis pour bloquer les actifs

[103] *Peterson* v. *Islamic Republic of Iran*, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013), CMUSA, Ann. 108, pp. 16-18.

[104] Section 1083 *(b)*(3) of the US National Defense Authorization Act (NDAA) for the Fiscal Year 2008, MI, Ann. 15, judges' folder, tab 5.

[105] Exceptions préliminaires soulevées par les Etats-Unis d'Amérique (ci-après «EPEU»), p. 56-71, par. 7.1-7.37.

iraniens, conformément au décret présidentiel n° 13599»[106] du 5 février 2012[107]. Cette exception a été unanimement rejetée par la Cour par son arrêt du 13 février 2019[108]. Pour s'opposer aux demandes de l'Iran concernant l'application de l'*Order*, l'Etat défendeur invoque à nouveau ces mêmes dispositions dans ses écritures sur le fond[109]. C'est à cette exception «relookée» que je vais m'essayer et m'employer à répondre.

2. Un premier constat s'impose : l'argument des Etats-Unis ne porte, comme ils en conviennent expressément, que sur «l'une des mesures contestées» par l'Iran[110], «one of the challenged measures», c'est-à-dire sur l'*Executive Order* 13599. Selon son titre même, ce décret concerne le «Blocage des biens du gouvernement iranien et des institutions financières iraniennes». Concrètement, ce texte ne joue qu'un rôle mineur dans l'affaire qui nous occupe qui, comme M[e] Vidal l'a expliqué ce matin, porte principalement sur la confiscation définitive et la distribution de ces biens. Dans certains cas, les avoirs visés par l'*Order* avaient d'ailleurs déjà été bloqués bien avant 2012, à la suite d'autres décisions, notamment l'*Executive Order* 13382 de 2005[111], qui a entraîné en particulier le blocage des avoirs des banques Melli et Sepah en 2007[112]. Et, même pour la banque Markazi, que l'*Order* de 2012 vise expressément, celui-ci a des conséquences limitées : certes il a pour effet de bloquer les fonds que cette banque détient aux Etats-Unis mais les plaignants dans la fameuse affaire *Peterson* en avaient déjà obtenu la saisie conservatoire en juin 2008[113]. Ce sont ces fonds qui seront ensuite confisqués ; mais, en fin de compte, l'*Order* n'y est pour rien.

3. Il ne s'agit donc que d'un élément particulier parmi le large éventail de mesures exécutives, législatives et judiciaires imposées à l'Iran par les Etats-Unis, y compris parmi celles qui font l'objet de la présente affaire. En visant, expressément et exclusivement, l'*Order* 13599, l'Etat défendeur

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[106] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 8.

[107] U.S. Executive Order 13599, 5 February 2012, 77 Fed. Ref. 6659 (MI, annexe 22).

[108] *Ibid.*, p. 25, par. 45-47.

[109] CMEU, p. 76-77, par. 11.2.

[110] CMEU, p. 5, par. 1.18 ; DEU, p. 58, par. 7.1.

[111] Executive Order 13382 "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters", 70 Fed. Reg. 38567, 28 juin 2005 (EPEU, annexe 197).

[112] U.S. Department of Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism, 25 octobre 2007* (RI, annexe 9) ; Iran's Bank Sepah Designated by Treasury Sepah Facilitating Iran's Weapons Program, 9 janvier 2007 (disponible à l'adresse suivante : https://home.treasury.gov/news/press-releases/hp219, consultée le 18 septembre 2022).

[113] Voir RI, p. 62, par. 2.96 ; voir aussi *Peterson, et al.* v. *Islamic Republic of Iran, et al.*, U.S. District Court, Southern District of New York, 28 février 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 5 (MI, annexe 58).

reconnaît que les autres mesures contestées ne tombent pas sous le coup des alinéas *c)* et *d)* de l'article XX, paragraphe 1.

4. Pour rappel, les dispositions invoquées par les Etats-Unis se lisent ainsi :

> «1. Le présent Traité ne fera pas obstacle à l'application de mesures :
>
> . . . . . .
>
> *c)* Réglementant la production ou le commerce des armes, des munitions et du matériel de guerre, ou le commerce d'autres produits lorsqu'il a pour but direct ou indirect d'approvisionner des unités militaires ;
>
> *d)* Ou nécessaires à l'exécution des obligations de l'une ou l'autre des Hautes Parties contractantes relatives au maintien ou au rétablissement de la paix et de la sécurité internationales ou à la protection des intérêts vitaux de cette Haute Partie contractante sur le plan de la sécurité.»

5. Avant de se pencher successivement sur chacun de ces motifs, il n'est pas superflu de donner quelques précisions concernant le principe même du contrôle qu'il vous appartient d'exercer sur la mesure que constitue l'*Executive Order* 13599 et sur les modalités de cet examen.

I. Etendue et modalités du contrôle par la Cour

6. Monsieur le président, dans notre affaire, l'article XX du traité d'amitié envisage des exceptions à l'application de certaines des règles qu'il pose. Leur interprétation doit être stricte *(exceptio est strictissimae applicationis)*[114]. Et ces exceptions ne constituent nullement un blanc-seing permettant aux Etats parties d'agir de manière arbitraire et artificielle. Leur invocation et leur mise en œuvre sont nécessairement régies par le droit international. Si vous laissiez l'appréciation de ces critères fixés par le paragraphe 1 au seul jugement de l'Etat qui les invoque, la sécurité juridique assurée par le traité serait réduite à néant — au mépris du principe *pacta sunt servanda*.

7. Il vous faut donc vous assurer que l'application de l'*Executive Order* entre effectivement dans le cadre des alinéas *c)* et *d)* de l'article XX — c'est-à-dire qu'elle relève de la règlementation

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[114] Voir *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 76 ; Lotus, *arrêt n° 9, 1927, C.P.J.I. série A n° 10*, opinion dissidente de M. le juge Loder, p. 39 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 103, par. 212 ; rapport du Groupe spécial, *Russie — Mesures concernant le trafic en transit*, WT/DS512/R, OMC, 5 avril 2019, p. 41-42, par. 7.65 et suiv.

de la production ou du commerce des armes, ou de la protection des intérêts vitaux de sécurité, et qu'elle ne porte pas atteinte aux principes fondamentaux du droit international.

8. En effet, cette évaluation ne doit pas être effectuée en vase clos. Comme la Cour l'a souligné dans l'affaire des *Plate-formes pétrolières*, elle «ne saurait admettre qu[e de telles dispositions] ai[en]t été conçu[es] comme devant s'appliquer de manière totalement indépendante des règles pertinentes du droit international»[115]. Dans la présente affaire, c'est à la lumière des règles et principes relatifs à la protection des droits fondamentaux des acteurs économiques iraniens, tant de l'Etat que des institutions financières, que l'article XX, paragraphe 1, doit être interprété et que l'application de l'*Executive Order* doit être appréciée. Vous ne sauriez accepter que les Etats-Unis se prévalent de ces dispositions pour violer ces principes fondamentaux.

9. Il vous appartient en outre de vous assurer que l'*Executive Order* est conforme au principe de nécessité[116]. Les Etats-Unis en conviennent puisqu'ils justifient le recours à l'alinéa *c)* (sur la production et le commerce des armes) en affirmant que «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»[117]. Qu'il s'agisse de l'invocation de l'alinéa *c)* ou de l'alinéa *d)*, c'est donc pour les besoins de leur sécurité que les Etats-Unis prétendent avoir adopté le décret.

10. L'examen de la nécessité implique inévitablement celui de la proportionnalité, c'est-à-dire, comme l'a très clairement expliqué un groupe spécial de l'OMC : «un «processus de soupesage et de mise en balance d'une série de facteurs», qui inclut … l'importance relative des intérêts ou valeurs promus par la mesure contestée, [et] la contribution de la mesure à la réalisation des objectifs qu'elle poursuit»[118]. A cette fin, selon les termes de la sentence intérimaire dans *Deutsche Telecom c. Inde*,

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[115] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, p. 182, par. 41.

[116] Voir *infra*, par. 29-30.

[117] DEU, p. 62, par. 7.13.

[118] Rapport du Groupe spécial, *Brésil — Mesures visant l'importation de pneumatiques rechapés*, WT/DS332/R, OMC, 12 June 2007, p. 168-169, par. 7.104, faisant référence à : rapport du groupe spécial, *Etats-Unis — Section 337*, OMC, 7 novembre 1989, p. 52-53, par. 5.26 ; rapport de l'Organe d'appel, *Corée — Diverses mesures affectant la viande de bœuf*, WT/DS161/AB/R et WT/DS169/AB/R, OMC, 11 décembre 2000, p. 57-58, par. 164-166 ; rapport de l'Organe d'appel, *CE — Amiante*, WT/DS135/AB/R, OMC, 12 mars 2001, p. 62-63, par. 172 ; rapport de l'Organe d'appel, *Etats-Unis — Jeux*, WT/DS285/AB/R, OMC, 7 avril, p. 102, par. 306 ; rapport de l'Organe d'appel, *République dominicaine — Importation et vente de cigarettes*, WT/DS302/AB/R, OMC, 25 avril 2005, p. 27, par. 70.

que les Etats-Unis ont bien du mal à neutraliser[119], la Cour doit s'assurer que — et je cite la sentence — «the measure was principally targeted to protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the State had reasonable alternatives, less in conflict or more compliant with its international obligations»[120].

11. L'objectif poursuivi par l'*Order* est, selon ses propres termes, de répondre aux prétendues

> «deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities»[121].

12. Cet objectif est purement financier et n'est lié ni à la production ou au commerce d'armes, ni à d'autres activités engageant les intérêts vitaux des Etats-Unis sur le plan de la sécurité. De manière très symptomatique, l'*Order* ne contient d'ailleurs ni le mot «armes» ni le mot «sécurité». Plus généralement, aucun des termes employés dans les alinéas *c)* et *d)* du paragraphe 1 de l'article XX ne figure dans le décret, qui ne fait pas davantage référence au traité de 1955. Ceci confirme que la justification que les Etats-Unis ont cru trouver *a posteriori* dans ces dispositions à l'appui des mesures imposées par l'*Executive Order* est totalement artificielle et qu'il n'était assurément pas *principalement* destiné à réglementer la production ou le commerce des armes ou à protéger les intérêts vitaux de sécurité des Etats-Unis.

13. Au surplus, le défendeur n'apporte pas la moindre preuve établissant que les banques concernées par l'*Executive Order* quel que soit leur statut se livraient aux pratiques alléguées. Il ne montre pas davantage qu'elles participaient à la fabrication, l'exportation ou l'importation d'armes sur le territoire américain ou à d'autres activités menaçantes pour la sécurité des Etats-Unis. Ceux-ci seraient bien en peine de le faire car, à la suite de l'imposition des sanctions de 1996, les banques iraniennes étaient largement coupées du système financier américain. En outre, les activités dénoncées sont prétendument le fait de l'Iran lui-même, et non pas des entités distinctes qui sont objets de l'*Order*. Selon la duplique, dont je cite un extrait : «the United States [already] set forth evidence of Iran's [***and I stress:*** not Bank Markazi or other Iranian banks] of Iran's pursuit of ballistic

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[119] DEU, p. 65-66, par. 7.19-7.22.

[120] Sentence intérimaire, 13 décembre 2017, *Deutsche Telekom c. Inde*, CPA affaire nº 2014-10, par. 239. Voir aussi sentence, 5 septembre 2008, *Continental Casualty Company c. Argentine*, CIRDI No. ARB/03/9, par. 198.

[121] Voir Executive Order 13599 (MI, annexe 22).

missile capabilities and history of supplying arms and other support to militant and terrorist groups abroad»[122]. Mais ce n'est pas la question.

14. L'*Order* contribue d'autant moins à la réalisation des objectifs qu'il dit poursuivre que les avoirs en cause étaient, je le répète, déjà bloqués ou saisis depuis plusieurs années — pour le dire en anglais : *blocked, restrained or seized,* et ceci depuis plusieurs années avant son adoption[123]. Ces avoirs ne pouvaient donc en aucune manière être utilisés en vue de financer le commerce d'armes, de munitions et de matériel de guerre, ou de toute autre activité mettant en danger les intérêts des Etats-Unis. Il n'y avait aucune raison impérieuse d'adopter l'*Order,* qui n'était assurément pas «objectivement nécessaire» pour assurer cette protection.

15. Mesdames et Messieurs les juges, pour vous acquitter de votre mission de contrôle, il vous revient donc de constater que l'*Executive Order* 13599 n'est aucunement justifié, que ce soit sur le fondement de l'alinéa *c)* ou de l'alinéa *d)* de l'article XX, paragraphe 1, du traité.

II. L'application de l'*Executive Order* 13 599 ne peut être justifiée sur le fondement de l'alinéa *c)* de l'article XX, paragraphe 1, du traité

16. Monsieur le président, dans ses plaidoiries écrites, l'Etat défendeur affecte de ne pas contester qu'il appartient à la Cour de contrôler la conformité de l'*Executive Order* à l'article XX, paragraphe 1 *c)*, du traité d'amitié — ne fût-ce que parce que les arguments qu'il avance à l'appui de sa thèse sur la «déférence» qui serait due à l'Etat invoquant l'article XX, paragraphe 1, concernent exclusivement l'alinéa *d)* de cette disposition[124]. Néanmoins, l'application qu'il vous demande d'en faire en l'espèce dilue tout autant le sens de l'alinéa *c)* que celui de l'alinéa *d)*.

17. Les Etats-Unis font valoir que : «Executive Order 13599 is a measure that the United States imposed to address Iran's evasion of U.S. and international sanctions relating to its development of ballistic missiles and its provision of arms and other support to militant and terrorist groups.»[125] C'est reconnaître que cet *Order* prévoit des sanctions qui n'ont qu'un rapport très lointain et très indirect avec les armes.

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[122] DEU, p. 59, par. 7.4.

[123] Voir *supra*, par. 2.

[124] Voir DEU, p.63, 64, par. 7.14-7.18. Voir aussi CMEU, p. 86-88, par. 11.19-11.24 ; DEU, p. 63-64, par. 7.14-7.18.

[125] CMEU, p. 82, par. 11.11

18. Cela ressort clairement de la défense des Etats-Unis qui se focalisent uniquement sur le contexte du décret[126]. Or, pour tomber sous le coup de la disposition qui nous intéresse, c'est le texte qui doit «réglementer» — comme l'impose le traité — ou «contrôler»[127], pour reprendre le terme que les Etats-Unis substituent à «réglementer» — la production ou le commerce des armes. Une réglementation au sens de l'alinéa *c)* pourrait consister par exemple en une interdiction d'exporter des armes américaines vers l'Iran — comme cela est en fait déjà le cas depuis la crise résultant de l'occupation de l'ambassade américaine à Téhéran, mais ceci sort du cadre de la présente affaire. Les résolutions du Conseil de sécurité invoquées par les Etats-Unis[128] appellent elles aussi expressément à réglementer la production et le trafic d'armes.

19. L'*Order* ne le fait pas. Non seulement il ne «réglemente» nullement «la production ou le commerce des armes» (comme le veut l'alinéa *c)*) mais encore, comme je l'ai rappelé il y a un instant, il ne s'y réfère pas une seule fois. Vous ne pourriez donc, Mesdames et Messieurs les juges, que constater que, contrairement à ce qu'affirment maintenant les Etats-Unis, «la production ou le commerce des armes, des munitions et du matériel de guerre» n'étaient pas l'objet de l'*Executive Order* au moment de son adoption.

20. Au demeurant, comme je l'ai rappelé il y a quelques instants[129], l'inutilité des mesures prises par l'*Executive Order* est d'autant plus avérée — qu'il s'agisse de l'alinéa *c)* ou de l'alinéa *d)* — que ces avoirs étaient déjà bloqués depuis plusieurs années[130].

21. Plus fondamentalement encore, le recours à l'exception envisagée par l'alinéa *c)* étant, selon les Etats-Unis, justifié par des considérations liées à leur sécurité[131], principal leitmotiv de leur argumentation, il convient de s'interroger sur cette notion de sécurité qui est formellement consacrée à l'alinéa *d)* du paragraphe 1) de l'article XX du traité de 1955.

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[126] DEU, p. 59, par. 7.4

[127] DEU, p. 58-59, par. 7.3

[128] CMEU, p. 77, par. 11.4.

[129] Voir *supra*, par. 17.

[130] Voir *supra*, par. 11.

[131] Voir *supra*, par. 13.

III. L'application de l'*Executive Order* 13 599 ne peut être justifiée sur le fondement de l'alinéa *d)* de l'article XX, paragraphe 1, du traité

22. Mesdames et Messieurs de la Cour, l'Iran ne doute pas que, dans l'exercice de votre contrôle, vous accorderez à la position des Etats-Unis l'attention qu'elle mérite notamment pour déterminer ce qui relève de leurs «intérêts vitaux de sécurité». Mais force est de constater que, bien qu'ils se gardent de déclarer explicitement que l'article XX du traité d'amitié est une clause «self-judging» et qu'ils affirment même le contraire[132], les Etats-Unis ne s'en efforcent pas moins de vous persuader que vous devez vous abstenir d'exercer un contrôle effectif, exactement comme si la mise en œuvre de l'article XX relevait de leur appréciation exclusive. Ainsi, ils affirment que «[t]he Article XX(1)(d) exception is broad and a high degree of deference is due to the State invoking it»[133], or, they say that Article XX establishes a «State's «paramount right»»[134]. Et ils en concluent que la Cour devrait limiter son examen à la vérification de leur seule bonne foi[135]. L'ardent plaidoyer des Etats-Unis selon lequel vous ne devriez pas être autorisés à apprécier objectivement le recours à l'alinéa *d)* est assez troublant et ne témoigne pas d'une grande confiance de leur part dans cet argument qui est pourtant au centre de leur objection à ce que vous connaissiez de l'application de l'*Order*.

23. Les Etats-Unis font grand cas de quelques citations jurisprudentielles isolées de leur contexte, qui reconnaissent la nécessité de tenir compte de la position de l'Etat dont les mesures sont contestées, et ils en déduisent à tort que cette position seule serait déterminante[136]. Pour justifier cette prétention, ils invoquent l'interprétation que la Cour a donnée de l'article 2 de la convention d'entraide judiciaire en matière pénale entre la France et Djibouti de 1986 dans son arrêt du 4 juin 2008. Cette argumentation appelle deux observations : d'une part, elle ne tient aucun compte des limites bien établies dans lesquelles la prétendue discrétion de l'Etat doit s'exercer — limites que j'ai détaillées au début de ma présentation —, et, d'autre part, l'argumentation américaine repose sur la comparaison de l'article XX avec des dispositions qui ne lui sont pas comparables.

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[132] DEU, p. 64, par. 7.18. Voir aussi EPEU, p. 75, par. 7.30.

[133] CMEU, p. 86, par. 11.20.

[134] *Ibid*., p. 87, par. 11.21, 11.22 ; voir aussi p. 90-91, par. 11.29.

[135] DEU, p. 63, par. 7.15.

[136] EPEU, p. 75-76, par. 7.30 ; DEU, p. 64, par. 7.18.

24. Dans l'affaire *Djibouti c. France*, la Cour a considéré que les termes de l'accord laissaient «un très large pouvoir discrétionnaire» à «l'Etat requis» — c'est-à-dire à l'Etat auquel la demande d'assistance judiciaire est adressée. Mais la Cour a affirmé aussitôt que «l'exercice de ce pouvoir demeure soumis à l'obligation de bonne foi»[137], *et* — et ce «et» est important car il montre que la Cour n'entend pas se limiter à un contrôle de la bonne foi dans l'abstrait — «et» donc que cela l'autorisait — elle, la Cour — à vérifier notamment «que les motifs du refus d'exécution de la commission rogatoire relevaient des cas prévus par l'article 2»[138]. Il ressort clairement, par analogie, de ces citations, faites par les Etats-Unis eux-mêmes, qu'ils ne peuvent s'abriter derrière l'article XX du traité d'amitié pour justifier juridiquement des mesures déraisonnables et arbitraires[139].

25. En outre et surtout, l'article 2 de la convention d'entraide judiciaire entre Djibouti et la France prévoit que «[l]'entraide judiciaire *pourra être* refusée … *[s]i l'Etat requis estime* que l'exécution de la demande est de nature à porter atteinte à sa souveraineté, à sa sécurité, à son ordre public ou à d'autres de ses intérêts essentiels». Cette disposition renvoie expressément à la perception subjective de l'Etat requis. Le traité d'amitié de 1955 ne fait rien de tel : il prévoit, *objectivement*, que l'article XX, paragraphe 1, alinéa *d)*, «ne fera pas obstacle à l'application de mesures … *nécessaires* à la protection des intérêts vitaux de cette Haute Partie contractante sur le plan de la sécurité».

26. Dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, la Cour elle-même a considéré que c'est à elle qu'il appartenait d'apprécier objectivement le comportement des Etats-Unis au regard des dispositions pertinentes de l'accord de 1956 liant les Etats-Unis et le Nicaragua «dans le cadre de son évaluation générale des faits constatés par rapport au droit applicable»[140]. Ceci l'a conduite à examiner, de manière très détaillée, la réalité et la plausibilité de la défense des Etats-Unis fondée sur l'article XXI de cet accord, qui est rédigé presque

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[137] *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 229, par. 145.

[138] *Ibid*.

[139] Rapport du Groupe spécial, *Russie — Mesures concernant le trafic en transit*, WT/DS512/R, OMC, 5 avril 2019, p. 41-42, par. 7.133 ; *Bank Melli Iran and Bank Saderat Iran* v. *The Kingdom of Bahrain*, PCA affaire nº 2017-25, sentence finale, 9 novembre 2021, p. 176, par. 631 ; *Técnicas Medioambientales Tecmed, S.A.* v. *United Mexican States*, CIRDI, affaire nº ARB(AF)/00/2, sentence finale, 29 mai 2003, p. 61, par. 153.

[140] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 117, par. 225.

exactement dans les mêmes termes que l'article XX du traité d'amitié de 1955[141]. Un contrôle similaire s'impose évidemment dans la présente affaire.

27. Ni dans leur duplique, ni dans leur contre-mémoire, les Etats-Unis n'ont pris la peine de définir le terme «nécessaire». Ils se limitent à des déclarations péremptoires et tautologiques telles que — je cite mais ce n'est qu'un exemple parmi d'autre : «[u]nder any definition of the Treaty's use of the term «necessary», E.O. 13599 was and remain necessary to protect U.S. essential security interests»[142].

28. Pourtant, l'adjectif «nécessaire» n'est pas synonyme des termes «commode» ou «pratique». Comme la Cour l'a souligné à plusieurs reprises,

> ««les mesures ne doivent pas simplement tendre à protéger les intérêts vitaux de sécurité de la partie qui les adopte ; elles doivent être «nécessaires» à cette fin» ; en outre, *la question de savoir si une mesure donnée est «nécessaire» ne «relève pas de l'appréciation subjective de la partie intéressée»* … et peut donc être évaluée par la Cour»[143].

29. Ainsi que vous l'avez souligné dans l'affaire des *Violations alléguées*, il vous appartient non seulement d'apprécier l'existence des intérêts vitaux prétendument menacés sur le plan de la sécurité mais aussi d'évaluer le «caractère raisonnable et nécessaire des mesures»[144] ou, pour reprendre les mots de Dame Rosalyn Higgins, la Cour doit «chercher elle-même d'abord à apprécier si des intérêts vitaux sur le plan de la sécurité étaient en danger» ; elle doit

> «ensuite examiner, sans avoir le moins du monde besoin d'accorder une «marge d'appréciation», le sens du terme «nécessaire». … [E]n droit international général, le terme «nécessaire» s'entend aussi comme imposant de prendre en compte un certain besoin de «proportionnalité»»[145].

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[141] *Ibid*., p. 116-117, par. 222-225 ; p. 136, par. 271 ; p. 141-142, par. 281-282.

[142] DEU, p. 66-67, par. 7.24. ; voir aussi CMEU, p. 81-82, par. 11.10.

[143] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, p. 183, par. 43, citant *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 141, par. 282 (les italiques sont de nous).

[144] *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2021*, p. 41, par. 112, se référant à *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 117, par. 224.

[145] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, opinion individuelle de Mme le juge Higgins, p. 238, par. 48.

30. Cette proportionnalité doit être appréciée au regard du dommage infligé par les mesures concernées[146]. Le critère est très exigeant : les intérêts protégés doivent être «essentiels» ; il doit y avoir des raisons sérieuses et impérieuses de prendre la mesure.

31. Je note en outre que, toujours dans son arrêt du 27 juin 1986 dans l'affaire *Nicaragua c. Etats-Unis*, la Cour a considéré que, pour aborder la question de l'application de l'article XXI du traité d'amitié de 1956, elle devait

> «[d]'abord tenir compte de la chronologie des événements. Pour que les activités des Etats-Unis entrent dans le cadre de l'article XXI du traité, elles auraient dû consister, *au moment où elles ont été prises*, en mesures nécessaires à la protection de leurs intérêts vitaux de sécurité»[147].

32. Il en va de même dans notre affaire : c'est à la date de l'adoption de l'*Executive Order* 13599, soit le 8 février 2012, que doit être réalisé l'examen de son caractère «nécessaire».

33. Permettez-moi, Monsieur le président, de paraphraser ici les termes qu'a choisis la Cour dans l'affaire des *Activités militaires* — je cite en paraphrasant :

> «Faute du moindre élément d'information indiquant comment les politiques suivies par [l'Iran] seraient devenues en fait une menace pour les intérêts vitaux de sécurité en [février 2012], alors qu'elles étaient constantes et constamment critiquées par les Etats-Unis depuis [longtemps], la Cour n'est pas en mesure de conclure que [les mesures du décret 13599 étaient] «nécessaires» à la protection de ces intérêts.»[148]

34. Les Etats-Unis n'ont établi aucun changement de paradigme qui aurait justifié le gel des fonds de *l'ensemble du secteur financier iranien* en février 2012, y compris ceux de la banque Markazi dont, comme je l'ai rappelé, les avoirs faisaient déjà l'objet d'une saisie conservatoire depuis 2008[149].

35. L'Etats défendeur s'appuie en outre sur plusieurs résolutions du Conseil de sécurité pour justifier l'adoption de l'*Executive Order* 13599[150] ainsi que sur diverses autres mesures adoptées avant 2012[151] ; toutes manquent de pertinence en l'espère, que ce soit chronologiquement ou

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[146] Voir R. Higgins, «International Law and the Avoidance, Containment and Resolution of Disputes General Course on Public International Law», *in* Académie de droit international de La Haye, *Recueil des cours*, 1991, vol. 230, p. 297, se référant à J. Hargrove, «The Nicaragua Judgment and the Future of the Law of Force and Self-Defence», *AJIL*, vol. 81, 1987, p. 136.

[147] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 141, par. 281 (les italiques sont de nous).

[148] *Ibid.*, par. 282.

[149] Voir *supra*, par. 013.

[150] DEU, p. 67, par. 7.26, et p. 69, par. 7.32.

[151] Voir *ibid*., p. 148-149, par. 11.15-11.16.

matériellement. ***C***es résolutions ne peuvent nullement justifier le blocage aveugle et brutal, sans discrimination, de *tous* les avoirs détenus par les institutions financières iraniennes. Aucune organisation internationale ni aucun Etat n'a pris des mesures aussi extrêmes. Par contraste avec le décret présidentiel, les mesures adoptées par le Conseil de sécurité sont ciblées, elles s'accompagnaient de l'établissement d'une liste précisant les entités visées et confiaient à un comité le soin d'en superviser l'application[152]. Non seulement les mesures envisagées par les résolutions ne pouvaient toucher que les entités préalablement désignées par le Conseil de sécurité ou son comité mais elles étaient en outre limitées à celles alléguées — je cite la résolution 1737 de 2006 — «comme participant, étant directement associées ou apportant un appui aux activités nucléaires de l'Iran posant un risque de prolifération et à la mise au point de vecteurs d'armes nucléaires»[153]. L'*Order* va bien au-delà des sanctions envisagées par les résolutions des Nations Unies.

36. Il convient également de noter que le maintien en vigueur de l'*Executive Order* 13599, depuis la date de sa mise en œuvre, le 5 février 2012, ne peut pas davantage être justifié. A cet égard, j'aimerais attirer votre attention, Mesdames et Messieurs les juges, sur le fait que les institutions financières iraniennes dont les avoirs avaient été bloqués avaient été supprimées de la liste américaine — je n'ai pas trouvé de citation — des «Specially Designated Nationals and Blocked Persons»[154] après la conclusion du JCPOA. Ce fait, à lui seul, illustre que, faute d'élément nouveau, il n'y avait aucune nécessité de cibler ces entités par le biais de l'*Executive Order*.

37. En mettant en balance les facteurs pertinents, il apparaît donc qu'aucun des prétextes inventés *ex post facto* par les Etats-Unis ne peut justifier l'adoption de l'*Order*.

38. Mesdames et Messieurs de la Cour, ma présentation clôt le premier tour des plaidoiries orales de la République islamique d'Iran. Au nom de toute notre délégation, je vous remercie vivement pour votre courtoise attention.

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[152] *Ibid*., p. 67, par. 7.25 se référant à Nations Unies, doc. S/RES/129, 9 juin 2010, (EPEU, annexe 110) ; Nations Unies, doc. S/RES/1803, 3 mars 2008, (EPEU, annexe 102).

[153] Nations Unies, doc. S/RES/1737, 23 décembre 2006 (disponible à l'adresse suivante : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/681/43/PDF/N0668143.pdf?OpenElement, consultée le 15 septembre 2022).

[154] Voir JCPOA-related Designation Removals, JCPOA Designation Updates, Foreign Sanctions Evaders Removals, NS-ISA List Removals; 13599 List Changes, 16 janvier 2016, (disponible à l'adresse suivante : https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/updated_names, consultée le 15 septembre 2022).

Le VICE-PRESIDENT, faisant fonction de président : Je remercie M. Pellet, dont l'exposé clôt le premier tour de plaidoiries de l'Iran. La Cour se réunira de nouveau mercredi matin, à 10 heures, pour entendre le premier tour des plaidoiries des Etats-Unis. L'audience est levée.

L'audience est levée à 16 h 50.

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